

Luxembourg: Changes in the VAT Legislation

On 1 January 2017, the Luxembourg Law no. 7020 on the tax reform entered into force, introducing inter alia a number of noteworthy changes to the Grand Duchy's value added tax (VAT) regime. At the same date, EU Regulation N°1042/2013 ('Regulation') took effect to articulate, among others, new VAT rules as to the place of supply of services connected with immovable properties, thereby facilitating the application of the EU VAT Directive 2006/112 ('Directive'). Moreover, the Court of Justice of the European Union (CJEU) is expected to soon rule on the compliance of the Luxembourg cost-sharing VAT exemption with the provisions of the Directive. **Luxembourg Law no. 7020 Director fees subject to VAT** Pursuant to the new legislation, independent directors have the status of taxable persons in Luxembourg. Furthermore, director fees are in principle subject to VAT at the rate of 17%, even if the director is a private individual. As a consequence, Luxembourg-based directors need to register with the authorities and charge VAT to the company paying the director fees. For directors based outside the country, the reverse charge mechanism applies. The new law exempts the director fees from the Luxembourg VAT in the following four situations:

1. Employees serving as a company director in representation of his or her employer. In such cases, the employer is the VAT payer.
2. Company directors making an annual turnover of less than EUR 30,000. However, they are required to register for VAT and annually declare the amount of their fees. This exception does not apply to foreign directors whose fees are subject to the reverse charge mechanism.
3. Honorary activities, i.e., if the indemnity is paid as a "contribution towards the expenses", a notion the legislator has not defined so far. In practice, this should mean that only the refund of reasonable travel and accommodation expenses remains outside the VAT scope.
4. Management services of an investment fund. Although the new rules do not address this topic, fees paid to directors of investment funds should continue to benefit from an exemption, provided that they relate to management services of a qualifying investment fund. By contrast, the services of directors on the board of management companies of contractual funds should be subject to partial tax. However, the law does not elucidate how to apportion the services at issue between the management of the company and the management of the fund itself.

Personal liability of managers The new legislation introduces personal liability for VAT of the persons in charge of the supervision and management of a company that is considered as a taxable person. If such a company fails to comply with its VAT obligations, the manager(s) will be personally and severally liable for the payment of the VAT. However, the liability is strictly limited to: (i) the delegated administrators of public limited companies; (ii) the managers of limited liability companies; and (iii) *ipso jure* or *de facto* managers carrying out the day-to-day management of the company. What is more, the manager(s) will only be held liable in the case of blameable failure to meet their legal requirements. **Increased Penalties** The legislator raised the fixed penalties (e.g. in the case of late filing) from the current range of EUR 50-5,000 to EUR 250-10,000. What is more, the new law provides for an increase of the daily penalty applicable in the case of failure to provide the VAT authorities with the requested data, from the current range of EUR 50-1,000 per day to a maximum amount of EUR 25,000 per day. It also increases the penalties in the case of fraudulent actions to avoid VAT payment or to illegally obtain the reimbursement of VAT from the current maximum of 10% to a range of 10-50% of the evaded VAT. Finally, the new rules introduce other specific measures in the Luxembourg VAT law and Criminal Code aimed at fighting VAT fraud and evasion. **Online VAT filing** As of January 2017, Luxembourg taxpayers need to file their periodical and annual VAT returns on the eCDF platform. **EU Regulation N°1042/2013** The Regulation contains new VAT rules applicable as to the place of supply of services connected with immovable properties. In particular, it supplies definitions and other clarifications so as to facilitate the application of the Directive. According to Article 47 of the Directive, services connected with real estate property are located and subject to VAT where the property is located (depending on the countries concerned, the reverse charge mechanism may apply or not). In addition, Article 44 of the Directive specifies that services not connected with real estate property are located and subject to

VAT where the recipient is established (under the reverse charge mechanism). In practice, the scope of application of both provisions turned out to be equivocal, leading to double or nil taxation VAT risk due to divergent interpretations on the part of the VAT authorities. In view of achieving more consistency, effectiveness and certainty with respect to the VAT treatment in the specific context of services connected with immovable property, the Regulation

- stipulates that the services connected to immovable property must have a sufficiently direct connection with immovable property. This condition is satisfied if the services are derived from immovable property and such property makes up a constituent element of the services and is central to, and essential for, the services supplied; or if they are provided to, or directed towards, immovable property, and are aimed at carrying out the legal or physical alteration of such property; and
- provides non-exhaustive lists of examples which are covered by Articles 47 and 44 of the Directive and therefore subject to VAT in the applicable jurisdiction (that is, either in the country where the property is located or in the country of the recipient). Such classification might imply foreign VAT registration, even if some Member States have introduced so-called reverse charge rules, which shift the obligation to pay VAT to the beneficiary of the service.

The Regulation is particularly relevant for all types of real estate structures, especially those involving numerous fee flows with various service providers and possible recharge of costs within the structures at hand. In order to better manage the complex VAT rules that prevail in the international context, promoters, asset managers, investors, servicers and directors should carefully examine the new indications that the Regulation articulates. **Luxembourg cost-sharing VAT exemption** The so-called Luxembourg cost-sharing VAT exemption refers to a specific provision in the Grand Duchy's VAT Law which exonerates from VAT the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members an exact reimbursement of their share of the joint expenses, provided that such an exemption is not likely to cause distortion of competition (Article 44.1.y of the Luxembourg VAT Law implementing Article 132.1.f of the Directive). In October 2016, the Advocate General of the CJEU handed down her opinion on CJEU case C-274/15 (*Commission v Luxembourg*) regarding the cost-sharing VAT exemption. She confirmed the position of the European Commission, considering the rules in question as inconsistent with the Directive. In case the CJEU adheres to the Advocate General's view, Luxembourg will need to modify its legislation with respect to the said exemption. As a consequence, companies having implemented this regime should review their position and anticipate necessary changes.