

General Communication with Tax Authorities in friendly or unfriendly ways

Tax Commission – of course...!

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National Report of Luxembourg

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1. Introduction

Tax authorities – surely each one of us had the pleasure to deal with one: as taxpayer at least with the tax authority of the country you are resident of, as a lawyer helping others in tax matters you might have had the chance to deal with the tax authorities of other countries as well. If the latter is the case you might have seen some differences in the behaviour of the different tax authorities. You might have realized that the tax authorities in some or even the majority of the countries do treat the taxpayers not as their customers or clients but rather as subordinates. In such cases the communications tends to be rather hierarchical and often results in administrative proceedings against the tax authorities with more or less success.

Other countries have realized that treating the taxpayer in ways like we know from the tale of Robin Hood and the Sheriff of Nottingham only results in the tax payers trying to circumvent their tax obligations. Some countries, thus, have not only reduced the taxes in their countries. They also made their tax authorities treat the taxpayers as their clients e.g. in offering the taxpayers the possibilities for tax rulings and trying to take a more tailored approach towards their taxpayers .

These – sometimes very significant – differences are what we are focusing on in this year's tax report: We want to show that there are big distinctions in the behaviour of and the dealing with the tax authorities in different countries both in the stage of an advance agreement on a tax position as well as in an objection or litigation phase. For this reason AIJA members from several countries around the globe were so kind to volunteer as national reporters for this report which is crucial for such a comparative topic.

The General Reporters would like to thank you all in advance for your contributions and are already very interested in the results of this year's annual congress session of the AIJA Tax Commission.

2. Questionnaire

Note: General assumption is discussions with the tax authorities regarding (corporate) income tax or indirect taxes. If a difference would apply in the treatment between either of these, please indicate in your report. Also, if there are different levels of tax authorities for different taxes or issues, please mark that in your report.

2.1 Communication general

How does the General Communication with the Tax Authorities take place?

- a. Is a direct contact in between the tax payer and the Tax Authorities possible/common/advisable?

Luxembourg tax authorities are generally prepared to answer taxpayers' questions, orally or in writing. Specific procedures and formalities are foreseen (i) as regards the withholding tax treatment of salaries and (ii) advance pricing agreements on intra-group financing transactions. It is not uncommon that taxpayers contact the tax authorities directly if they have doubts on the correct filing of their income tax return or their tax refund claims. Tax officers are usually very helpful to advise taxpayers on their tax filings in order to speed-up the process by ensuring that the filings are correct.

- b. If not, does the communication only take place via tax counsels?

Taxpayers are free to contact the tax authorities themselves. In case of sophisticated transactions however, the communication takes typically place through external tax advisors (except in case the company has its own internal tax counsel), given the technicalities of the requests and their motivation/justification.

- c. How can the communication regarding special matters be described?

The communication is generally very professional. Provided that the taxpayer duly motivates the request, the tax authorities are generally willing to analyze the arguments and confirm their position under the applicable law and regulations.

- d. Does it take place only in a written form or are meetings possible?

There are no general rules and the administrative practice may vary depending on the competent tax officer. Physical meetings are not excluded if helpful.

- e. Can the behaviour of the Tax Authorities in your country be described as all dominant, cooperative, customer-oriented or otherwise?

The Luxembourg tax authorities are usually prepared to help taxpayers, be it regarding their understanding of the law or the correct filing of tax returns. Accordingly, they are known as being cooperative (as most Luxembourg administrations).

2.2 Agreements between tax payers and tax authority

- a. Is there the possibility of a tax ruling and, if so, which costs can be expected?

There are no formal rules in this respect, except regarding (i) the withholding tax treatment of salaries and (ii) advance pricing agreements on intra-group financing transactions. According to the administrative practice of the direct tax authorities written advance tax confirmations are issued for a maximum period of 5 years. The confirmation is limited to an identified taxpayer and to a given transaction and secures the tax treatment in advance of a specific issue. For indirect taxes (e.g. registration duties and VAT), no advance tax confirmations are generally issued. The Luxembourg tax authorities do not charge any tax, fee or duty in this respect.

- b. What is the average time frame to get a tax ruling done?

The timing is very variable and depends on the tax authorities' workload. Responses could usually be obtained within 4 to 6 weeks, but may also take as long as 6 months.

- c. Are these consultations binding and, if so, which possible remedies do exist?

Although there are no formal rules (except in the aforementioned cases), it is admitted that the tax authorities' confirmation is binding on them provided (i) the confirmation is given by a tax officer who is in charge of the relevant tax, (ii) all facts and circumstances have been properly disclosed, (iii) the transaction is implemented in accordance with the request and (iv) the confirmation is not prima facie erroneous or contra legem. Also, the binding effect may be waived when the underlying legal provisions change so that the confirmation no longer complies with the new legal provisions.

- d. Once a tax ruling between all the parties concerned has been achieved, can one rely on it?

Yes, see above.

- e. What is the exact legal status of a tax ruling?

It is a confirmation of administrative authority, binding upon it under the general principle of good faith based on the relevant legal provisions.

- f. Is it common in order to get a tax ruling that the tax payer has to give up certain rights or explicitly agree to e.g. information exchange?

No.

- g. Is a tax ruling a public document or will it be treated confidentially by the tax authority? Does the taxpayer have an obligation to keep it confidential?

Advance tax confirmations only apply to a determined factual situation of a given taxpayer. Under the general principle of tax secret, the requests and the confirmation are confidential. The taxpayers have no obligation towards confidentiality, but in practice keep their fiscal documents confidential for obvious reasons.

2.3 Remedies against decisions of the Tax Authorities

- a. Is it common that one has to litigate if a decision has been made by the Tax Authorities and which remedies do exist?

Yes, appropriate court action may be lodged against the tax authorities' decision to tax. The ordinary litigation rules apply.

- b. Is there the possibility of addressing a court or is this an administrative procedure?

Depending on the matter, a preliminary complain has to be addressed to the director of the relevant tax authority. Under the common procedure rules, a negative decision or no decision after 3 months may then be challenged before court.

- c. Which costs are to be expected in such a case?

Court costs are usually insignificant.

- d. Is it compulsory to have a lawyer in case of any remedy?

Yes, depending on the matter or the instance (e.g. in appeal or before the Supreme Court).

- e. What timeframe can be expected in case of a remedy/litigation?

Except in limited cases (e.g. exchange of information requests of a foreign tax authority), no timeframe are provided for by Luxembourg law. Usually, litigation against a tax assessment may take between 10 to 18 months.

- f. Is it possible to postpone the payment of the tax debt as assessed by the tax authority until the end of a pending litigation with the tax authority? Will the tax authorities require guarantees for the postponement (Bank guarantees, mortgages etc.)?

No, the relevant tax needs to be paid from the outset.

- g. Is it possible that the tax authorities submit a report to the public prosecutor to investigate on possible criminal tax offences and under what circumstances?

Yes, in case the tax authorities suspect the taxpayer of having committed a criminal offense, they may inform the public prosecutor thereof who may

then take action. However, in fiscal matters, this is very rare, since the only criminal offense under Luxembourg law is an aggravated tax fraud (*escroquerie fiscale*) whereby the taxpayer has actually saved a significant amount of taxes by the systematic use of fraudulent manoeuvres.

- h. Is it possible to include a clause in an agreement to automatically amend this agreement in accordance with the outcome of a discussion or litigation with the tax authority (e.g. if an “at arms length payment” is not accepted as such by the tax authority or if interests are held to be dividends or a loan is seen to be a gift)?

Although under Luxembourg law the parties are generally free to agree the terms of their agreement, it is quite uncommon to foresee such provisions, in particular since any retroactive amendments are not binding on the tax authorities.

2.4 Sanctions

- a. What is the statute of limitations for tax related matters?

Usually the statute of limitations is 5 years, which may be extended to 10 years in case of incorrect or no filing of the relevant tax return. For registration duties, the general statute of limitation is 30 years, but usually shorter periods are foreseen (2 years).

- b. What is the typical sanction/amount of fines in your jurisdiction? Is there a different fine level for direct or indirect taxes?

The sanction depends on the breach of the underlying obligation of the taxpayer. In case of non-filing of tax returns within the legal delays, the tax authorities may impose a fine for late filing and/or proceed to a taxation based on their valuation (*taxation d'office*). In case of late payment of a tax, an administrative fine may be in addition to interest. Imprisonment (max. 6 months) is only possible in case of aggravated tax fraud (*escroquerie fiscale*).

- c. Is it possible for a taxpayer to prevent tax penalties to be imposed should he/she be able to prove her good faith or reasonable interpretation of the law? Yes, but the burden of proof remains with the taxpayer.

- d. Is it possible to regularize your tax situation with reduced or no fines/sanctions?

Yes, the Luxembourg General Tax Law provides for the possibility for the taxpayer and his/her/its representative to disclose (*Selbstanzeige*) the tax fraud or aggravated tax fraud to the Luxembourg tax authorities, benefitting in such case from a relief or the relevant sanction provided such disclosure takes place before (i) the taxpayer is indicted and (ii) a tax investigation has commenced.

- e. May tax advisors/tax lawyers be held responsible by the tax authority for their advice to taxpayers?

Yes, the Luxembourg General Tax Law extends the sanctions to people who have assisted the taxpayer.

2.5 Tax information exchange

- a. Does a tax information exchange on the EU level or OECD level happen and how does it take place?

Yes, it has to be distinguished between (i) the exchange of information upon request of a foreign tax authority under a double tax treaty, (ii) an automatic exchange of information under the EU Directive on administrative cooperation between tax authorities and (iii) an automatic exchange of information under the EU Directive on the effective taxation savings income.

The exchange of information upon demand of a foreign tax authority under a treaty follows basically article 26 of the OECD Model Tax Convention.

Under the implemented EU Directive on administrative cooperation, an automatic exchange of information applies to salaries, pensions and director's fees paid to EU residents (real estate income and income from life insurance are likely to follow).

An automatic exchange of information as regards EU cross border interest payments to individuals/residual entities applies, unless the beneficiary has opted for the 35% withholding tax. It has to be noted that the withholding tax system will be abolished so that as from the 1 January 2015, only the exchange of information system applies.

Finally, Luxembourg signed an IGA Model 1 for FATCA with the US.

- b. Does your country enter into tax treaties that oblige to exchange information spontaneously, automatically and/or upon request?

No, the Luxembourg treaty policy is to implement article 26 of the OECD Model Tax Convention (exchange of information upon request), with the exception of the OECD Convention on Mutual Administrative Assistance in Tax Matters.

- c. Is the tax payer notified in case information is exchanged with foreign tax authorities?

In theory the taxpayer is not necessarily informed of pending request of a foreign tax authority for an exchange of information: indeed, the request may be addressed by the Luxembourg tax authorities to the suspected information holder (bank, insurance company ...) and a notification towards the

information holder is deemed to be a valid notification to the taxpayer. In practice, the information holder then communicates the request to the concerned person in order to enable him/her to take appropriate actions (the delays to introduce court action starts as from the notification to the information holder).

- d. Can the tax payer object against an exchange of information?

Yes, the taxpayer may introduce court action within 30 days as from the notification and has the right to appeal the court's decision.