

Exchange of information and banking secrecy dated 17 March 2010

Adoption of bill no. 6072 which ratifies the double tax treaties signed by Luxembourg and sets out the procedure governing exchange of information

On 13 March 2009, the Luxembourg government had made clear that it would fully comply with OECD standards relating to exchange of information on request. This objective has now been achieved with the adoption of the Act dated 17 March 2010, which has a double purpose:

1. To ratify double tax treaties and protocols to double tax treaties, so that they can become effective, and
2. To arrange the actual terms of the exchange of information.

The adoption of this Act is a milestone and is the completion of a legal and political process which was initiated several months ago.

Fruitful talks

Within a relatively short period of time, the Luxembourg government had signed 24 double tax treaties and protocols which include article 26 (5) of the 2005 OECD Model Tax Convention. The said article refers to the principle of exchange of information on request if there is a presumption of tax fraud.

The adoption of the Act carries with it the approval of the following 20 double tax treaties and protocols (including 15 with OECD Member States):

- Five double tax treaties (Kingdom of Bahrain, Republic of Armenia, Qatar, Monaco and Liechtenstein) and
- Fifteen protocols amending existing tax treaties (United States, Netherlands, France, Denmark, Finland, United Kingdom, Austria, Norway, Belgium, Switzerland, Iceland, Turkey, Mexico, Spain and Germany).

The rules set out in the Act must also apply to India in accordance with a protocol to the India – Luxembourg double tax treaty. The treaties entered into with Japan, San Marino and Barbados are not referred to in the Act.

In principle, the provisions of the abovementioned treaties and protocols apply to assessment years starting on or after 1 January of the calendar year following the year in which the treaties (or protocols thereto) become effective. As a result, the first assessment year affected by the exchange of information should be 2011 (i.e. for the income derived in 2011), as long as the other contracting state has also ratified the treaty (or the protocol thereto). A few exceptions should however be pointed out: United States (2009), France (2010) and Germany (2010).

Nevertheless, it should be noted that Luxembourg will maintain banking secrecy as a way to protect privacy and that secrecy may only be lifted in the event of tax fraud.

To ensure that information is exchanged effectively, changes had to be made to the internal procedures implemented by the tax authorities affected by the exchange of information and to the rights of review against the decisions as part of those procedures.

How is information exchanged?

The Luxembourg tax authorities will receive the requests for information directly from the foreign tax authorities and will only pass on the requests to the holders of information to the extent that:

- The applicant State provides facts that tend to show that the request relates to relevant facts that may be indicative of tax fraud (i.e. unjustified requests are excluded – countries cannot go “fishing” for information);
- The request is issued by a foreign tax authority of a signatory country.

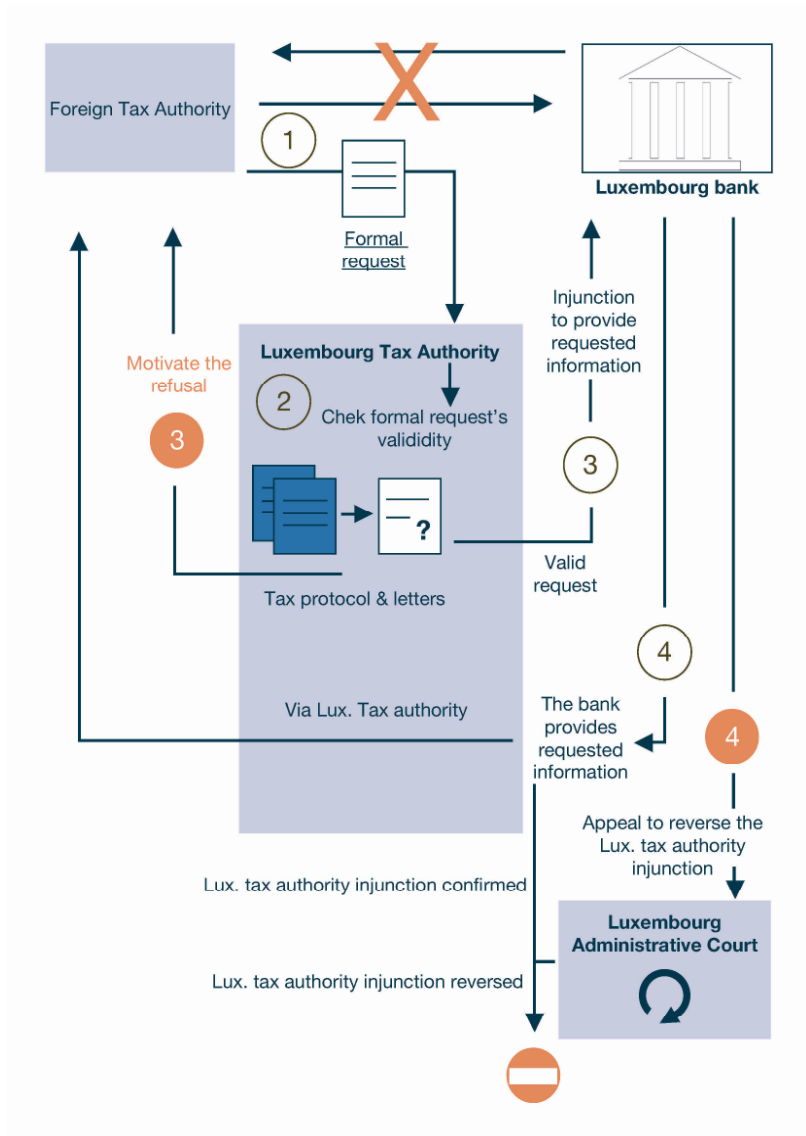
How do the Luxembourg authorities examine the request?

- The Luxembourg tax authorities will have to ascertain that the requests from foreign tax authorities comply with the requirements in substance and form set out in the tax treaties. The exchanges of notes signed by all signatory countries set out the requirements to be met as regards the contents of the request, which must include the following information:
 - The identity of the person under examination or investigation;
 - A statement of the information sought, including its nature and the form in which the applicant State wishes to receive the information from the requested State;
 - The tax purpose for which the information is sought;
 - Grounds for believing that the information requested is held in the requested State or is in the possession or control of a person within the jurisdiction of the requested State;
 - To the extent known, the name and address of any person believed to be in possession of the requested information;
 - A statement that the request is in conformity with the law and administrative practices of the applicant State...;
 - A statement that the applicant State has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.
- If the request is deemed admissible by the Luxembourg tax authorities, they will send the holder of information (i.e. usually the bank, but other financial institutions as well as any agent or trustee are also referred to in the protocols) an injunction to provide the requested information within one month from the date on which that decision was notified (administrative fine of up to €250,000 for failing to comply with the deadline).
- The information held by the holder of information will then be sent to the Luxembourg tax authorities which will be in charge of passing it on to the foreign tax authorities (no direct communication between the holder of information and the foreign tax authorities).

Review of the request by the Administrative Tribunal and / or Administrative Court

- Within one month of the injunction being issued, the holder of the information or any interested party (i.e. the taxpayer himself / herself) may appeal the injunction to provide information issued by the Luxembourg tax authorities before an Administrative Tribunal judge (*Tribunal Administratif*) (the appeal has suspensive effect). This is a simplified and speedy procedure which takes three months at the most.
- The decision of the Administrative Tribunal may be appealed against before a higher administrative court, i.e. the Administrative Court (*Cour Administrative*), within two weeks of the decision by the Administrative Tribunal.

Simplified chart of the exchange of information process



The adoption of this Act shows that a happy medium can be struck between the need to exchange information efficiently between tax authorities in compliance with OECD Model Tax Convention and the need to respect privacy. An initial review of the request by the Luxembourg tax authorities combined with a possible review by an administrative authority makes sure that appropriate filters are in place to enable efficient exchange of information. Finally, it should be noted that banking secrecy still applies to Luxembourg residents and to residents of countries with which Luxembourg has not amended its double tax treaties.

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