

## New VAT rules: Draft bills 5797 and 5801

Amongst the changes of Law proposed to be voted before year-end appear also new VAT rules.

### VAT representation

Starting 1st January 2008, it is proposed to introduce the system of tax representation for VAT purposes. This system allows a foreign entrepreneur to appoint a third party in Luxembourg to carry out the necessary VAT formalities and to pay the VAT due in Luxembourg on his behalf.

#### Scope:

Only foreign traders (whether established in the EU or outside the EU) who are neither established nor identified for VAT purposes in Luxembourg can apply for this regime. Moreover, VAT representation will only be allowed for a limited number of transactions, i.e. for the importation of goods of non-EU origin into Luxembourg, for the subsequent deliveries of these imported goods as well as for services (such as handling and warehousing services) performed on these goods in Luxembourg after import.

A foreign tax payer performing intra-Community acquisitions in addition to imports of goods of non-EU origin in Luxembourg would therefore not be allowed to apply for the regime. He would indeed be liable to register for VAT in Luxembourg for his intra-EU acquisitions and would thus be precluded from the possibility to appoint a fiscal representative.

#### Appointment of a VAT representative:

The appointment of a VAT representative is optional: the foreign trader can, also for eligible transactions, still directly register for VAT purposes. Foreign traders are also allowed to designate several VAT representatives, each one being responsible only for the transactions for which he acts as representative.

#### Certification of the VAT representative:

Only a certified operator may operate as a VAT representative. The granting of such status is subject to a certification process, the practical procedures of which will be introduced by Grand Ducal Decree.

#### Obligations of the VAT representative:

The VAT representative acts in lieu of the foreign trader for all transactions for which he has been appointed as representative.

He will receive a specific VAT identification number under which he will have to submit the VAT returns and sales listings for all the foreign traders he represents. The VAT returns should include the costs and related input VAT incurred by the foreign trader in Luxembourg related to the transactions covered by the representation. The VAT returns and recapitulative statements must be filed electronically; the records and supporting documents must also be stored electronically and an online access must be provided to the authorities.

The VAT representative will have the obligation to issue the invoices relating to the transactions for which he represents the foreign trader on behalf of the trader, obligation which he can not delegate. He must also keep the necessary records

enabling the tracking and tracing of the imported goods from the moment of their import in Luxembourg.

Finally, the VAT representative is required to set-up a bank guarantee to ensure the payment of the taxes, interest and fines due. This guarantee, calculated on the basis of 50% of the VAT balance due for the last three monthly returns shall not be below 10,000€.

In practice, it seems that only specialized logistics agents will be able to fulfill all these conditions and respect all the imposed obligations.

### **Transfer pricing and VAT:**

The proposals also include a measure to tackle tax evasion.

Indeed, based on the proposals, the tax authorities will be allowed to modify the taxable basis of a transaction in three cases, each case referring to transactions between related parties where prices are not 'normal' because of this close relationship.

By 'normal price/value' is meant the total price that a purchaser would have to pay to a supplier in Luxembourg should the transaction be realized at that time between independent parties operating at the same stage of commercialisation and in a fully competitive environment. Where it is not possible to identify the normal price based on a comparable transaction, then the normal value will be deemed to be the purchase price or production cost (in case of goods) or the expenses incurred (in case of services).

Related parties are parties connected by family or other close personal ties, by organizational links, by ownership or by financial or legal links.

The definition of a legal link includes the relationship between an employer and an employee, the employee's family or any close relative.

The VAT authorities may adjust the taxable basis to the normal value in the following cases: when the compensation is lower than the normal value and the beneficiary has no full right to deduct the input VAT; or when the compensation is lower than the normal value and the transaction is exempt and the supplier has no full right to deduct input tax; or when the compensation is higher than the normal value and the supplier has no full right to deduct input VAT.

This new measure effectively implements the notion of transfer pricing in the VAT code. It combats 'artificial pricing' aimed either at maximising the right to deduct input VAT for the supplier (by reducing exempt revenues or increasing taxable revenues) or at minimising non deductible VAT for the buyer (by decreasing the amount of the taxable consideration).

It has to be noted that the introduction of these anti-abuse provisions is an option accorded to the Member States by the Directive 2006/69/EC. The Luxembourg authorities decided to use this option but explain in the commentaries to the draft bill that the scope of the new provisions is limited. They should not be applied by the authorities in cases of daily and classical transactions, but only to a small number of transactions carried out in specific circumstances. This lack of clarity may however raise a number of questions for instance in the financial sector where most of the companies have a limited right to deduct input VAT and where the trend to outsource and pool services has been growing for some years. As "VAT grouping" (which allows disregarding all transactions between members from a VAT perspective) is not authorised for the time being by the Luxembourg VAT law, some precisions on the scope and objectives of the new rules would certainly be welcome.

## Other measures:

The proposals also provide for transitional measures relating to the EU accession of Romania and Bulgaria and for some procedural changes. The proposal i.a. provides that an administrative appeal must be introduced before a court appeal can be lodged.

Finally, the draft bill 5801 also contains a VAT measure, where it changes the description of radio and broadcasting services that can benefit from the 3 % super-reduced VAT rate. The wording is amended in such a way that there can be no doubt that the reduced rate also applies to the mere transmission of programs produced outside Luxembourg ("teledistribution").

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