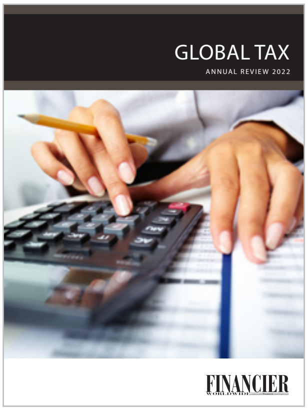

ATOZ
TAX ADVISERS LUXEMBOURG

Published by Financier Worldwide Ltd

ANNUAL REVIEW Reprint JULY 2022

Global Tax

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in global tax.

Luxembourg

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Romain Tiffon is a partner within the international & corporate tax team at ATOZ Tax Advisers. A tax professional since 2006, Mr Tiffon has experience in structuring pan-European alternative investment funds across all asset classes, as well as coordinating tax structuring advice and implementation for a wide range of institutional investors. He also has extensive experience in structured finance, M&A transactions and sovereign wealth funds, and is currently responsible for ATOZ's DAC6 initiatives, working closely with Taxand and ATOZ Digital Solutions.

Q. Could you outline what you consider to be the key developments relating to tax regulations that you have seen in Luxembourg over the last 12-18 months?

TIFFON: The last 12 months have seen a great deal of activity in terms of new tax legislation. On 22 December 2021, the EU Commission issued two significant directive proposals. The first proposal, known as the 'Unshell Directive proposal', lays down rules to prevent the misuse of shell entities for tax purposes. This proposal was heavily driven by the perception that some legal entities that lack or have minimal substance continue to be used for aggressive tax planning structures. This proposal aims to identify these entities by trying to determine minimum substance standards which, if not met, would lead to a denial of treaty and EU directive access to these entities. The second proposal originates from an Organisation for Economic Co-operation and Development (OECD) initiative known as Pillar 2 or the Global Anti-Base Erosion (GloBE) Rules. This proposal aims to ensure a global minimum level for multinational groups within the EU by introducing a top-up tax using an effective tax rate test that is calculated by reference to financial accounting income. Finally, Luxembourg had to amend its interest deduction limitation rules

stemming from the European Anti-Tax Avoidance Directive (ATAD1) by removing the EU-regulated securitisation entities from the scope of carved-out entities.

Q. What factors are driving the political agenda on tax-related decisions? Does there seem to be a motivation to get tougher on tax enforcement, for example?

TIFFON: The Luxembourg government has introduced a few tax measures to increase the transition to sustainability, such as tax rebates for electric vehicles. At the same time, the government is considering its property tax regime to help reduce the price pressure on real estate assets in Luxembourg. On the enforcement side, the Luxembourg tax authorities have increased their reviews of tax returns, which has led to growing litigation due to conflicting conclusions. I would not say that there is a motivation to get tougher on tax enforcement per se, however the fact that we have seen a surge in tax legislation over the past 24 months with little or no guidance from the tax authorities has led tax advisers to take positions which are technically grounded but that may not necessarily be shared by the Luxembourg tax authorities.

Q. To what extent is transfer pricing a key challenge for multinational enterprises? Are too many companies underestimating the importance of compliance and risk management in this area?

TIFFON: Luxembourg is a renowned financial centre in Europe and a prime location for holding companies. These companies are therefore naturally very frequently party to intragroup transactions. We have seen a strong and voluntary adaptation of taxpayers to growing transfer pricing regulations over the years. While this may have been a key challenge in the past, transfer pricing has become a structural part of how parties operate and is well managed and understood. I do not believe companies are underestimating the importance of compliance and risk management in this area because the current global economic context is pressurising prices, which therefore requires a dynamic adaptation of transfer pricing documentation.

Q. How would you describe the tax laws in Luxembourg as they relate to foreign entities? Has there been an effort

to tighten laws and crack down on issues such as offshore tax jurisdictions?

TIFFON: Luxembourg has fully adhered to European standards when it comes to foreign and offshore entities. The most notable recent pieces of legislation in this respect are the controlled foreign company (CFC) rules and the disallowance of certain interests and royalties owed to associated enterprises that are located in a country that is listed on the EU list of non-cooperative jurisdictions. As a matter of principle, companies that are part of the same group are taxed on a standalone basis. To counteract situations where the distributing company is in a low-tax jurisdiction and where the parent is in a higher-tax jurisdiction that offers a participation exemption, the CFC rules have been introduced as an anti-abuse measure. The law provides for specific thresholds to determine if a foreign company is a CFC. Concomitantly, a low-tax test needs to be conducted. If both tests are satisfied, then we are in the presence of a CFC. However, there will only be an inclusion of the income arising to the CFC in the hands of the Luxembourg parent company to the extent the activities of that CFC are managed by the Luxembourg parent. Finally, with regard to the disallowance of interest and royalties to blacklisted resident associated enterprises, deductibility will be denied if certain cumulative conditions are met, as follows. First, if the beneficiary of the interest or royalty is a collective undertaking, thus excluding tax transparent entities. If the beneficiary is not the beneficial owner, then the beneficial owner has to be taken into account. Second, if the beneficiary of the interest or royalty is an associated enterprise. Third, if the collective undertaking, which is the beneficiary of the interest or royalty, is established in a country or territory which is on the EU list of non-cooperative tax countries and territories. Interest and royalties remain tax deductible to the extent that the taxpayer can demonstrate that the operation to which the interest or royalties relate has been put in place for valid economic reasons which reflect economic reality.

Q. Have you seen an increase in tax disputes in Luxembourg? What lessons can companies learn from their outcome?

TIFFON: We have witnessed a non-negligible increase in tax disputes in Luxembourg with recent landmark cases that have refined the interpretation of administrative practice. The most recent dispute dealt with an equity account without the issuance of shares. In this specific case, the contribution to that equity account without the issuance of shares was realised separately from the acquisition of the shares for which a price was set. The court ruled that this additional but distinct equity account could not be considered part of the acquisition cost when determining the eligibility for the purposes of the Luxembourg participation exemption regime.

Q. If a company does find itself the subject of a tax-related audit, investigation or enquiry, what steps should it take to manage its relationship with tax authorities?

TIFFON: Luxembourg is a business-friendly environment where all administrations remain approachable. The tax code requires Luxembourg taxpayers to cooperate with the tax authorities in the case of an audit. More specifically, taxpayers are under an obligation to evidence facts and

“We have witnessed a non-negligible increase in tax disputes in Luxembourg with recent landmark cases that have refined the interpretation of administrative practice.”

provide information assuming the evidence is available, reasonable for the taxpayer to have, and relevant for clarification purposes. Another tax provision was added in 2015, which extended a taxpayer’s duty of cooperation to transactions between associated enterprises, although no specific transfer pricing documentation requirements are detailed therein. There is, therefore, a greater focus on transfer pricing which should preferably be in place when a transaction is implemented.

Q. What general advice would you give to companies on effective tax planning? How important is it to create tax efficient structures and improve internal functions and processes across the organisation?

TIFFON: Effective tax planning is under more scrutiny, not only by tax authorities, but by taxpayers and stakeholders alike. Tax planning is becoming heavily reliant on sound transfer pricing documentation which now goes well beyond a mere tax compliance exercise and rather spans into a greater tax strategy that international groups abide by. Given the ever-changing systems that these groups operate in, it is key that transfer pricing also adapts to these changes. ■

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ATOZ Tax Advisers, founded in 2004, is a high-end independent advisory firm based in Luxembourg offering a comprehensive and integrated range of direct and indirect tax solutions as well as transfer pricing, aviation finance and tax litigation services. The firm advises on, and delivers solutions for, sophisticated local and global professional clients. With over 150 highly skilled professionals, the team has in-depth experience of serving very demanding businesses and institutional clients in need of tailor-made advice. ATOZ is the Luxembourg member of the Taxand network which provides high quality, integrated tax advice worldwide.

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