

ATOZ ALERT

Luxembourg Parliament adopts law modernising investment tax credit regime as from 2024

20 December 2023

Introduction

On 19 December 2023, the Luxembourg Parliament adopted the law introducing a major reform of the investment tax credit ("ITC") framework (the "Law"), applicable with effect as from tax year 2024. The Law not only implements the investment tax credit modifications agreed upon in the tripartite agreement of 28 September 2022, but also completely reforms the current regime.

First, it increases the rates of the global ITC. Further, it replaces the current additional ITC by an additional tax credit for investments and operating expenses linked to the digital transformation and the ecological and energy transition and introduces a new system to certify the nature and reality of such investments and operating expenses.

We provide hereafter an overview of the key aspects of the new framework introduced.

Background

The ITC framework was, until now, limited to investments in tangible depreciable assets and excluded operating expenses, including those linked to the digital transformation and the ecological and energy transition.

To accelerate the digital transformation, as well as the ecological and energy transition of Luxembourg businesses, and strengthen the competitiveness of Luxembourg companies by stimulating more innovation, while promoting the development of knowledge and skills in digital transformation and ecological and energy transition, the Law introduces major amendments to Article 152bis of the Luxembourg income tax law ("LITL").

The new ITC framework in brief

- Global ITC rate increased for investments in tangible depreciable assets

First, the Law increases the existing tax credit for global investments from 8% to 12% and removes the condition of the investment bracket of EUR 150,000. In other words, based on the acquisition price or cost price of investments made during a financial year, a global ITC of 12% will be granted on investments in tangible depreciable assets other than buildings, livestock and mineral and fossil deposits, and for the acquisition of software. In addition, for investments in fixed assets approved to be eligible for the special depreciation referred to in Article 32bis of the LITL, the tax credit has been increased to 14%.

- Additional ITC repealed and replaced by new tax credit for investments and expenses linked to digital transformation and ecological and energy transition

The additional ITC is repealed and replaced by a new specific ITC for investments and operating expenses linked to the digital transformation and ecological and energy transition. The rate of the new tax credit is either 18% or 6% depending on whether investments are made in tangible depreciable assets or not¹.

The new additional ITC is computed on the acquisition (or the cost) price of investments made during the financial year. However, if during the first three years from the first establishment the acquisition price of investments considered as being invested as part of the first establishment exceeds the amount of EUR 250,000, the basis for calculating the respective ITC is to be reduced by the amount exceeding the threshold of EUR 250,000. The LITL provides for a list of investments not to be considered as being invested as part of the first establishment. For operating expenses, the new additional ITC is computed on the deductible operating expenses of the financial year.

Digital transformation is to be understood as the realisation of a process innovation or an organisational innovation by means of the implementation and use of digital technologies. Digital transformation goes thus far beyond the digitisation of data and the digitalisation of a business' activities. While digitisation can be defined as the conversion of information into digital format, digitalisation aims to digitise and automate a specific part of an existing process. Ecological and energy transition refers to any change that reduces the environmental impact, in the production or consumption of energy or use of resources, said change having to be significant and of a technical or material nature.

In order to guide taxpayers in their digital transformation and ecological and energy transition processes, the Law lists specific objectives which the investments and operating expenses have to meet in order to fall within the scope of the new additional ITC. Digital transformation has to, for example, redefine an entire business process in such a way as to substantially improve its productivity, or implement an innovative business model, including by circular economy, to create new value for the stakeholders. As far as the ecological and energy transition is concerned, the Law also sets out clear objectives to guide taxpayers in their processes, such as the objective of significantly improving the energy efficiency of a business' production process, to significantly decarbonise the production process of the business, or to produce or store energy produced from renewable non-fossil sources to meet the energy needs of the business.

- New system of attestation and certification for investments and operating expenses linked to the digital transformation and ecological and energy transition

To benefit from the new additional ITC, a specific certificate is required which will attest of the reality of the investments and operating expenses made/incurred during the financial year and the fact that these investments and operating expenses qualify for the new additional ITC. The provision of the initial draft law that excluded

¹ Operating expenses and investments incurred within the framework of a digital transformation, or an ecological and energy transition project, are eligible for the new additional ITC at a rate of 18%. However, if these investments are made in tangible depreciable assets, the applicable rate will be limited to 6%. This is because such investments would already be eligible for the 12% global ITC (so a total of 12% + 6%, i.e. 18% of tax credits).

projects with combined investment and operating expenses of less than EUR 20,000² has been removed following the observations of the Council of State in order to support as a matter of principle all companies that wish to invest in digital transformation or ecological and energy transition, regardless of the scale of the project or the size of the company.

For the purpose of obtaining such certificate, a statement of eligibility will have to be requested from the Ministry of Economy.

The Law introduces the following system of statement and certification:

[Statement of eligibility](#): in a first step, the taxpayer will have to submit an application to obtain a statement of eligibility for a specific project from the Minister of the Economy, detailing, among other points, the description of the project, the desired objective, the expected effect and the steps, as well as the investments and operating expenses to be made/incurred within the framework of the digital transformation and ecological and energy transition of the business.

Following the observations of the Council of State, an inter-ministerial consultative commission will be set up by a Grand-Ducal decree (rather than by Grand-Ducal regulation as initially proposed), which will focus on analysing the eligibility of investments and operating expenses relating to a digital transformation and ecological and energy transition project. In a [note published](#) on the *Chambre des Députés*'s website, the Minister of Finance reportedly confirmed that a response should be given within three months. It is regrettable that this deadline has not been enshrined in the law. We could also regret a too long delay, which could also delay the investments or prevent a clear and ambitious strategy for three months.

[Certificate](#): for each tax year, to benefit from the new ITC, the taxpayer will have to send a request to the Ministry of Economy in order to obtain a certificate attesting of the reality of the investments and operating expenses made/incurred during the financial year. The request must be made within the two months following the end of the financial year in which the investments or operating expenses were made/incurred. The certificate will only be granted to the extent that a statement of eligibility has been obtained previously. This certificate will have to be filed by the taxpayer each year, together with its annual income tax return.

The decision of the Ministry of Economy must be issued no later than nine months following the end of the financial year in which the investments or operating expenses were made/incurred.

Following the observations of the Council of State, a procedure was introduced which enables taxpayers, in case of litigation brought before the Administrative Courts due to the fact that the certificate was not issued, to maintain their entitlement to an ITC in the event of a favourable decision by the Administrative Courts and the subsequent issue of a tax certificate in accordance with the Court's decision, even if a final tax assessment has been issued and the statute of limitations has expired. In such case, the new certificate which adjusts the ITC triggers the issuance of a new tax assessment.

Moreover, it is explicitly stated in the Law that the Luxembourg tax authorities ("LTA") are bound by the certificate issued by the Minister of the Economy.

² Excl. VAT.

Implications and next steps

The reform of the ITC regime is a positive initiative to accelerate the digital transformation as well as the ecological and energy transition of Luxembourg businesses and strengthen their competitiveness. However, since the new procedure of certification (which is only applicable to benefit from the new additional ICT) seems heavy, it remains to be seen how it will work in practice, given the related additional administrative burden for both taxpayers and the administration. For example, without specific legally enshrined deadlines which statements of eligibility have to be issued within, it is doubtful that the new ICT regime will be efficient. A three-month delay will also delay the investment or prevent a clear and ambitious strategy for three months.

For the purposes of calculating the top-up tax under the so-called "Pillar 2" rules, determining the tax rate requires identifying the taxes borne by the group in a given jurisdiction. In this context, the draft law transposing the Pillar 2 Directive contains rules for identifying the "covered" taxes that can be taken into account for the purposes of determining the effective tax rate. The ITC is likely to reduce the amount of tax "covered" and therefore significantly dilute the calculation of the effective tax rate, unless it meets the definition of a "Qualified Refundable Tax Credit" ("QRTC"). To be "qualified", a tax credit must be repayable in cash or cash equivalent within four years of the date on which the right to the tax credit arises.

It is therefore very regrettable that the legislator did not bring the ITC into line with the definition of a QRTC under the new Pillar 2 rules³ in order to make the new system fully effective and attractive in practice. This reduces the attractiveness of Luxembourg for multinationals subject to Pillar II, in a particularly competitive European environment on tax credits.

We will be happy to answer any questions you may have about this new regime.

Do you have further questions?



HUGUES HENAFF

Partner,
International & Corporate Tax
hugues.henaff@atoz.lu
T + 352 26 940 516

³ As has been done in other neighbouring countries such as Belgium.