

## **IMPLEMENTATION OF THE TAX INFORMATION EXCHANGE AGREEMENT ON THE OECD MODEL**

### **Introduction**

Following the international developments regarding the strengthening of the international cooperation on tax matters, the Grand-Duchy of Luxembourg has decided, by withdrawing its reserves concerning the article 26 § 5 of the OECD's model on double tax (2005 version) to join the OECD standard relating to the information exchange upon demand between tax authorities.

The Law of 31 Mars 2010 (hereafter the "Law") has approved tax treaties, protocols and amendments in order to comply with the OECD model and provides the procedure which will be applied according to the above mentioned tax treaties, protocols and amendments on information exchange upon demand.

The Grand-Duchy of Luxembourg has now 20 conventions entirely compliant with the OECD model.

### **1. Approval of the tax treaties, protocols and amendment in order to comply with OECD's model**

In order to avoid double taxation and to prevent tax avoidance (evasion) of income and wealth tax, five conventions have been signed with :

- Kingdom of Bahrain (6 May 2009)
- Republic of Armenia (23 June 2009)
- State of Qatar (3 July 2009)
- Principality of Monaco (27 July 2009)
- Principality of Liechtenstein (26 August 2009)

and 15 protocols and amendments amending existing treaties with :

- The United States of America (20 May 2009)
- The Netherlands (28 May 2009)
- France (3 June 2009)
- Denmark (4 June 2009)

- Finland (1 July 2009)
- The United Kingdom (2 July 2009)
- Austria (7 July 2009)
- Norway (7 July -2009)
- Belgium (16 July 2009)
- Switzerland (25 August 2009)
- Iceland (28 August 2009)
- Turkey (30 September 2009)
- The United Mexican States (7 October 2009)
- Spain (10 November 2009)
- Germany (11 December 2009)

The same rules on information's exchange upon demand apply to India.

## **2. Requirements for an exchange of information**

### **2.1 Before the Law**

Before the Law, a clause named "legislation clause", inserted in the majority of the double tax treaties concluded by Luxembourg, limited the exchange of information between the Luxembourg tax authorities and the foreign tax authorities.

This clause provided on the one hand that the requesting state can not require the transfer of information which its own legislation did not allow it to obtain and, on the other hand that the state addressed should not go beyond what its national law allows to control the basis of its own tax assessment.

Luxembourg law, notably the Grand-Ducal regulation of 24 March 1989 specifying banking secrecy on tax and delimiting the investigation powers of the tax authority (Mémorial A, 1989, 181), excluded in principle the possibility for the Luxembourg tax authorities to investigate and to collect information with banks.

As a consequence, Luxembourg tax authorities used to not answer to requests of information from a foreign tax authority, if Luxembourg law, respectively its administrative practice, did not allow it to collect these same information for its own needs.

An exception was introduced in case of tax fraud by a law of 27 August 1997 (Mémorial A, n° 66, 1997, p.2078), which approved the additional protocol of 17 March 1978 to the European Convention on mutual assistance in criminal matters.

Thus, where there was a suspicion of tax fraud, Luxembourg had to cooperate with all the member state which required it. Such request must have been precise and proportionate. The use of the information must have been limited to the case.

## 2.2 Since the Law

The tax treaties, protocols and amendments which were approved by the Law allow for now the exchange of information, notably the information covered by the banking secrecy.

The tax authorities of the member states may now exchange information which “appear relevant” (“*vraisemblablement pertinent*”) to apply the provisions of their conventions.

It must noted that the request of information of the foreign tax authorities have to be sufficiently justified. In fact, they shall notably point the identity of the person under examination, the type and form of the information required, the tax purpose in which the information is requested, the grounds which justified the existence of a link with Luxembourg, the name and address of the person who would be in possession of the requested information, a statement that the request is in conformity with the law and the administrative practice of the requesting state and that all national proceedings were used to obtain the information.

Fishing expeditions in order to get information are not allowed.

Besides, the information received by a member state will be kept secret and their communication limited to the person and authorities (including the administrative court and authorities) in relation with the proceedings. The information obtained could, however be disclosed during public session or within court sentence.

A member state may not refuse to convey the information only because they are held by a bank, another financial institution, a representative, or a person as a fiduciary trustee or because the information are attached to the property rights of a person.

It should be pointed out that the question whether lawyers or auditor may object to the communication of information which are requested by a foreign tax authority to the Luxembourg tax administration because of the existence of their professional secrecy has not been answered yet.

### **3. The new procedure of information exchange upon demand**

First, Luxembourg tax authorities will have to consider whether the request of exchange of information from the competent authority of the applicant state comply or not with the legal provisions of the tax treaties. Then, by registered letter, it will notify to the person holding the information, its decision to order the provision of the requested information.

The person holding the information will have to provide the requested information within one month from the notification of the decision. If the information is not provided on time, an administrative fine up to EUR 250,000 may be imposed on him. The amount will be determined by the director of the competent tax authority or his delegate.

An action for annulment against the order of providing the requested document is possible before the administrative jurisdiction by any person affected by the decision or any relevant third party showing a legitimate personal interest.

Moreover, the information holder may file an action for annulment before the administrative court against the decision of the director of a tax authority which sentenced him for a failure to answer on time to an administrative fine.

The action against one of these decisions has to be filed within one month since the notification of the decision to the information's holder. The action has a suspensive power.

The decisions of the administrative court may be subject to appeal before the administrative court of appeal. The filing of the appeal has to be introduced within fifteen days from the notification of the decision by the clerk's office.

We remain at your disposal for any further information about this new law.

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