

ATOZ ALERT

Upcoming amendments to the Luxembourg procedure in tax matters

06 April 2023

On 28 March 2023, a new draft law (the “**Draft Law**”) was presented to the Parliament which amends the Luxembourg General Tax Law (“**GTL**”) as well as some other laws on tax procedure in order to simplify and modernise the rules governing the tax procedure in Luxembourg. Afterwards, drafts of Grand-Ducal Regulations aiming at implementing various provisions of the Draft Law were released.

Some provisions to be introduced are positive as they will bring more certainty for taxpayers (*e.g.* implementation of a procedure to obtain an advance bilateral/multilateral agreement on transfer pricing or clarification of the transfer pricing documentation to be provided to the LTA as part of the cooperation duty of taxpayers).

Unfortunately, this Draft Law clearly lacks ambition in respect of the current needs to modernise the Luxembourg tax procedure, for example (without the list below being seen as exclusive):

- the possibility to challenge a zero-tax assessment - and thus the amount of tax losses carried forward – which should be confirmed annually given the massive importance of tax losses in the proper management of a Luxembourg fully taxable company;
- the introduction of additional obligations on the part of the tax authorities (such as the obligation to answer advance tax ruling requests within a certain time limit);
- adding more flexibility in the conditions to file an amended tax return when it is clear that unfortunate mistakes have been introduced in the accounts or the tax returns, even if the amendment would mean a decrease of the tax liability;
- the obligation to issue tax assessments within a reasonable time, especially for individual taxpayers, etc.

In addition, it seems that the main purpose of the changes to be introduced is to ease the duties of the tax authorities or to relieve the tax authorities congestion (*i.e.* obligation to file an appeal before the Administrative Tribunal within a certain deadline in case of silence of the Director, 10% threshold to limit the right to file a tax claim in case of *taxation d'office*) rather than to increase the tax certainty for taxpayers. In addition, many draft provisions raise questions.

It remains to be seen how this Draft Law will evolve over the legislative process. Nevertheless, in the meantime, here is a summary of the main changes proposed by the government:

Mutual agreement procedure and arbitration

- **Request for advanced bilateral or multilateral agreement on transfer pricing**

The Draft Law introduces a new procedure (new § 29c of the GTL) for requesting an advanced bilateral or multilateral agreement on transfer pricing pursuant to the double tax treaties (“**DTT**”) concluded by Luxembourg. The advanced agreement will be concluded between the competent authorities of the State(s) concerned based on the mutual agreement procedure (“**MAP**”) provided in DTTs concluded by Luxembourg with this/these State(s) (Article 25 (3) of the OECD Model Tax Convention (“**OECD MTC**”). It remains to be seen how this new provision will be articulated in practice with the current provision according to which taxpayers can ask for advanced pricing agreements (“**APA**”).

To obtain an advanced bilateral or multilateral agreement on transfer pricing, a written request will have to be sent to the Director of the Luxembourg tax authorities (*Administration des Contributions Directes*, “**LTA**”). The request for an advanced bilateral or multilateral agreement on transfer pricing will be subject to a fee varying from EUR 10,000 to 20,000 depending on the level of complexity and amount of work required. A draft Grand-Ducal Regulation provides more details on the procedure to follow to obtain such advanced agreement and lists all the information the taxpayer’s request must contain.

- **Impact of MAP and arbitration decisions on tax assessments**

The Draft Law clarifies the consequences of implementing a MAP or arbitration decision (based on Article 25 (1) (2) (3) and (5) of the OECD MTC or based on the EU Arbitration Convention) by laying down explicitly that tax assessments may be issued, withdrawn or modified pursuant to MAP or arbitration decisions (new § 96a of the GTL).

Cooperation duty of taxpayers in transfer pricing matters

The Draft Law specifies the documentation requirements for associated enterprises in relation to transfer pricing, in line with the international standards developed by the OECD (Action 13 of the BEPS action plan). The proposed provision (new paragraph (4) to § 171 of the GTL) complements paragraph (3) of § 171 according to which the taxpayers’ duty of cooperation applies to transactions between associated enterprises.

As a result, associated enterprises will be required to present, upon request, documentation to justify the transfer pricing policy applied. For this purpose, a draft Grand-Ducal Regulation specifies the scope and content of this documentation for Luxembourg Constituent Entities of a Multinational Enterprise Group under the Luxembourg Country-by-Country Reporting legislation (*i.e.* Local File and Master File).

It should also be noted that when they exist in an electronic form, the Draft Law provides that the LTA may request to be provided with books, documents and information in such an electronic format (amendment of § 171 paragraph 2 of the GTL).

Conditions applicable to claims and appeals against tax assessments or other administrative decisions in tax matters

- **Formal conditions to challenge a tax assessment**

The Draft Law amends the tax procedure rules in order to align the formal conditions for initiating a tax claim (*réclamation*) before the Director of the LTA with those applicable to appeal a decision given by the Director on a tax claim before the Administrative Tribunal. This is important for legal certainty for taxpayers as, currently, due to the lack of clear guidelines in respect to the form of a *réclamation*, there is a lot of debate in front of the Tribunal on whether such a claim was effectively filed.

A tax claim will thus have to be made in writing and signed by the taxpayer or its representative. In addition, the request will have to mention expressly the following information in order to be admissible: the name and address of the claimant, a clear designation of the Administration's decision at stake, the purpose of the request, a brief explanation of the facts and arguments of the claimant, the power of attorney if relevant, and a list of evidence the taxpayer intends to make use of (new § 249 of the GTL).

- **New time limit in the event of silence of the Director of the LTA**

The Draft Law amends the Law of 7 November 1996 on the organisation of the administrative courts concerning the introduction of a time limit for appeals before the Administrative Tribunal in the event of silence on the part of the Director of the LTA. Currently, if no decision has been taken within the six-month period, the taxpayer can appeal to the Administrative Tribunal without any time limit. This new time limit will apply in the context of requests made based on § 228 (claim against a tax assessment), § 131 (non-contentious appeal, *demande de remise gracieuse*) or § 237 (hierarchical appeal). It should be noted in this respect that the Draft Law opens the possibility of an appeal before the Administrative Tribunal after six months of directorial silence against discretionary decisions against which the action is a formal hierarchical appeal.

If the Director of the LTA does not decide on the claim/appeal of the taxpayer within six months following the written request, the taxpayer can consider the claim/appeal as rejected. According to the Draft Law, at the end of this six-month period, a new twelve-month period (extended by six months if an investigating measure is taken by the Director) will start, during which the taxpayer will be required to take legal action before the Administrative Tribunal. In the absence of such action, the decision initially challenged (*i.e.* the tax assessment) will be considered as irrevocably confirmed. The twelve-month deadline will only apply to claims submitted to the Director of the LTA as of the entry into force of the Draft Law and thus will not apply to claims filed previously.

- **Automatic (estimated) taxation**

In accordance with the current case law in relation to automatic (estimated) taxation (*taxation d'office*), the taxpayer is currently only allowed to file a claim if he proves that his real income or wealth deviates significantly from the tax base fixed by the challenged automatic tax assessment. The proposed amendment aims at defining the notion of significant deviation on the basis of objective and easily quantifiable criteria.

For that purpose, the Draft Law provides that an automatic tax assessment can only be challenged by the taxpayer if the difference between the income or wealth assessed and the real income or wealth exceeds 10%. This percentage seems quite arbitrary as 10% of an important amount can be quite significant. If it is understandable that in some cases the amount at stake is not worth a legal proceeding for the tax authorities, what about situations where amounts at stake are substantial? In the latter case, the real income or wealth of a taxpayer could effectively deviate significantly from the tax bases fixed by the automatic tax assessment challenged even if the difference between the two does not exceed 10% (*i.e.* 10% of 1,000,000 euros = 100,000 euros).

Other changes to be introduced

The Draft Law also introduces the following additional changes:

- The application of tax law provisions which only apply upon request (*e.g.* the investment tax credit) has to be requested in the tax return and cannot be requested as part of a subsequent claim anymore (§ 85 GTL).
- Tax recovery: the Draft Law proposes to empower the tax collector to allow, under certain conditions, taxpayers with financial difficulties to pay the taxes due in instalments. However, in such a case, late payment interest remains due. The Draft Grand-Ducal regulation clarifies the procedure and methods of collection (*i.e.* that the request must be motivated; the instalment may not exceed six months; withholding taxes are excluded).
- Accounting obligations: it is proposed to sanction the failure to file annual accounts in accordance with the legal requirements by making them unenforceable for tax purposes.
- Administrative cooperation: the LTA will be allowed to exchange information necessary for the performance of their respective duties with both the *Commission de Surveillance du Secteur Financier* and the *Commissariat aux Assurances*.
- Finally, the Draft Law repeals several provisions of the General Tax Law that have become obsolete.

Entry into force

While most of the new provisions to be introduced will apply as soon as the legislative procedure is finalised and the law is promulgated through the *Journal Officiel* (Memorial), other provisions will apply as from 1 January 2024 (*e.g.* accounts unenforceable if not filed in time) or as from tax year 2024 (*e.g.* cooperation duty in transfer pricing matters).

Do you have further questions?



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