

Luxembourg Tax Alert

VAT group: draft bill lodged with the Parliament

17 April 2018

As announced by the Luxembourg Minister of Finance, Pierre Gramegna, on 23 November 2017 and further confirmed in his answer on 5 March 2018 to the parliamentary question of Laurent Mosar, on 16 April 2018, the Luxembourg government has lodged with the Parliament the draft bill n°7288 to introduce the VAT group into the Luxembourg legislation.

The introduction of the VAT group is justified by the jurisprudence of the Court of Justice of the European Union, which decided on 21 September 2017 that the benefit of the exemption for services rendered by an independent group of persons must be restricted to activities in the public interest. This was a major change for the financial industry, which has implemented a large number of independent group of persons in order to share resources without incurring additional VAT cost. Luxembourg will be the 17th EU Member State out of 28 to introduce this VAT regime. The wide spread of this regime illustrates its advantages and importance.

The draft bill indicates 31 July 2018 as a date of entry into force. However, the consultation of the EU VAT Committee and the advice of the Council of State may delay the legislative process and the vote of the law.

Even if the text is still a draft and is subject to the above-mentioned consultations, it is most likely that the main features of the draft bill will remain unchanged. It is thus interesting to mention these main features in order to anticipate the vote of the law and the decision to set up a VAT group or not.

Advantage of setting up a VAT group

The main consequence and advantage of a VAT group is to treat all supply of goods or services between the members of the group as “out of scope” transactions. The internal transactions are thus not subject to VAT. The scope of the VAT group regime is therefore broader than the one of the independent group of persons, which was limited to “support” services (IT, accounting, etc.) to members who could not or only partly recover VAT.

This absence of VAT is favorable for taxpayers who cannot or only partly recover the VAT on their costs: asset managers, banks, insurance companies, management companies of funds, etc.

For taxpayers who can fully recover VAT on their costs (e.g., industrial, services, trading activities), the VAT group could also be interesting because it avoids the pre-financing of the VAT on the transactions between the members.

Conditions to set up a VAT group

In principle, any legally independent person is considered a separate taxpayer. However, persons closely bound by financial, economic, and organizational links could opt to be considered as one single taxpayer. It is important to emphasize that these three categories of links must be simultaneously met.

Passive holding companies could be members of a VAT group. This is an interesting feature for the numerous private equity, real estate, and international holding structures existing in Luxembourg.

It is also important to note that the setting up of a VAT group is an option to be exercised or not by the taxpayers.

Only persons established in Luxembourg may be a member of a VAT group. This includes the Luxembourg branches of foreign companies. This is a major difference with the independent group of persons, which were able to have members in different member states.

It is possible to be a member of only one Luxembourg VAT group.

Financial links are defined by reference to article 1711-1, §1, 1, points 1, 2, and 3 of the Luxembourg corporate law, which states the obligation for a company to include undertakings in its consolidated accounting in which the company:

1. has a majority of the shareholders' or members' voting rights in another undertaking; or
2. has the right to appoint or remove a majority of the members of the administrative, management, or supervisory body of another undertaking and is at that time a shareholder in or a member of that undertaking; or
3. is a shareholder in or a member of an undertaking, and control alone, pursuant to an agreement with other shareholders in or members of that undertaking, a majority of shareholders' or member's voting rights in that undertaking.

This includes any company or undertaking where a common shareholder directly or indirectly owns 50 percent of the voting rights. This also includes companies or undertakings where this threshold is not reached but where a "de facto" control exists.

An auditor or chartered accountant must certify the existence of these financial links when the group is set up and registers for VAT. This certificate must be renewed every year.

Economic links exist when the activities of the companies are of the same nature, the activities of the companies are complementary or are combined for the achievement of a common economic objective, or when the activities of a member are fully or partly performed for the benefit of the other members.

Organizational links exist when the members of a group are under a common management or organize their activities partly or fully in common, or are under the direct or indirect control of the same person. The management or the control might be legal or “de facto.”

An “opt-out” option is available for persons closely linked when they are not interposed in the economic flow between two members of the group and if their non-affiliation to the group does not imply a VAT saving.

A specific rule exists for companies that are members of the group despite the fact that they are not usually integrated in a similar economic organization and are not part of the “core business.” The “exposé des motifs” gives the case of insurance companies that own garages as an example. If this situation leads to a distortion of concurrence, the members must be excluded from the group except if they also perform activities that do not lead to distortion of concurrence. In this case, the supplies of goods or services to the group will be subject to VAT.

Organization of the VAT group

The main features of the organization of the VAT group could be summarized as follows:

1. The VAT group must apply for a VAT identification number. At that time, the VAT group should provide a file containing different information regarding its members, activities, and organization. This VAT number will be used in the relationships between the VAT group and the VAT authorities. The VAT group will file the VAT returns of the group under this VAT number. The VAT returns will consolidate all transactions with third parties.
2. VAT numbers that exist before the setting up of the group remains active as “auxiliary” VAT numbers of the group and will be used for relationships with third parties. Members no longer must file individual returns.
3. A member is designated as the representative of the group with the VAT authorities.
4. For groups active in the financial industry that could only partly recover VAT on their costs, the VAT deduction will be based on the principle of the direct link between the purchases and the turnover. It will thus be necessary, based on the analytical accounting, to trace the costs and the income. The VAT on costs that could be traced with turnover opening the right to recover input VAT will thus be fully deductible, while the VAT on costs that are used for turnover not opening the right to recover will be fully unrecoverable. Even if not expressly mentioned, the VAT on general costs that could not be allocated to one or the other activity should be deductible based on the general turnover prorate (prorate between turnover opening the right to recover VAT/total turnover).
5. Each member is jointly liable toward the VAT authorities of the VAT due by the group.
6. Members should stay in the group at least two calendar years except if the links ceases to exist (e.g. in the case a company is sold).

7. Specific rules are applicable to invoicing, accounting, and reporting. The group will have the obligation to provide the VAT administration with information regarding transactions between the members, among other duties. Indeed, these transactions are disregarded for VAT purposes and therefore not included in the VAT returns filed by the group. The VAT authorities will have to issue specific forms suited for the specific needs of the VAT group.

As a conclusion, it could be said that the introduction of the VAT group is a major step in the Luxembourg VAT law. The advantage and importance of this regime is illustrated by the fact that 16 EU Member States have already implemented this regime in their national law. The decision to opt out of setting up a VAT group is important, which must be envisaged from different angles: VAT, accounting, legal, IT, and more. It is time to reflect on this new opportunity.

Your contacts

Raphaël Glohr

Partner | Indirect Tax – VAT

T +352 45145 2665

rglohr@deloitte.lu

Christian Deglas

Partner | Indirect Tax – VAT

T +352 45145 2611

cdeglass@deloitte.lu

Joachim Bailly

Partner | Indirect Tax – VAT

T +352 45145 2824

jbailly@deloitte.lu

Deloitte Luxembourg

560, rue de Neudorf

L-2220 Luxembourg

Tel: +352 451 451

Fax: +352 451 452 401

www.deloitte.lu

Deloitte is a multidisciplinary service organisation which is subject to certain regulatory and professional restrictions on the types of services we can provide to our clients, particularly where an audit relationship exists, as independence issues and other conflicts of interest may arise. Any services we commit to deliver to you will comply fully with applicable restrictions.

Due to the constant changes and amendments to Luxembourg legislation, Deloitte cannot assume any liability for the content of this leaflet. It shall only serve as general information and shall not replace the need to consult your Deloitte advisor.

About Deloitte Touche Tohmatsu Limited:

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/lu/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.

Deloitte provides audit, tax, consulting and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries, Deloitte brings world-class capabilities and deep local expertise to help clients succeed wherever they operate. Deloitte has in the region of 200,000 professionals, all committed to becoming the standard of excellence.

© 2018 Deloitte General Services

Designed and produced by MarCom at Deloitte Luxembourg