

NEWSLETTER NOVEMBER 2015

# EUROLUX ACCOUNTING



As the year's end moves closer, we would like to take the opportunity to thank you for our last year's successful cooperation. Furthermore, we are pleased to inform you about some relevant current and upcoming developments in the Grand-Duchy of Luxembourg on the next few pages.

We wish you an interesting reading as well as a pleasant start into a successful year 2016 and are looking forward to our further cooperation!

Alhard von Ketelhodt

## **NORTH RHINE-WESTPHALIA PURCHASES FURTHER TAX RECORDS**

*Investigations are targeting the „Banque et Caisse d'Epargne de l'Etat (BCEE)‘ and their clients*

The German federal State of North Rhine-Westphalia once again – now for the ninth time – obtained access to records with information on more than 50,000 transactions which shall potentially proof cases of tax evasion and fraudulent tax deals with a volume of 70 Billion Dollars. While first statements reported a record setting purchase price of five million euros raised by the authorities, it turned out that the potential seller came away empty-handed due to a cooperation of German and French authorities. The records shall derive from the „Banque et Caisse d'Epargne de l'Etat (BCEE)‘ which already brought a criminal charge against a person unknown immediately after the betrayal became public. Although the ascertainment concern approximately about 1,000 clients with capital assets of more than 300,000 euros as well as domestic and foreign financial service providers for the time being, the investigating authorities – the department of prosecution of the City of Cologne and the tax fraud investigation office of Wuppertal – announced to initiate a procedure against the BCEE itself.

### **„Cum-Ex-Trades“**

#### **Two-Person-Relationship**

A Cum-Ex Trade is initiated by the purchase of shares right after the decision on a dividend distribution but still before the dividend has been paid out to the shareholders („cum-dividend“). After the payment of the dividend – of which the company deducts withholding tax that might be refundable under certain circumstances – the shares are repurchased „ex-dividend“ for a consideration reduced by the value corresponding to the dividend. In the light of certain circumstances, a taxable income from capital assets might now be counted as a not taxable exchange profit.

#### **Three-Person-Relationship**

By all means, such a trade becomes illicit if the „cum-share“ is sold short and the short seller needs to purchase „ex-shares“ by simultaneously compensating the exchange losses caused by the payment of the dividend in order to maintain his contractual obligations towards the short purchaser. In such case, the short seller might – under certain circumstances – claim a tax refund on his losses suffered during such deal. As a result, capital yield tax is only paid once as the refund of the tax has been claimed two times.

As an automated data transfer concerning foreign interest income takes place between Luxembourg banks and German authorities since the beginning of 2015, the investigations don't focus on illicit earnings alone anymore but authorities also seem to investigate in respect of illegal „cum-ex-deals“, also known as „dividend stripping“, a procedure which may lead to an illegitimate dual refund of capital yield tax. As the collusive collaboration of professional financial service providers is a characteristic feature of such complex transactions, suspicion especially falls on domestic and foreign affiliates of BCEE as well as on the state-owned bank itself.

As at today, North Rhine-Westphalia already encashed an amount of two Billion euros out of the enforcement of arrears or administrative and judicial fines after evaluating purchased foreign tax data. Throughout Germany, additional revenues gained by the purchase of such data are estimated at four to five Billion euros. Since 2010, around 120,000 Germans filed self-denunciations because of tax fraud.

## **MINIMUM NET WEALTH TAX SUPERSEDES MINIMUM CORPORATE INCOME TAX**

*Not yet adopted reforms shall enter into force as at January 1<sup>st</sup> 2016*

In order to avoid an infringement procedure regarding the non-compatibility of the minimum corporate income tax with EU law and especially with the Parent-Subsidiary Directive (2011/96/EU), the minimum Corporate Income Tax shall be replaced by a minimum net wealth tax as at January 1<sup>st</sup> 2016. Further, the net wealth tax rate will be amended itself and henceforth follow a two-track approach comparable to the current corporate income tax:

- If financial fixed assets, receivables towards affiliates, securities and cash (accounts N° 23, 41, 50 and 51 of the Luxembourg standard chart of accounts) are representing more than 90% of the total balance sheet and if such total adds up to more than EUR 350,000, the minimum wealth tax will amount to EUR 3,210.

- If such financial assets represent less than 90% of the total balance (or more than 90% but less than EUR 350,000), a net wealth tax of as EUR 535 to EUR 32,100 will apply.

However, it will be possible to deduct the amount of corporate income tax due for the prior year (exceptionally for the year 2016 by the tax due in the same year) from the minimum net wealth tax down to the net wealth tax hypothetically due based on the taxable net asset value.

If companies have entered into a fiscal unity for tax purposes, the added minimum wealth tax due by the members of the unit is limited to EUR 32,100. Affected entities will be able to reduce their minimum wealth tax liability to the hypothetically owed tax as mentioned above.

As hitherto, corporate securitization vehicles and SICARs as well as ASSEPs and SEPCAVs have been exempted from the wealth tax. Within the scope of said legislative changes, such entities will now become liable to the minimum wealth tax.

Although the net wealth tax credit will remain, such credit may from now on only reduce the net wealth tax to the amount of the minimum net wealth tax. Further, the new legislation put straight that a reduction of the share capital within five years after an increase of capital out of the net wealth tax reserve shall be deemed as premature cancellation of such reserve.

Concerning the net wealth tax rate, a two-scale-rate will be introduced. As hitherto, the rate will amount to 0.5% for the first 500 Million euros of net asset values. The assets exceeding this threshold will be taxed with 0.05%.

## **ABROGATION OF THE IP-BOX REGIME AS AT JUNE 30<sup>th</sup> 2016**

*Previous advantages can be secured until 2021 – urgent action until December 31<sup>st</sup> 2015 strongly recommended*

Under the impression of the BEPS-Agenda and further to arrangements of the OECD and the EU with regard to the future of IP-Box regimes, the present

Luxembourg IP-Box Regime - providing a tax exemption for 80% of the income generated from royalties - will phase out as at June 30<sup>th</sup> 2016.

According to a transitory provision, companies which fall under the current IP-Regime as at June 30<sup>th</sup> 2016 will benefit from the previous regime until June 30<sup>th</sup> 2021.

However, intentions to secure such advantages should be implemented preferably before this year's end for several reasons:

- To fall within the scope of said grandfathering rule, any purchase of IP-Rights between January 1<sup>st</sup> and June 30<sup>th</sup> 2016 has to comply with aggravate restrictions (Non-consideration of tax exempted restructuring if the IP hasn't been activated in a former IP-Box of the same owner for the time being).

### **The „old“ IP-Box Regime**

- IP has been developed or purchased after December 31<sup>st</sup> 12 2007
- No purchase of the IP from an affiliated entity
- The IP or its development costs have been activated in the balance sheet
- IP doesn't need to be formally registered but exclusive use of the IP in a certain area is mandatory
- Luxembourg registered office and permanent manager in Luxembourg is necessary

- If the IP right is activated and royalties are gained already in 2015, assets and income are filed in the annual tax return for 2015. In this case, it is highly unlikely to be confronted with the question, if the IP-Box regime has already been established before the deadline of June 30<sup>th</sup> 2016. As IP-Boxes established after December 31<sup>st</sup> 2015

will file their first tax declaration after December 2016, they might be confronted with investigations whether the regime has actually been established before June 30<sup>th</sup> 2016.

## **SANCTIONING OF SELF DENUNCIATIONS**

*Introduction of fines for self-denunciations*

As voluntary declarations remained unsanctioned for the time being, fines will apply for denunciations

concerning income and inheritance taxes as well as registration charges with effect as of January 1<sup>st</sup> 2016.

- Voluntary declarations filed between January 1<sup>st</sup> and December 31<sup>st</sup> 2016 will be subject to a fine of 10% of the tax burden.
- For voluntary declarations filed between January 1<sup>st</sup> and December 31<sup>st</sup> 2017, a fine of 20% of the tax burden will become due.

As in the past, voluntary declarations involve impunity only as long no administrative or judicial proceeding has been opened yet against the taxpayer on the date of filing of the voluntary disclosure and provided that the reassessed amounts are paid within one month after the issuance of the rectified tax assessment.

### **COMMISSION DECIDES SELECTIVE TAX ADVANTAGES FOR FIAT IN LUXEMBOURG AND STARBUCKS IN THE NETHERLANDS ARE ILLEGAL UNDER EU STATE AID RULES** *Outlook and background of the Commission's decision*

After closing its investigations, the European Commission found the „tax-rulings“ in the case of *Starbucks* in the Netherlands and of *Fiat Finance and Trade* in Luxembourg to have been illegal state aid within the meaning of Article 107 Paragraph 1 of the TFEU and decided that both states are obliged to claim the illegal benefits of about 20-30 Million Euros each from said companies.

#### ***The cases' facts***

##### **I.**

In the case of **Starbucks**, a group's distribution company, *Starbucks Manufacturing*, based in the Netherlands, purchased green coffee for exceptional high considerations from a Swiss affiliated entity. On the other hand, *Starbucks Manufacturing* paid very substantial royalties for the „roasting-know-how“ of such beans to a British daughter company. By doing so, major parts of the Company's income were transferred abroad. The applied transfer prizes had

been waved through as in the line with market conditions by a tax-ruling previously.

The Commission investigated the customary practice of the reciprocal goods and services and considered that the practice did not adequately reflect market conditions for two major reasons:

- While *Starbucks Manufacturing* was required to pay a remarkable consideration for using the „roasting-know-how“, no other group company nor any other independent roaster in essentially the same situation were required to pay any royalty for using the same know-how.
- Affected by the highly inflated price paid for green coffee beans and the additional costs involved by the maintenance of the „roasting-know-how“, *Starbucks Manufacturing's* coffee roasting activities alone did even not generate sufficient profits to pay the royalties for the coffee-roasting-know-how. The royalty therefore mainly shifted abroad the profits generated from sales of other products sold to the Starbucks outlets, such as tea, pastries and cups, which represented most of the turnover of *Starbucks Manufacturing*.

##### **II.**

The Luxembourg based company ***Fiat Finance and Trade*** provided financial services, such as intra-group loans, to other Fiat group companies. As the company's activities were comparable to those of a bank, the taxable profits for *Fiat Finance and Trade* could have been determined by a calculation of return on capital deployed by the company for its financing activities. The investigated tax rulings found that the methodology with which the tax base was determined wasn't appropriate for the calculation of taxable profits. In particular, it artificially lowered taxes paid by Fiat Finance and Trade in two ways:

- Due to a number of economically unjustifiable assumptions and down-ward adjustments, the capital base approximated by the tax ruling was much lower than the company's actual capital.

- The estimated remuneration applied to this already much lower capital for tax purposes was also much lower compared to market rates.

### **Are Tax-Rulings illegal?**

In its press release, published immediately after taking the above mentioned decisions, the Commission points out explicitly:

„Tax rulings as such are perfectly legal“.

Especially facing the various incriminations of such rulings – even by reputable press coverages during the “lux-leaks-affair” – this can’t be emphasized enough: tax-rulings are lawful as far as complying with national laws and European stipulations. In several judicial systems throughout Europe such rulings are legally anchored (e.g. §§ 204 ff. of the German AO) – and, more important: Especially in a quantitatively limited jurisdiction in which complex and detailed questions concerning the classification of specific issues are not answered by various and precise case-by-case-decisions in less time, such preliminary decisions entail a value-factor for the business location.

#### **EU-Beihilfen**

- State aid: any direct or indirect benefit of any kind provided out of public funds
- In principal: forbidden
- Exemptions:
  - Non discriminating aid having a social character, granted to individual consumers (Art. 107 Abs. 2a TFEU)
  - Remedies in the case of disasters (Art. 107 Abs. 2b TFEU)
  - Aid granted in respect of the German reunification (Art. 107 Abs. 2c TFEU)
  - „de-minimis-aid“ amounting to max. € 200,000 granted to the same beneficiary within 36 months
  - Particular cases within the meaning of Art. 107 Abs. 3 TFEU (z.B. Regional Fonds, Structural Fonds etc.)
- Consequences of infringements: Redemption of the granted benefit even in the case of binding effect under national laws.

### **Outlook**

Against the commission’s decision, both states – and in the certain case

exceptionally also both companies – can file a nullity suit at the European Court of first instance but it might take years until a judgement – or all the more,

until a final judgement by the European Court of Justice - may be handed down.

In the meantime, further decisions are expected as the commission already investigates the allegedly

similar cases *Amazon* (Luxembourg) and *Apple* (Ireland). Moreover, the commission already requested information on particular rulings throughout all European member states in order to investigate suspicious cases on a random basis. In October 2015, after only seven months of negotiations, the European Union was able to reach a decision concerning the automatic exchange of information on tax rulings; regulations following such decision will probably further improve the recent surveillance network.

In the final analysis, despite all the attention paid hereunto, the Commission’s decision doesn’t state anything new - except an peripherally provided „operating manual“ on transfer-pricing-rules: Rulings are - as long as complying with valid laws - permitted, important and (in some cases legally anchored) practice in almost all EU member states – and no one has the intention to change this.

### **BCL-REPORTING-OBLIGATION FOR LEVERAGED ENTITIES**

**Amendments entered into force on December 01<sup>st</sup> 2014 already**

Pursuant to the regulation of the Luxembourg Central Bank (BcL) n° 2014/17, companies with a balance sheet total of at least 500 Million Euro with main activity in the leveraged purchase and the holding of participations are subject to the obligation to file periodic reportings with the BcL since December 2014.

Said regulation amended the former regulation BCL 2011/8 and extended its scope towards said investment companies.



## **DRAFT LAW ON „S.à r.l.-S“**

### ***Legislative proposal concerning the invention of a „small Ltd.“ still waiting in the wings***

Already earlier this year, on February 2<sup>nd</sup> 2015, a draft law on the invention of a „small Ltd.“, the so called „S.à r.l.-S“, has been introduced to the Luxembourg parliament; since then, it remained quiet around the

project although its implementation would allow Luxembourg to catch up with its neighbours in respect of its own competitiveness.

Akin to the Belgian „SPRL-Starter“ or the German „UG (haftungsbeschränkt)“, the envisaged law shall enable the incorporation of a „S.à r.l.-S“ during a severe simplified procedure entailing relevant lower costs and efforts. The draft law's intention is the establishment of a so called „1-1-1“ model, which means that such a company may be incorporated by a sole shareholder within one day with a minimum share capital of only one Euro. Further features of the S.à r.l.-S shall be the possibility of incorporation by simple private deed without the necessity of the consultation of a notary as well as significantly reduced registration fees.

On the other hand, certain restrictions shall apply: The company may only be incorporated by natural persons who can only be shareholder of a single „S.à r.l.-S“. However, the major restriction is the limitation of the company's purpose on commercial activities for which a commercial license needs to be maintained.

Contrary to the German „UG (haftungsbeschränkt)“, the draft law doesn't intent an obligation of accruing its capital: If the share capital is increased up to the legal minimum share capital of a „normal“ S.à r.l., the shareholders shall be free to decide, whether to convert the company into a S.à r.l. what would

involve the obligatory notarization of the company's articles of incorporation.

It remains to be seen whether, how and when the legislator will implement said proposal.

## **INDEX-ADJUSTMENT POSTPONED**

### ***The next adjustment possibly upcoming in the middle of 2016***

At the very beginning of the year, STATEC forecasted the next adjustment of the index for 2016. Then, in July 2015, Etienne Schneider, minister of economics, announced the next adjustment for the third quarter of 2015 what has been immediately questioned by the secretary of treasury, Pierre Gramegna.

Now, at the years end at November 11<sup>th</sup>, STATEC points out that the next adjustment might come up in the middle of 2016 as its earliest: Due to the falling oil prices and the upgraded Euro, the Luxembourg's statistic authority expects an inflation of 0,5 % for the 2015 and of 1,3 % in 2016.

S.à r.l.-S
<ul style="list-style-type: none"> <li>• Incorporation: <ul style="list-style-type: none"> <li>○ Simple private deed</li> <li>○ 1.- € share capital</li> <li>○ Reduced registration fees</li> </ul> </li> <li>• Shareholder <ul style="list-style-type: none"> <li>○ One shareholder sufficient</li> <li>○ Only natural persons</li> <li>○ Not shareholder in another S.à r.l.-S</li> </ul> </li> <li>• Purpose: <ul style="list-style-type: none"> <li>○ Exclusively activities for which a commercial license is required.</li> </ul> </li> </ul>

## **LEGAL HOLIDAYS 2016**

New Year's Day	January 1 <sup>st</sup> (Friday)
Easter Monday	28 March 28 <sup>th</sup>
1st of May	1 May 1 <sup>st</sup> (Sunday)
Ascension Day	5 May 5 <sup>th</sup> (Thursday)
Whit Monday	16. May 16 <sup>th</sup>
Grand-Duke's Birthday	23. June 23 <sup>rd</sup> (Thursday)
Virgin Mary's Ascension	15. August 15 <sup>th</sup> (Monday)
All Saints Day	1. November 1 <sup>st</sup> (Tuesday)
Christmas Day	25. December 25 <sup>th</sup> (Sunday)
Boxing Day	26. December 26 <sup>th</sup> (Monday)