

# NewsAlert

Real Estate Tax Services



Luxembourg

December 2012

## *New tax measures for 2013*

On 13 December 2012, the Luxembourg Parliament enacted (subject to confirmation by the Council of State that no second hearing is required) bill n°6497 (the “Tax Bill”), introducing new tax measures for corporations and individuals. This NewsAlert reviews only those measures that are likely to affect the real estate industry.

Further to discussions held between the Government and various stakeholders, some of the original proposals in the proposed austerity package have been softened. The changes relate mainly to the minimum corporate income tax regime, and are described further below.

The new measures will apply with effect from the tax year 2013.

### ***Corporate income taxes – effective rate***

The basic corporate income tax rate remains unchanged, but the solidarity surtax is increased from 5% to 7%. As a result, the aggregate income tax rate increases from 28.80% to **29.22%** (for Luxembourg City).

### ***Extension of the minimum corporate income tax***

#### **Holding and finance companies**

- Since the 2011 tax year, a minimum corporate income tax has been applicable to all corporate entities having their statutory seat or central administration in Luxembourg and for which the sum of fixed financial assets, transferable securities and cash at bank exceeds 90%

of their total gross assets. For the 2013 tax year, this minimum corporate income tax is increased from EUR 1,500 to EUR 3,000 (in practice, **EUR 3,210** when taking into account the solidarity surtax).

- The Tax Bill expressly provides that, when assessing the above 90% threshold, receivables due from affiliated companies are to be included in the list of assets to be considered. A reference to item 41 in the Standard Chart of Accounts has therefore been added, along with items 23, 50 and 51 which were already listed in the law.
- Until now, this minimum tax was only applicable to entities whose activities did not require a business license or the approval of a supervisory activity. As this condition has been removed by the Tax Bill, regulated entities (e.g., SICARs,

regulated securitisation companies) will, as from the 2013 tax year, also fall within the scope of the EUR 3,000 minimum corporate income tax (on the basis that the 90% threshold condition described above is exceeded).

### Other companies

- A new and different minimum corporate income tax regime is to be applicable as from tax year 2013 to **all other corporations** (i.e., all corporations not falling within the scope of the EUR 3,000 minimum tax noted above) having their statutory seat or central administration in Luxembourg. The minimum corporate income tax ranges from EUR 500 to EUR 20,000 (plus the solidarity surtax) depending on a company's total **gross** assets in its accounting balance sheet, as detailed in Table 1 below.

Total gross assets*	Minimum tax **
Up to EUR 350,000	EUR 535
From EUR 350,001 to EUR 2,000,000	EUR 1,605
From EUR 2,000,001 to EUR 10,000,000	EUR 5,350
From EUR 10,000,001 to EUR 15,000,000	EUR 10,700
From EUR 15,000,001 to EUR 20,000,000	EUR 16,050
As from EUR 20,000,001	EUR 21,400

**Table 1**

\* Total gross assets of the company as at the **end** of the fiscal year

\*\* Including solidarity surtax

- Consequently, Luxembourg companies directly holding real estate (either in Luxembourg or elsewhere) will, for the first time in tax year 2013, be subject to a minimum corporate income tax, with the amount due being driven by reference to the gross asset value of the real estate shown in its accounting balance sheet at the close of the relevant accounting period.

### Related new provisions

- To avoid concerns over breaches of EU Directives or tax treaties, and following an amendment proposed by the Luxembourg Council of State, the Tax Bill provides that any minimum corporate income tax is to be considered as an advance tax payment of any present or future corporate income tax that will be due by the company. However, as an exception to article 154 of the Luxembourg income tax law ("LITL"), this minimum corporate income tax **cannot** ever be reimbursed to the taxpayer. The question of the compatibility of this minimum tax with double tax treaties or the Parent/Subsidiary Directive arguably remains open insofar as it concerns taxpayers only deriving income which is exempt on the basis of these treaties and Directives.
- Tax credits for capital investments provided by article 152bis LITL, for the recruitment of unemployed persons, for expenses related to further professional education, and for venture-capital investments, are to be creditable only against the amount of corporate income tax in excess of the amount of minimum corporate income tax as determined above. As the list above is to be regarded as exhaustive, any foreign withholding taxes might, in our view, still be creditable against the minimum corporate income tax.
- For tax-consolidated entities, the company heading the tax unity will bear the aggregate amount of minimum corporate income tax that would have been borne by each member of the tax unity had these not been consolidated. Following an amendment proposed by the Luxembourg Council of State, the aggregate amount of minimum corporate income tax will however be capped at EUR 20,000 for any tax unity group.
- Luxembourg companies are subject to a 0.5% net wealth tax ("NWT") on their net asset value. However, under certain conditions, § 8a of the NWT tax law provides for reduction or elimination of

the NWT liability, to the extent that a NWT reserve equal to 5 times the reduction in the NWT liability is recorded in the accounts and is maintained for the next 5 tax years. One of the conditions noted above is that the amount of NWT reduced cannot exceed the amount of corporate income tax payable for the year in question. The Tax Bill further restricts the amount of the NWT reduction, which as from the 2013 tax year cannot exceed the amount of corporate income tax in excess of the minimum corporate income tax as determined above.

- Following an amendment proposed by the Luxembourg Council of State, the maximum amount of NWT reduction will remain determined by reference to the corporate income tax payable for the year in question before deduction of any tax credits. Taxpayers enjoying the benefits of a tax credit (for investments notably) will therefore not suffer a NWT increase compared with the current situation.
- The minimum corporate income tax applies only to collective entities that have their statutory seat or place of central administration in Luxembourg. Hence, non-residents deriving Luxembourg-source income (such as foreign entities with a permanent establishment in Luxembourg) are out of the scope of the minimum corporate income tax.
- It is understood that requests for quarterly advance payments to be made by companies not previously subject to the minimum corporate income tax charge may not be made until June 2013.

### Our View

Over the past fifteen years, a very large number of Luxembourg companies have been set up to own, directly, individual real estate investments in territories outside Luxembourg – now most notably in the United Kingdom and Germany. These “SPV” companies have until now paid little or no corporate income tax in Luxembourg, given that the relevant tax treaty does not give Luxembourg taxing rights over their principal source of income.

The impact of the changes described above may thus be very significant, as the minimum tax regime does **not** exclude from its computation assets that produce tax treaty excluded income. Consequently, some fund structures owning a portfolio of assets through Luxembourg SPV companies could face very material tax liabilities for the 2013 tax year unless steps are taken during 2013 to mitigate liabilities, given that a structure might contain many SPVs otherwise each incurring up to EUR 21,400 of tax a year.

Opting to bring all SPVs that are potentially affected into a tax unity may be seen as a way of capping the tax to be incurred by a fund structure at EUR 21,400. Care is needed, however, as the tax unity regime can only be used by 95% subsidiaries, and requires companies to be “locked in” to the tax unity group for a minimum five year period – breach of this requirement causing entities leaving the tax unity to be taxed retrospectively as if the unity had never existed.

The contribution of real estate investments by the Luxembourg SPV to a tax transparent entity, such as a German KG, that is effectively 100% owned by the SPV could also potentially reduce the minimum corporate income tax liability for the SPV to EUR 3,000 plus solidarity surcharge. The ownership interest in the tax transparent entity, if accounted for as “opaque”, would be seen as a “financial asset”, making it more likely that the Luxembourg SPV could qualify for the minimum corporate income tax charge applicable to holding and finance companies as described above.

It is unfortunate that these measures have now been legislated despite the concern of the Luxembourg Council of State. The Council of State is on record as having pointed out that “the Government have omitted to examine the impact on the competitiveness of the financial marketplace and to analyse losses eventually arising from the “delocalisation” of a sector of the market to territories not applying a comparable minimum tax.”

PwC, together with other advisers in Luxembourg, have lobbied the Luxembourg Government hard to moderate the scope and

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impact of these measures, and it had been hoped until yesterday that it might be possible to secure a more reasonable treatment for real estate owning SPV companies. Regrettably, it is now clear that the impetus for the new measures is very strong, and that no immediate practical reliefs can be identified.

It goes without saying that PwC and other advisers in Luxembourg will nevertheless continue to press strongly for the legislation to be amended, to recognise the specific situation of treaty protected real estate owning SPV companies, before its impact becomes irreversible, this being at the point when such entities close their 2013 accounts.

*For more information, please contact your local PwC real estate tax service provider or one of the contacts below.*

### **Global**

**Uwe Stoschek**

Global Real Estate Tax Leader  
+49 30 2636-5286  
uwe.stoschek@de.pwc.com

### **Europe and Africa**

**David Roach**

Regional Real Estate Tax Leader  
+352 49 48 48 3057  
david.roach@lu.pwc.com

### **Middle East**

**Oliver Reichel**

Regional Real Estate Tax Leader  
+971 2694 6946  
oliver.reichel@ae.pwc.com

### **Central /Eastern Europe**

**Glen Lonie**

Regional Real Estate Tax Leader  
+420 251 152 619  
glen.lonie@cz.pwc.com

### **Americas**

**Paul Ryan**

US Real Estate Tax Leader  
+1 646-471-8419  
paul.ryan@us.pwc.com

### **AsiaPacific**

**KK So**

Regional Real Estate Tax Leader  
+852 2289 3789  
kk.so@hk.pwc.com

### **Nationally**

#### **Luxembourg**

**Alexandre Jaumotte**

+352 49 4848 5380  
alexandre.jaumotte@lu.pwc.com

**Cécile Menner**

+352 49 4848 3140  
cecile.menner@lu.pwc.com

**David Roach**

+352 49 4848 3057  
david.roach@lu.pwc.com

**Thierry Braem**

+352 49 4848 5106  
thierry.braem@lu.pwc.com

**Maarten Verjans**

+352 49 4848 3014  
maarten.verjans@lu.pwc.com

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