

Luxembourg tax updates Q2 2020

5 May 2020

Tax ruling decisions obtained prior to 1 January 2015 no longer valid

As of 1 January 2020, the content of advance tax clearances, including advanced pricing agreements, obtained by Luxembourg taxpayers before 1 January 2015 no longer binds the Luxembourg Tax Authorities.

A new administrative procedure is in place since 2015 regarding the submission and approval process of tax rulings in Luxembourg, which includes in particular:

- The analysis of a duly motivated ruling request – including specific statements and documentation, among others a summary of the ruling request – by the Advance Tax Clearance Committee (“Commission des Décisions Anticipées”)
- The filing of the standard form (777E) for the international exchange of information on advance cross-border rulings and advance pricing agreements
- A validity period of maximum 5 tax years for each tax ruling
- The payment of an administrative fee ranging from EUR 3,000 to EUR 10,000 for requests covering corporate taxation aspects

Our comments

Luxembourg taxpayers who previously submitted tax rulings related to a structure currently in place should verify their validity period.

The tax treatment described in an “outdated” ruling may still be applicable though. The structure and the operations included in the concerned “outdated” ruling should therefore be reviewed to verify whether the tax treatment described is still valid under the current legal framework or whether a new tax ruling should be filed.

Administrative guidance issued on CFC rules

On 4 March 2020, the Luxembourg Tax Authorities issued administrative circular No. 164ter/1 providing some guidance on rules related to controlled foreign companies (“CFC”).

As a reminder, the new Luxembourg legislation implementing the Anti-Tax Avoidance Directive (“ATAD 1”) entered into force on 1 January 2019. CFC rules aim, in particular, at discouraging Luxembourg taxpayers – exercising a direct or indirect control over a subsidiary or owning a permanent establishment – from eroding their taxable basis in Luxembourg through the transfer of income to a low taxation jurisdiction where said subsidiary or permanent establishment is located (i.e., the CFC).

In that case, the non-distributed income artificially allocated the CFC should be included in the taxpayer’s taxable basis and be subject to Luxembourg corporate income tax. The income to be reintegrated in the taxable basis of the Luxembourg taxpayer pursuant to the CFC rules is limited to the income generated by assets and risks related to significant people functions exercised by the taxpayer controlling the CFC. The reintegration is performed in line with the arm’s length principle pursuant to art. 56 and 56bis of the Income Tax Law (“ITL”).

Although the ITL itself does not provide for such obligation, the circular requires taxpayers to make available a transfer pricing analysis covering the functions and risks of the CFC in relation to its income and assets, which should include:

- A list of all direct and indirect CFCs of the taxpayer
- The identification of significant people functions managing/controlling the assets and risks for each CFC
- The location of these functions and the description of their role in the generation of income at the level of the CFC

This documentation should be prepared annually and be provided to the Luxembourg tax authorities upon request.

The circular further states that any restructuring operations, whose purpose would be for the taxpayer to fall outside the scope of the Luxembourg CFC rules, would be considered an abuse, when such operations are performed without valid commercial reasons reflecting the economic reality.

Additional details are included in the circular regarding the control test and the effective tax test (i.e., the two main conditions to fall within the scope of the CFC rules) as well as on other aspects of the law.

Our comments

Luxembourg taxpayers should review their tax position to assess whether they fall within the scope of the Luxembourg CFC rules, in which case additional compliance – including a TP functional analysis – would be required.

COVID-19 tax measures in Luxembourg for companies and self-employed persons

The Luxembourg government has taken several measures to protect the Luxembourg economy during the Covid-19 crisis, in particular:

- Upon request: cancellation of the quarterly tax advances to be paid for corporate income tax (“CIT”) and municipal business tax (“MBT”) for Q1 and Q2 2020
- Upon request: possibility to obtain an additional payment term for the CIT, MBT and Net Wealth Tax liabilities due, if the ultimate payment date of said liabilities falls after 29 February 2020 (additional payment term of 4 months)
- A reduction of the amount of the quarterly tax advances can also be requested

For further information or advice concerning Luxembourg tax ruling decisions, the interpretation of CFC rules or any advice with respect to Luxembourg taxation, please contact Aurélie Moline at aurelie.moline@afcbenelux.eu or call +352 39 58 42 82.