ATOZ
TAX ADVISERS LUXEMBOURG

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GLOBAL TAX

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in global tax.

LUXEMBOURG

ATOZ Tax Advisers

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Romain Tiffon is a partner within the international & corporate tax team at ATOZ Tax Advisers. A tax professional since 2006, Mr Tiffon has experience in structuring pan-European alternative investment funds across all asset classes, as well as coordinating tax structuring advice and implementation for a wide range of institutional investors. He also has extensive experience in structured finance, M&A transactions and sovereign wealth funds, and is currently responsible for ATOZ's DAC6 initiatives, working closely with Taxand and ATOZ Digital Solutions.

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Q. What do you consider to be among the key developments affecting corporate tax in Luxembourg over the last year or so?

A. On 28 March 2023, a draft law was presented to parliament which amends the Luxembourg General Tax Law, as well as some other laws on tax procedure, to simplify and modernise these rules. It aims to bring more certainty to taxpayers through the implementation of a procedure to obtain an advance bilateral or multilateral agreement on transfer pricing (TP) or clarification of the TP documentation to be provided to the Luxembourg Tax Administration (LTA) as part of the cooperation duty of taxpayers. On 13 July 2023, a draft law was released to reform the current investment tax credit framework, with effect from tax year 2024. On 19 July 2023, a draft law implementing the public country-by-country reporting (PCbCR) was adopted and will require certain Luxembourg-based multinationals, including non-EU multinationals doing business in the EU through Luxembourg subsidiaries and branches, with consolidated revenues of more than €750m to publicly disclose the corporate income tax that they pay by country. Finally, on 4 August 2023, a draft law was released with a view to transposing the European Directive on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the EU, which implements the global anti-base erosion rules, known as Pillar II.

Q. To what extent have tax authorities in Luxembourg increased their monitoring and enforcement activities?

A. The Luxembourg tax authorities have gradually expanded their monitoring and enforcement activities by digitalising the filing of corporate tax returns, thereby alleviating the administrative work of tax inspectors who thus have more time to focus on tax monitoring and enforcement. This is also the case as the Luxembourg tax authorities have created a dedicated tax audit division which has to be appreciated from a broader standpoint. Indeed, since 2010 the Luxembourg tax authorities have generally issued preliminary tax assessments based on the tax returns that are filed. This gives the tax authorities the ability to review and revisit tax returns within a period of five years.

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Q. How are tax authorities approaching the issue of transfer pricing? In your experience, do companies tend to underestimate the risks and challenges in this area?

A. Luxembourg is a renowned financial centre in Europe and a prime location for holding and financing companies and we are seeing a surge in the setup of treasury companies to improve cash management within a group. These companies are naturally frequently party to intragroup transactions and have now fully onboarded this TP dimension into their overall setup. We can clearly see that TP is now not only a risk management issue but one of the fundamentals of good corporate governance. There is a growing dispute environment in Luxembourg and TP is naturally an integral part of it. However, an audit usually originates from the fact that no TP documentation was ever prepared to substantiate intragroup transactions. In this regard, the draft law of 28 March 2023 specifies the documentation requirements for associated enterprises in relation to TP, in line with the international standards developed by the Organisation for Economic Co-operation and Development (OECD) and base erosion and profit shifting (BEPS) Action 13.

Q. How would you describe tax laws in Luxembourg as they relate to foreign entities? Are there any unique regulatory aspects, whether positive or negative, that need to be considered?

A. Luxembourg fully adheres to European standards when it comes to foreign and offshore entities. Controlled foreign company rules have been in place for a few years as part of the Anti-Tax Avoidance Directive (ATAD1) transposition package. On 14 February 2023, the EU finance ministers decided to add the British Virgin Islands (BVI), Costa Rica, the Marshall Islands and Russia to the EU list of non-cooperative jurisdictions for tax purposes. This update has an impact on different Luxembourg tax measures: the requirement to disclose transactions with entities located in non-cooperative jurisdictions in tax returns, and the mandatory disclosure rules applicable to certain cross-border arrangements (DAC6). The October 2023 version of the EU list will also impact, for 2024, the

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measure denying the deduction of interest and royalties due to entities located in non-cooperative tax jurisdictions.

Q. Have you seen an increase in tax disputes in Luxembourg? What lessons can companies learn from recent settlements, prosecutions, penalties and court rulings?

A. In January 2023, the Administrative Tribunal ruled that the redemption of a class of shares by a Luxembourg company should amount to a sale of shares and not to a dividend distribution to the extent the redemption price does not exceed the fair market value of the share class that is redeemed. In March 2023, the Administrative Tribunal ruled that a company that incurred tax losses while it was a holding company, wholly owned by an individual, could not use these losses, following several years of being dormant, against a capital gain that it realised following the disposal of a newly acquired Luxembourg real estate asset. The deduction of tax losses carried forward was denied based on the abuse of law provision provided in section 6 of the Tax Adaptation Law, notably because,

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according to the Tribunal, it was sufficient evidence that the legal and tax personality of the holding company was used solely to benefit from its tax loss carry-forward and to reduce the tax that would have otherwise been incurred on such a transaction.

Q. What is your advice to a company that finds itself subject to a tax-related audit, investigation or enquiry?

A. Luxembourg is a business-friendly environment where all administrations remain approachable. It is becoming more common for taxpayers to receive information requests from the LTA, which are generally more geared toward gaining a better understanding of the structures than conducting a tax audit. Where this expands into a tax audit, the tax law requires Luxembourg taxpayers to cooperate with the tax authorities. Taxpayers are obliged to evidence facts and provide information assuming the evidence is available, reasonable for the taxpayer to have and relevant for clarification purposes. Another tax provision was added in 2015, which extended a taxpayer's duty of cooperation to transactions between associated enterprises, although no specific TP documentation requirements are detailed therein. This should be fixed by the draft law of 28 March 2023, which, if enacted as is, will require associated enterprises to present, upon request, documentation to demonstrate that the TP policy has been applied.

Q. What steps can companies take to ensure they maintain robust tax compliance processes while maximising tax efficient structures?

A. The last couple of years have imposed broader compliance and disclosure obligations on taxpayers. Leaving aside the Foreign Account Tax Compliance Act (FATCA), the Common Reporting Standard (CRS) and Registered Beneficial Owners (RBE), DAC6 has added another layer of compliance which has slightly drifted into investor relations and other collateral concerns. In the alternative investment fund space, limited partners are warier of DAC6 monitoring and disclosure. This is relevant in that if a taxpayer discloses an arrangement based on a hallmark that requires the main benefit test to be met, it acknowledges

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that tax was the main or one of the main drivers for setting up the arrangement, which makes it even more complicated to argue that it should be treaty eligible having passed the principal purpose test. Good governance practice should be that any transaction is presented to the board with a DAC6 analysis. ❑

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ATOZ TAX ADVISERS, founded in 2004, is a high-end independent advisory firm based in Luxembourg offering a comprehensive and integrated range of direct and indirect tax solutions as well as transfer pricing, aviation finance and tax litigation services. The firm advises on, and delivers solutions for, sophisticated local and global professional clients. With over 150 highly skilled professionals, the team has in-depth experience of serving very demanding businesses and institutional clients in need of tailor-made advice. ATOZ is the Luxembourg member of the Taxand network which provides high quality, integrated tax advice worldwide.

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