

TAX NEWS:

LUXEMBOURG LAW DATED DECEMBER 21, 2007: NEW TAX REGIME FOR INTELLECTUAL PROPERTY INCOME AND OTHER TAX MEASURES

1. Special tax regime for intellectual property income

Following the announcement in mid October by the Minister of Economy and Foreign Trade on a special tax regime for income from I.P., Luxembourg Parliament has adopted the bill 5801 in the law dated December 21, 2007 (the "**Law**"). The new I.P. tax regime applicable from tax year 2008 is aimed at increasing the competitiveness of Luxembourg in matters of investments in industrial and intellectual property assets and R&D.

The special regime can be summarised as follows:

- The new I.P. tax regime (article 50bis in the Luxembourg income tax code ("**LIR**")) consists of an exemption from income tax of 80% of the net income derived from specific I.P. rights managed from Luxembourg.
- Eligible for the new regime is I.P. income derived from the use or licensing of copyrights for computer software, patents, industrial or commercial trademarks, and industrial designs. The relevant I.P. should be created (internally) or acquired after December 31, 2007. Income derived from copyrights other than on software, plans, formulas and similar I.P. is not included.
- For internally developed I.P., the exemption consists in a deduction equal to 80% of a deemed royalty income (i.e., the income which the I.P., would have generated if a license would have been granted to a third party under market conditions), as soon as the tax payer applies for the protection of its patent. In cases where the application is turned down, the initial deduction must be reinstated to the tax base of the financial year during which this decision was notified to the taxpayer.
- The beneficial tax regime is not available for I.P. rights acquired from an "affiliated" company. According to the parliamentary discussion relating to bill 5801, the exclusion of I.P. acquired from an "affiliated" company aims at avoiding that same I.P. would give right to a multiple application of the beneficial tax regime within the same group. For purposes of this provision, the transferring company is considered to be "affiliated" to the acquiring Luxembourg company in the following three situations:
 1. The company acquiring the I.P. holds a 10% direct participation in the transferring company;
 2. The transferring company holds a 10% direct participation in the share capital of the acquiring company;
 3. The share capital of each of the transferring company and acquiring company is held for at least 10% by a common shareholder.
- Considering the fact that the text refers to affiliated companies without distinction as to their residence, the exclusion should also apply for transfers made by foreign affiliated companies (despite the fact that a transfer by a foreign affiliated company does not necessarily result in a multiple use of the beneficial tax regime – the Law is unfortunately not clear on this point).

- The 80% exemption applies to positive net income derived from the abovementioned I.P. rights, including capital gains upon disposal of the I.P. rights, so that negative net income remains fully deductible. The exemption is available only to the extent the expenses, write-off, depreciations in connection with the exempt income and which have not been offset in a given tax year by relating income, are capitalised on the asset side of the balance sheet. As it is optional in Luxembourg to capitalise the expenses linked to internally developed I.P. rights, this provision aims at avoiding that, for a given amount of income, the global taxation could be different depending on the accounting option chosen.
- To the extent that negative income on the eligible I.P. has been used to offset other taxable income, a recapture will apply upon realisation of a capital gain in the I.P., i.e., the 80% exemption of the capital gain will not be available up to the negative income which has been used to offset other taxable income. For purposes of computing the capital gain realised, small and medium sized enterprises have the possibility to determine the realisation value of I.P. rights on a lump-sum basis equal to 110% of all expenses in economic connection to the realised I.P. right that have been relieved during the tax year of disposal or any previous tax years.

2. Other tax measures

For businesses, the other salient tax measures introduced by the Law consist of:

- an increase from 10% to 12% of the investment tax credit provided for by article 152bis LIR and available for investments in specific (excluding buildings, livestock and mining fields) amortizable tangible assets;
- Extension of the scope of the reduced VAT rate of 3% to fees paid to teledistributors covering both the content as well as the transmission of TV or radio broadcasts.

For individuals, the Law introduces the following salient tax measures:

- A 6% increase of the brackets of the income tax schedule for individuals in order to take the inflation into account;
- The annual tax rebate of EUR 922,50 currently granted for each child being part of the taxpayer's household is replaced by a cash bonus of the same amount, irrespective of the taxable income of the taxpayer, provided the said children fall within the scope of the family allowance regime;
- Introduction of a joint-taxation (same tax regime as married taxpayers) for non-married taxpayers living under a civil partnership;
- Tax exemption of remuneration for overtime work;
- Inclusion of all foreign income/losses in computing the Luxembourg tax rate for non-resident taxpayers deriving at least 90% of their professional income from Luxembourg (amendment of article 157ter LIR following the ECJ case "C-182/06 Lakebrink").

The above is for information purposes only and does not constitute nor can it be relied upon as binding legal advice. Before implementing a transaction on the basis of the above it is highly recommended to seek detailed advice.