

NEWSLETTER

Dear clients,

snow is falling, life seems to quieten down and the best place to be is at home and right in front of a roaring fire place. We would like to thank you for working with us. At the same time we would like to point out the latest changes in Luxemburg's tax legislation and its consequences for your business.

Responsibilities under criminal law for legal entities

Until recently only people being responsible for a legal entity could be held responsible for criminal misdemeanours regarding the legal entity. However, this has changed since the law from 03.03.2010 has come into force. Since then incorporations themselves can be held accountable for „profitable“ infringements.

Until this law has come into force there was only the option of administrative sanctions when a legal entity was breaking the law (for example concerning fiscal offences). In some cases the prosecution could ask for the dissolution and liquidation of a company pursuing illegal activities. Nowadays this has changed and the Luxemburg Code Pénal now establishes in Art. 34 a new legal principle of penal responsibility of companies.

„Art. 34. When a criminal offence or misdemeanour is being committed in the name and in the interest of a legal entity by one or more of its legal or effective directors the legal entity can be held accountable and convicted and fined according to Art. 35 – 38.

The liability of the legal entity does not rule out any liability of the offender or his abettors. (...)”.

Apart from the state and local communities all legal entities (commercial companies, clubs and associations, public institutions and professional organisations etc.) are covered by this new liability.

This applies when committing a crime or a misdemeanour as well as criminal intent can actually be proven. The crime must have been committed intentionally in the interest of the legal entity, in order to achieve a financial advantage, to realise economies or to avoid losses. The legal entity can be prosecuted independently from the offender himself.

Due to the principle of opportunity the court can decide whether the legal entity shall also be prosecuted or not.

The possible fines are the following:

- A fine (between 500 and 750.000 €)

- Confiscation
- Exclusion from public markets
- Liquidation (only of juristic persons governed by private law)

Charges would be brought against the company represented by its representative. This prosecution is being dropped if the company should lose its legal personality (if it is dissolved wither with or without previous liquidation on a voluntary or a mandatory basis.). However, the charges will not be dropped in case the dissolution was done with the intention to avoid prosecution.

In case of recurrence the original fine can be quadrupled; the legislator has stressed that this is meant to serve as deterrent.

The Coroner can also take preliminary steps, like interrupting an already initiated process

of dissolution, forbidding any kind of transactions which might lead to the insolvency of the company or ask for a deposit to be left.

Previously the prosecution proved to be quite difficult since it was hard to identify the offenders. Part of this problem was solved by introducing penal liability of legal entities, especially in regard to money laundering, financing of terrorism, fraud, corruption and embezzlement.

This responsibility for legal entities that has been introduced in Luxemburg, Belgian and French law is definitely to be considered as progress. It is to be hoped that the intended educational effect is soon to be realised.

(Regis Lux / Carsten Söns)

New tax laws

As you might have read in the papers the legal draft No 6166 including a number of initiatives to tackle the crunch has passed parliament on 2 December 2010. The new law introduces an augmentation of tax exemptions on investments into technical developments. The rate of the complementary tax credit rises from 12 % to 13 % & while the global rate rises from 6 % to 7 % (for the part of the investments less than 150.000 €) and from 2 % to 3 % (for the part of the investment in excess of 15.000 €)

Just a reminder – the global tax credit is calculated on the basis of acquisition costs of all investments made during a tax year while the complimentary tax credit is calculated on the basis of the investment's net value.

This tax credit can be accounted to corporate as well as private income tax (for private individuals with commercial income) for a period of ten years. Please talk to us if you would like to receive further information on tax credits. (Benoît Servais)

Tax cards 2011

In the past only the employees were responsible for the inscriptions on their tax cards. The treasury has now decided to pose some part of this responsibility onto the shoulders of the employers. The Treasury seems to want to make sure that the right parameters are put down in the tax card from the beginning of the year. This apparently wasn't always the case with non – Luxemburg workforce.

The Treasury asks employers of employees living abroad (that is in Germany, France or

Belgium etc.) to inform the Treasury about necessary information to be recorded on the 2011 tax cards like new addresses, changes in marital status, changes in tax classes.

In case you feel there is anything of the kind to report please let us know, so that we can forward this information to the tax authorities.

(Katharina von Randow)

Where to pay payroll tax - for employees living in Germany

Since the double tax treaty between Luxemburg and Germany has been in force since 1958 one could be forgiven to assume its regulations might be well known by now. However, it seems there is still something new to be discovered after all this time which might turn out to be interesting for your business.

All of a sudden the question has come up in which country an employee living in Germany has to pay his income tax. Until now all of the salary of employees residing in Germany was simply submitted to Luxemburg tax regardless where the employee was actually doing his work.

These days the German Tax authorities insist on the application of Art 10 of the double tax treaty according to which any salary for services rendered has to be submitted to taxation in the same country where the

services have been rendered. This means that Luxemburg is entitled to tax incomes generated in Luxemburg. However, things might look different for services rendered outside of Luxemburg – even if they were rendered for the same employer. If an employee who is living in Germany works for a Luxemburg employer outside of Luxemburg he might have to pay income tax for these days in Germany.

This idea isn't exactly new but it hasn't really been put to practice in the past. Meanwhile the German authorities have begun to investigate people living in Germany and working in Luxemburg and they insist on income tax being paid in Germany for those parts of a salary that have been earned outside of Luxemburg. This can refer to visiting clients at their German offices, taking part in seminars in Germany, office Christmas parties, meetings etc in Germany.

a) which days are to be taxed where?

This question is at the moment still being answered differently depending on which tax authority you ask:

It is assumed by the German tax authorities that only those parts of a salary earned through physical presence in Luxembourg are to be taxed in Luxembourg. Consequently the parts of a salary earned on days the employee has worked outside of Luxembourg should be taxed in Germany instead. Accordingly they would like to see taxes on redundancy money or on a salary paid while an employee is being released from his duties completely to be paid in Germany. Germany holds the view that these parts of a salary are not being earned by any physical presence in Luxembourg and therefore not to be taxed there.

On the other hand Luxembourg applies the notion of „exercising a professional activity“. What counts is whether an activity is directly connected with the employment in Luxembourg, regardless of an employee's physical presence in Luxembourg. According to this point of view salaries earned while on holidays, further education, presentations, or in the form of golden handshakes are to be submitted to tax in Luxembourg because they are directly linked to the job in Luxembourg. The same shall apply to salaries being paid while an employee is released from duty. However, even Luxembourg's tax authority seem to agree that salary continuation in the case of sickness might lead to being taxed in Germany (apparently since being sick doesn't have that much to do with your job). However, this is not to be the case once sickness benefits are paid by the "Caisse nationale de Santé". These benefits would be sponsored by Luxembourg and therefore not to be taxed in Germany.

b) what is there to consider for the year 2010?

According to the rules of the Tax treaty any salary for days during which an employee has been working outside of Luxembourg is to be paid free of Luxembourg income tax. Instead, taxes for these days have to be paid in Germany.

Therefore one could furnish an extra salary statement for the month of December 2010 at the beginning of 2011. Within this statement those days not spent in Luxembourg in 2010 could be paid tax free retroactively. Any income tax amounts that would have been already deducted could be refunded to the employee. However, travel expenses allowances and tax credits (CIS) would have been taken into consideration.

Technically we would hand in a so called „negative“ tax declaration in Luxembourg and thus reduce the next tax payment for you accordingly.

There would be an inscription of the salary that has been paid exempt of taxes on the salary certificates for the year 2010 under the heading „Steuerbefreiungen / Autres exemptions“ stating the number of days spent working abroad. It is the responsibility of each employee to make sure he pays taxes on this part of his salary in Germany. Employers should advise employees living in Germany nonetheless on his obligation to declare his income in Germany. This should be done in writing and the employee should sign a receipt. This is meant as a safeguard so that you cannot be held liable for abetting to defraud the revenue later on.

The employee hands in his salary certificate together with his tax declaration and the German tax authority will calculate the German income tax accordingly which has to be paid by the employee himself then.

The Tax office Trier has said it will grant a de minimus threshold of four days. If an employee worked less than four days outside of Luxemburg the German taxation would become obsolete and the salary would be taxed as usual in Luxemburg. Nonetheless the employee remains under the obligation to hand in a tax declaration in Germany.

If an employee is working outside of Luxemburg more than four days he has to pay German income tax from the first day on.

c) what is to be done?

In order to be able to prepare the necessary tax documents we would need the following information for each employee:

- how many days has the employee worked outside of Luxemburg (meetings with clients, meetings at the parent company, working from home etc.)?
- how many days has the employee spent outside Luxemburg on continuing education?
- how many days of holidays has the employee taken?
- how many days has he been ill?

We would like to point out that the two states are still negotiating on what kind of professional activities outside of Luxemburg are to be taxed under German tax laws. We will inform you as soon as possible once we know more about this.

We do advise you in any case to stick to the Luxemburg tax laws in case an agreement

should not be reached within the next few weeks. In cases where double taxation would be inevitable due to the two different views of the States on when a salary is being earned in Germany or in Luxemburg, there is a legal remedy, called mutual agreement procedure (Art. 22 of the tax treaty). Through this one would be able to apply for recovering any income tax paid twice. Because at the end of all this, even though both states insist on having their share of the cake double taxation would still be regarded as contrary to the double tax treaty.

If only to avoid unnecessary liability we believe one should leave it to the German tax authorities to calculate the German Income tax. Luxemburgish Employers therefore should stay away from any attempts to calculate German income tax on their own. Instead it would be better to advise employees in a written note that it would be up to them to hand in a tax return in Germany and that they might have to pay taxes on part of their income in Germany.

d) what is to be done about the past?

In principle it might be necessary to rectify even past year's tax calculations. According to German Tax authorities this could concern the years 2005 to 2009. However, as long as the two national tax authorities have not reached an agreement on how the income tax is to be divided between them we suggest waiting for further developments in the matter.

(Katharina von Randow)

Increase of the minimum wage on 1st January 2011

Good news for those employees earning minimal wages. Not quite as good news for employers. The minimum wage for employees is to be increased by 1.9 % on the 1st of January 2011. From now on the minimum wage amounts to 1.757, 58 for non-qualified and to 2.109,10 € for qualified

employees. This means an increase of nearly 30 € in the pockets of the employees, while employers will have to pay 37,05 € more for non-qualified employees and even 44,48 € more for qualified employees each month. (Katharina von Randow)

New Accounts code from 1st January 2011

By grand-ducal regulation from 10th June 2009 a new accounts code has been introduced in Luxemburg which has become and generally binding for all enterprises in Luxemburg for business years beginning on the 1st January 2011 or later. This rather technical innovation is basically concerned with the categorisation and numeration of individual accounts and is to clarify matters at the same time.

There won't be many perceptible changes for those companies whose accounting is being done by us. However those companies who endeavour to do their book keeping themselves and only let us do their annual

accounts have to observe the new accounts code.

One substantial reason for the introduction of this general code has been the idea of installing an electronic centre for balance sheets. The next step on the way of harmonising the way balance sheets are being handed in might be to ask enterprises to hand in their accounts electronically (Excel for example).

In case you should have any questions on how to adapt your accounting to the new rules please don't hesitate to ask us. (Carsten Söns)

Dear clients,

We wish you a happy new year. May the year 2011 turn into an excellent year for you both privately as well as professionally!

Best regards

Alhard von Ketelhodt

Luxembourg, January 2011