Major corporate tax measures in Luxembourg - Bill of Law 6847

On 5 August 2015, the bill of Law 6847 (the "**Bill**") introducing major corporate tax measures was submitted to the Luxembourg Parliament.

This Bill aims mainly:

- to transpose into Luxembourg domestic tax law anti-hybrid and anti-abuse rules amending the Luxembourg parent subsidiary regime,
- to amend the Luxembourg tax unit regime so that it is in line with the case law of the European Court of the European Union,
- to amend the Luxembourg exit tax regime, and
- to introduce certain other tax measures.

(i) Luxembourg participation exemption

The Bill transposes into domestic tax law Directive 2014/86/EU on anti-hybrid instruments and Directive 2015/121/EU on the European General Anti Abuse Rule ("**GAAR**") amending the parent subsidiary directive 2011/96/EU, respectively, and Articles 147 and 166 of the Luxembourg Income Tax Law ("**LITL**").

Any such dividends paid by a Luxembourg company falling within the scope of the Directive will not benefit from a withholding tax exemption (Article 147 LITL) if:

- the transaction under GAAR is characterised as an abuse of law within the meaning of Directive 2015/121/EU. Under this Directive an abuse of law should be characterised when an arrangement or a series of arrangements is/are (i) put in place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purposes of this Directive and (ii) is/are not genuine having regard to all relevant facts and circumstances. The Directive furthermore provides that the arrangement or a series of arrangements shall be regarded as not genuine to the extent that they have not been put in place for valid commercial reasons reflecting economic reality.

  In a nutshell, the exemption should be denied when the structure has been put in place mainly to benefit from a special tax advantage; however, neither the Bill nor the Directive give specific examples of an abuse of law.

Furthermore, profits deriving from qualifying participations in EU companies will not be exempt (Article 166 LITL) if:

- the profits received by the eligible Luxembourg entity have been deducted from the taxable basis of the Member State company which distributes the profit (anti-hybrid instrument measure) and,
- the transaction is characterised as an abuse of law under GAAR.

The Bill states that these amendments to the Luxembourg parent subsidiary regime are applicable to inbound and outbound dividends received/distributed after 31 December 2015.
It is worth mentioning that the GAAR should not, for the time being, affect the distributions made by eligible companies located outside the EU. However, in the general framework against tax planning and especially the OECD report on Base Erosion and Profit Shifting "BEPS", there may be pressure to close this loophole in the near future.

Currently, however,, these new provisions should not affect either the taxation of capital gains deriving from the sale of shares under the Luxembourg parent-subsidiary regime.

(ii) Luxembourg tax unity regime

At the moment, Article 164bis of the LITL provides for a vertical tax unity regime, which means that under certain conditions a Luxembourg parent company or the Luxembourg permanent establishment of a foreign company may form a tax group with its controlled Luxembourg subsidiaries in order to aggregate their taxable income.

The decision of the European Court of Justice the European Union ("**CJEU**") of 12 June 2014 in the SCA Holding case (C-39/13) ruled that the Dutch tax integration regime infringed the EU freedom of establishment as it denied the right for two sister companies located in the same Member State and held by the same parent company resident in another Member State to be integrated, the so-called "horizontal tax integration".

Hence, in order to be in line with the case law of the CJEU the Bill proposes to extend the scope of the Luxembourg tax unity regime to allow horizontal tax integration between Luxembourg sister companies. As such, Luxembourg qualifying companies will be allowed to be part of a tax unity group if they are held by a common parent company resident in the European Union or the European Economic Area (EEA) and if the latter is subject to corporate taxation similar to the Luxembourg corporate income tax.

In addition, the vertical tax integration is now extended to also include, as head of the fiscal unity, the Luxembourg permanent establishment of a corporation ("*société de capitaux*") that is a tax resident in an EEA jurisdiction in which it is subject to corporate taxation comparable to Luxembourg corporate income tax. Since Luxembourg has tax treaties with Art. 24 (3) OECD Model Convention alike non-discrimination provisions in place with Iceland, Liechtenstein and

Norway, this new provision is not really breaking ground because, it would seem that the same result could already have been achieved before under the respective tax treaty.

(iii) Luxembourg exit tax deferral

In May 2014, the Luxembourg Parliament introduced an unconditional deferral of the exit taxation in the case where a Luxembourg company transfers its registered office or its effective place of management in an EEA country. This payment deferral is granted upon simple request by the taxpayer but is subject to annual reporting in order to prove that the company remains resident in an EU or EEA country. For further details please refer to our Newsletter of July 2014.

The Bill proposes to extend the scope of the deferred tax regime to Luxembourg companies transferring their registered office or place of effective management to a non-EEA Member State under the condition that this State has concluded a treaty which contains an exchange of information clause in line with Article 26 of the OECD model tax convention.

(iv) Other tax measures

- Investment tax credit ("*bonification d'impôt pour investissement*"): will be enlarged to allow a lessor to benefit from this provision for ships used in international traffic.
- Paragraph 114 of the Luxembourg general law (*Abganordnung*) will be modified to facilitate a claim for the recovery of tax when a company which benefits from the tax unity regime (parent or subsidiary) is subject to bankruptcy.
- The availability of a tax credit for hiring unemployed persons is extended to the end of the year 2016.

It is expected that the Bill will be voted by the Luxembourg Parliament before the end of 2015.

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