Flash News

New tax measures for corporations and individuals: laws enacted

On 17 December 2015, the Luxembourg Parliament enacted (subject in each case to confirmation by the Luxembourg Conseil d’Etat that no second hearing is required) Bills nos. 6847, 6891 and 6900 (which sets the State budget for 2016). All three Bills introduce new tax measures, and these concern both corporations and individuals. The original drafting of these measures in these Bills, described in our two previous Flash News reports dated 6 August 2015 and 16 October 2015, has only been subject to minor changes during the legislative process.

These measures will enter into force mainly from 1 January 2016, although some of the relieving provisions have retrospective effect for the 2015 tax year.

1. Corporations

1.1. Repeal of the minimum corporate income tax, and modifications to the net wealth tax regime

The minimum corporate income tax provisions are repealed. They cease to have effect for tax years after the tax year 2015.

The rate for Net Wealth Tax (NWT) is amended. A digressive scale of rates for NWT is introduced as from 1 January 2016, as follows:

- 0.5% (i.e. the rate that applied in 2015), on a taxable base of up to EUR 500 million;
- On a taxable base exceeding EUR 500 million: NWT of EUR 2.5 million, plus 0.05% on the component of the NWT base above EUR 500 million;
- No cap is set.

A minimum NWT charge applies from 1 January 2016, for all corporate entities having their statutory seat or central administration in Luxembourg. (The measures imposing this new charge have very many similarities with the outgoing provisions for the minimum corporate income tax charge.)

Such entities, for which the sum of their fixed financial assets, intercompany loans, transferable securities and cash at bank (as reported in their commercial accounts presented in the standard Luxembourg form) exceeds 90% of their total gross assets and EUR 350,000, are subject to a minimum NWT charge of EUR 3,210.
All other corporations having their statutory seat or central administration in Luxembourg, are subject to a minimum NWT charge of from EUR 535 to EUR 32,100, dependent on total gross assets as shown in the balance sheet.

The legislation makes it clear that the balance sheet to be used for these purposes is the closing balance sheet for the tax year concerned that is in conformity with all corporate income tax provisions (n.b. rather than the NWT provisions for computing the normal NWT basis). Consequently, all figures to be used are those as shown in the commercial balance sheet, subject only to any specific revaluations necessary to apply corporate income tax provisions. In practice, the computation rules for the gross assets figure are the same as under the outgoing minimum corporate income tax charge provisions.

In particular, text supporting the Bill voted confirms that shareholdings that qualify for the participation exemption, and Luxembourg-situs real estate, must both be included in gross assets for these purposes. Conversely, foreign-situs real estate, and other assets such as those of a foreign branch, the income from which is excluded from the Luxembourg tax base under the provisions of a double tax treaty, are not to be included in gross assets.

1.2. Transitional rules for repeal of the IP regime

The existing Luxembourg Intellectual Property (IP) regime (article 50bis LITL) grants an 80% exemption from tax on the net income and capital gains derived, or deemed to be derived, from a wide variety of types of intellectual property. In conformity with both decisions made by the EU’s Code of Conduct for Business Taxation Group in 2014, and the conclusions and timeline set out in the OECD/G20 BEPS Project Final Report on Countering Harmful Tax Practices, the existing regime will begin to “sunset” on 1 July 2016.

The existing IP regime is thus in general repealed, as from 1 July 2016 for corporate income tax/municipal business tax, and as from 1 January 2017 for NWT.

Taxpayers owning IP assets that currently benefit from the existing IP regime will however continue to be able to benefit, but only for a transitional period lasting until 30 June 2021.

IP assets newly acquired after 1 January 2016 can also benefit from the existing IP regime, again only until 30 June 2021, provided that:

- They have been developed, or acquired from unrelated parties, before 1 July 2016; or
- They were acquired from a related party before 1 July 2016 (including via a tax-neutral transaction), and had already been eligible for the existing IP regime or had benefited from a foreign country’s IP regime that corresponds to the existing IP regime in Luxembourg, prior to their acquisition.

IP assets acquired from any related party between 31 December 2015 and 30 June 2016 and that have not, prior to acquisition, benefited from an IP regime as noted above, will only be eligible for the existing IP regime until 31 December 2016.

IP assets acquired or developed after 30 June 2016 will not benefit from the existing IP regime. They, and related income and expenses, will be subject to the standard tax regime and rates, or they may possibly be able to benefit from a future new IP regime, which will necessarily be based on the “nexus” approach prescribed by the EU Code of Conduct group and the OECD in its work on countering harmful tax practices.
1.3. Participation exemption regime

New provisions, amending the participation exemption regime, translate, effectively verbatim, into Luxembourg law the anti-“hybrid instrument” and “common minimum anti-avoidance rule” measures now in the EU Parent/Subsidiary Directive, adopted in July 2014 and January 2015 respectively. These new provisions apply to income distributed or received after 31 December 2015.

This “common minimum anti-avoidance rule” precludes Directive benefits, in situations where there are arrangements which (having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the Directive) are “not genuine”, having regard to all relevant facts and circumstances. For the purposes of this rule, an arrangement must be regarded as “not genuine” insofar as it has not been put into place for “valid commercial reasons which reflect economic reality”.

The Luxembourg tax authorities have so far not provided any substantive guidance on how to interpret the wording of these new, EU-driven measures.

However, if the “common minimum anti-avoidance rule” is held to be in point, the exemption from Luxembourg withholding tax obligations given by article 147 2. (a) (or (d)) LITL will not apply to a distribution made to a corporate entity in another EU Member State, even if this would otherwise be regarded as qualifying as a participation to which this specific exemption should apply. Exemption under other sub-parts of article 147 2. remains available – notably in the case of a corporate entity that is fully liable to a tax corresponding to the Luxembourg corporate income tax, and is resident in any country (including one within the EU) which has a tax treaty with Luxembourg.

As regards dividends received from a corporate entity in another EU Member State that would normally qualify for the participation exemption of article 166 LIR, if the “common minimum anti-avoidance rule” is held to be in point, this specific exemption cannot be applied. If however the corporate entity paying the dividend is also fully liable to a tax corresponding to the Luxembourg corporate income tax, then the participation exemption can remain available, as it is not subject to this new anti-avoidance constraint.

The article 166 LITL exemption is also not applicable if the income flow gives rise to a corresponding tax-deductible expense (i.e. would give rise to a “hybrid mismatch”) at its source, where the source is a corporate entity in another EU Member State.

These new measures do not affect the participation exemption regime as it applies to capital gains of Luxembourg corporate entities, or the NWT.

1.4. Tax unity

The “tax unity” fiscal consolidation regime (set out in article 164bis LITL) is extended, with effect from the 2015 tax year, to allow horizontal integration between qualifying companies that are held by a common parent company established in any European Economic Area (EEA) country and subject to a tax comparable to Luxembourg’s corporate income tax.

A tax unity can also include, as an “integrated” entity, a Luxembourg Permanent Establishment (PE) of a company established in any country and which is subject to a tax comparable to Luxembourg’s corporate income tax.
The text of article 164bis LITL has been completely rewritten. However, the conditions for the regime to apply remain substantially unaltered.

1.5. Exit tax in case of migration

The scope of the exit tax deferral through §127 of the Abgabenordnung (“AO”) is extended as from tax year 2016.

This measure applies to the transfer of a Luxembourg company, a Luxembourg PE, or business assets, to any country with which Luxembourg has concluded a double tax treaty that contains suitable “exchange of information” measures.

Post-migration mergers are to have no impact on the deferral of the exit tax, so long as the beneficiary entity remains the owner of the transferred assets, and remains a taxpayer resident in an EU Member State.

1.6. Other new tax measures

Other new relieving tax measures, taking effect from the 2015 tax year, have been introduced with regard to:

- Investment tax credits for the maritime sector;
- The recovery of tax claims; and
- Tax credits for employment.

2. Individuals

The following new tax measures relating to individuals take effect with effect from the 2015 tax year:

- Application of the “step-up” principle to an individual becoming a Luxembourg tax resident; and
- Reimbursement of potentially excessive amounts of tax withheld from employment income, for individuals who are Luxembourg tax residents for only part of the year.

A specific tax amnesty programme is available to Luxembourg tax resident individuals from 1 January 2016 until 31 December 2017, under certain specific conditions.