Branch Reporter
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Summary and conclusions

Luxembourg income tax law traditionally does not distinguish between services and other kinds of income. Services income and royalty income are taxed similarly. This principle applies to rules for commercial profits and profits from an independent professional activity. There is an exception for certain royalties from patents, trademarks and computer software. If they are derived by a commercial company or by a sole proprietor in the context of his/her commercial activity, then 80 per cent of these royalties may be exempt.

Non-residents are taxable in Luxembourg on commercial income if it is derived via a Luxembourg branch. Income from an independent professional activity is taxable in Luxembourg if the activity is put to use in the country. As a general rule, this income from a non-resident (e.g. royalty box) is subject to taxation by way of general assessment and not by way of withholding tax.

Luxembourg double tax treaties usually follow the OECD model tax convention (MC). In recent double tax treaties, Luxembourg has sometimes excluded article 14 on taxation of independent professionals. The concept of a services permanent establishment (PE) is also found in certain double tax treaties. Usually, deviations from the OECD MC are motivated by requests made by the other contracting state.

In the reporter's view, it may be considered that the taxation of services and royalties derived by residents and non-residents is appropriate because of its simplicity (there are no complex rules distinguishing between various kinds of income), the absence of discriminatory treatment and the incentive existing for certain royalty income, providing for an 80 per cent exemption. This rule is the Luxembourg response to certain incentives existing in other European Member States.

1. Taxation of income from services under domestic law

1.1. Basic rules

Although Luxembourg income tax law recognises eight categories of income, Luxembourg resident companies are only subject to taxation by application of the rules

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on commercial profits. The rules for commercial profit apply to all kinds of income and profits and gains made by a company, regardless of the nature of the income, except where an exemption applies (such as the participation exemption on dividends and capital gains). Taxpayers other than Luxembourg resident companies may also be subject to the rules of commercial profits if they exercise a commercial activity.

This addresses, for instance, non-resident taxpayers acting via a Luxembourg PE (see section 1.4 below) or via a commercially tainted partnership.

Under Luxembourg domestic law profits from a commercial activity are treated as commercial profits for income tax purposes; a commercial activity is defined as an independent activity exercised with an economic purpose and consisting in a participation in general business life, provided this activity is not considered an agricultural or independent professional activity (article 14 *loi concernant l'impôt sur le revenu* of 4 December 1967 as amended (ITL)).

Income derived from a partnership which does not have a commercial activity is nonetheless subject to taxation by application of the commercial profit rules (it is said to be "commercially tainted"), if a majority of partners are either Luxembourg corporates or foreign corporates acting via a Luxembourg PE in a general partnership (*société en nom collectif*), a civil law partnership or an economic interest grouping (*groupement d'intérêts économiques*). The same applies in the case of a limited partnership, where one of the general partners is a Luxembourg corporate.

Luxembourg companies are subject to corporate income tax (*impôt sur le revenu des collectivités*) at a rate of 22.05 per cent (including a solidarity levy for the employment fund) as well as the municipal business tax (*impôt commercial communal*), levied at a rate of 6.75 per cent in Luxembourg City. This rate may vary from one municipality to the other.

The tax basis for municipal business tax is, subject to minor adjustments, identical to the tax base for income tax, as determined per application of the rules provided for in the ITL for commercial profits.

Corporation taxes are levied via general assessment and not via withholding at source. Withholding taxes exist only for certain limited items of income, such as dividends, and this withholding tax is then usually creditable against income tax.

Individuals are subject to income tax per application of a progressive schedule with the marginal rate being at 39 per cent for income exceeding 41,793 euro for a single person. This rate is increased by a solidarity surcharge and by a contribution for the employment fund. Married spouses are accessed jointly. If the individual derives commercial profits, as defined above, he or she is also subject to municipal business tax. The principles for the determination of commercial profits are *a priori* identical for individuals and companies, with the exception of certain specific rules, applicable only to companies, such as the participation exemption or the possibility to attack tax-neutral mergers or demergers.

Partnerships are transparent for income tax purposes. Their income is determined at the level of the partnership, and then allocated to each partner, where the tax regime and tax rules that are specific to that partner apply. Further, a partnership which has a commercial activity or which is commercially tainted is itself subject to municipal business tax (hence there is no transparency for municipal business tax).

The commercial profit of a Luxembourg company is determined by reference to its accounting profits (*Massgeblichkeit*). The accounts serve as the basis for the computation of income which is subject to taxation, except for certain adjustments defined by the income tax legislation itself. Luxembourg commercial tax is based on Luxembourg generally applicable accounting principles (GAAP). There is no formal recognition so far of International Financial Reporting Standards (IFRS) under Luxembourg tax law, although in practice certain companies (in particular banks) base their tax returns on IFRS accounts. Except for certain small undertakings, individuals having a commercial activity are subject to accounting obligations, imposed by tax law, which are comparable to those applicable to companies.

The corollary to this rule is that all payments made by the Luxembourg company, which are deducted for GAAP accounting purposes, are also accepted for tax purposes, except where these payments relate to tax exempt income. Furthermore, transfer pricing rules may limit the adaptability of such payments. There is no distinction between the residence of the beneficiary of the payments.

Services may also be rendered in the context of an independent professional activity, such as that of a lawyer, an accountant or a doctor.[1] Basically, the rules for commercial profits apply to these independent professions as well. If the taxpayer is an individual, he or she would be subject to income taxation by application of the progressive income tax schedule described above, but would not be subject to municipal business tax, absent a commercial activity. A Luxembourg commercial company (such as a public or private limited company[2] for instance) exercising an activity which by its nature would not be deemed commercial would still be subject to corporate income tax and municipal business tax. Finally, for a partnership not engaged in a commercial activity, the application of municipal business tax would depend on whether the partnership was commercially tainted.

In the following we will address the rules for commercial profits, as applied to companies, bearing in mind that these rules generally are valid for individual entrepreneurs and partnerships as well.

Domestic rules for taxation may be superseded by tax treaties. Luxembourg currently has a treaty network of over sixty double tax treaties (DTTs) in force, whereby foreign countries may be granted the right to tax certain items of income. If Luxembourg is awarded a taxation right, tax is usually assessed by application of domestic rules only, regardless of the tax treaty's characterisation of an item of income.

1.2. Income classification issues

1.2.1. Definition of services

Luxembourg tax law does not provide for a specific definition of services for income tax purposes.

As indicated in the previous subsection, such a definition would be of little importance in any case, because of the fact that income tax does not distinguish

1 See section 1.4.1. below.

2 *Société anonyme* and *société à responsabilité limitée*.

between sources of income, with two notable exceptions: the application of withholding tax on certain payments, which will be discussed below; and the exemption which is provided by article 50*bis* of the Luxembourg ITL for 80 per cent of royalty income received as remuneration for the use of, or the right to use, patents, trademarks, domain names, models and computer programs. This deduction, which is based on similar incentives as in other EU Member States, has been put in place to increase the attractiveness of Luxembourg for the development of intellectual property (IP) and IT rights. Models, trademarks, patents[3] and computer software are defined as those rights which under the legislation applicable to them are capable of being recognised and protected.

Without entering into detail, the deduction is only granted for IP and IT rights which have been constituted or acquired since 1 January 2008 and on the condition that the acquisition has not been made from another company which is a direct affiliate of the Luxembourg company claiming the deduction. Finally, to avoid a double advantage, the legislation provides for a specific mechanism which claws back expenses and depreciations in relation to IP rights.[4]

In the circular letter commenting on the 80 per cent exemption for royalties on certain IP/IR rights,[5] the tax administration has defined the rights which qualify for the favourable tax regimes and it has also indicated that where a contract contains elements qualifying for the exemption and others which do not the various elements have to be separated.

The tax administration excludes, for instance, auxiliary services from the benefit of the exemption. This exclusion would concern goodwill, knowhow or trade secrets which were not covered as such by legislation protecting patents, trademarks and computer software.

On the other hand, it seems possible, in relation to computer software particularly, to integrate certain elements of knowhow into the software itself, rather than separating it, by using different "support".

The 80 per cent exemption is also available for non-resident companies acting via a Luxembourg PE.

1.2.2. Services v. royalties

Luxembourg tax law provides for withholding tax of 10 per cent on certain payments for artistic and literary activities, if these activities are exercised or put to use (see below section 1.3) in Luxembourg, as well as for income from professional sports activities exercised in Luxembourg (article 152. I ITL). The beneficiary must be a non-resident, without distinction as to the existence of a Luxembourg PE. If derived via a Luxembourg PE, the withholding tax would be creditable against income tax.

The withholding tax operates in complete satisfaction of tax liability, unless the royalties are profits of a commercial undertaking or are allocated to non-resident

3 For example, patents qualifying for a European patent delivered by the *Office européen des brevets*, in accordance with the *Convention sur le brevet européen* of 5 October 1973.

4 For more information, see Oliver Hoor, "Mémento sur le régime fiscal de la propriété intellectuelle au Luxembourg", *Les cahiers du droit luxembourgeois*, 8 (2009), Legitech.

5 Circular letter (*circulaire*) L.I.R. no. 50*bis*/1 of 5 March 2009.

salaried persons who are subject to tax by way of general assessment. The beneficiary of the royalties may also ask to be subject to tax via assessment so as to take into account expenses, in which case the withholding tax forms a tax credit.

There is, however, no longer any withholding tax for royalties in relation to patents, formulae or processes. In the past, prior to 2002, a 12 per cent withholding tax was due on royalties on patents if the patent was registered in Luxembourg or the invention was put to use in Luxembourg and the beneficiary was a non-resident, and 10 per cent withholding tax on artistic and literary activities, as well as on directors' fees.[6]

As indicated above, the only situation where the definition of services may be relevant is in the context of the 80 per cent exemption applicable on certain payments for IP/IT rights. Copyrights of a cultural nature received by a Luxembourg beneficiary are not subject to the 80 per cent exemption for certain IP/IT rights. The same applies if such rights are put to use in the country.[7]

In addition, in relation to the source rules for non-resident taxpayers, which will be discussed below, there is no specific definition of services.

Luxembourg has two sets of rules enabling the tax administration to make adjustments for transfer prices. Article 164 ITL enables the consideration of all advantages conferred on a related party as a profit distribution, granted directly or indirectly because of this relationship, which would otherwise not have been awarded. This provision may apply to transfers to the benefit of a Luxembourg resident as well as to the benefit of a non-resident.

Article 56 ITL, on the other hand, applies only to transfers to the benefit of a non-resident. It enables a high-ranked civil servant of the tax administration, who has been designated by the head of the Luxembourg tax administration, to determine the taxable result of a business undertaking, where profits have been transferred to a non-resident taxpayer because of the existence of particular economic relationships.

It is considered that article 56 does not apply in practice, as no such high-ranking civil servant has ever been designated by the director of the tax administration. Luxembourg has also recently introduced specific transfer pricing rules for group financing transactions,[8] but has no official guidelines on transfer prices for services

6 Withholding tax still exists on directors' fees, although its regime has been modified since 2002. The withholding tax on directors' fees is currently levied at a rate of 20 per cent, and the rate is 25 per cent where the company paying the fee bears the cost of the withholding tax. The following are considered to be directors' fees: any fees to company directors, auditors, supervisory board members, managers in public or private limited companies, corporate societies or similar collective undertakings, subject to corporation tax. However, remuneration paid to a director for the day-to-day management of the company is not taken into account in this respect. This remuneration is considered as salary. It is also subject to withholding tax, but on salaried income. The withholding tax on a directors' fees is also applied if the beneficiary is a resident. It operates in complete satisfaction of income taxation for non-residents, on the condition that the director's fee does not exceed 100,000 euro (this threshold is appreciated for all companies paying directors' fees to one beneficiary on an aggregated basis and not per company, and on the condition that the beneficiary has no other Luxembourg source of professional income, which is subject to taxation in Luxembourg by way of general assessment).

7 The term "put to use" (*mis en valeur*) is defined below in section 1.3.

8 Circular letter no. 164/2 of 28 January 2011 and circular letter no. 164/2*bis* of 8 April 2011.

and royalties. Luxembourg used to have administrative guidelines for coordination centres.[9] These guidelines referred to arm's length prices and the application of a cost-plus method for companies providing certain administrative, secretarial, accounting, marketing, publicity and IT services. A 5 per cent cost-plus on all costs and expenses was deemed in line with market standards. If a higher profit was realised, this higher profit replaced the cost-plus minimum. There was also a *de minimis* rule if expenses were less than LUF30 million (approximately 750,000 euro), in which case the commercial profit was assumed to be no lower than LUF1.5 million (37,500 euro).

It may be inferred that Luxembourg would most probably refer to the OECD transfer pricing guidelines in the case of an argument about the treatment of various elements of a contract, but there is to the reporter's knowledge no official guidance in this respect.[10]

1.2.3. Embedded intangibles

There should be no situation where taxpayers would relocate intangible assets or high-value services in one form, rather than another, to a foreign jurisdiction in order to avoid Luxembourg taxation. This seems to be mainly due to the fact that there is no general withholding tax on royalties in Luxembourg and that there is no particular difference in treatment between various services and royalties. Luxembourg may be a more likely location for IP/IT rights qualifying for an 80 per cent exemption, but this is unlikely to apply to services.

Notable exceptions in this respect could be a possibility for the tax administration to challenge a transaction which was abusive. Abuse of law applies to operations which are either fictitious or motivated only by tax reasons without any valid business reasons.

If a contract involves a transfer of some elements which are subject to withholding tax and some elements which are exempt from withholding tax, one would *a priori* have to separate the two elements. This may be inferred particularly from the *Réponse ministérielle Gira*,[11] in the case of sale of convertible bonds, where the interest component and the capital gain component have to be split according to the tax administration.

This issue has also been addressed in the circular letter commenting on the 80 per cent exemption for royalties on certain IP/IR rights.[12] If a licence agreement contains several elements, which do not benefit from an exemption, the tax administration has indicated that the various elements have to be separated so as to isolate those which qualify for an exemption. However, the administration does not indicate how this split of elements should be effected.

In the reporter's view, it should also be possible, if one element is purely ancillary to the other, but nonetheless linked to it, for the tax qualification of the main

9 Circular letter L.I.R. no. 119 of 12 June 1989 *sur l'imposition des activités administratives exercées par des sociétés de coordination*, abolished by circular letter no. 1119 of 20 February 1996.

10 Oliver Hoor, "Précis des prix de transfert au Luxembourg", *Les cahiers du droit luxembourgeois*, no. 3, April 2009.

11 Parliamentary question of MP Camille Gira, no. 456, dated 29 July 1997.

12 Circular letter L.I.R. no. 50*bis*/1 of 5 March 2009.

element to be followed through the entire payment.[13] This is, of course, subject to any bar on abuses. In relation to the 80 per cent exemption for certain IP/IT royalties, the administrative position seems to be not to include auxiliary services within the scope of the exemption. This would exclude from the benefit of the 80 per cent exemption goodwill, knowhow or trade secrets which are not addressed by the legislation protecting patents, trademarks and computer software.

Another example may be given in relation to taxation of directors' fees. As indicated above, these are subject to withholding tax. Moreover, they are not deductible from the business profits of the payer, as they are assimilated into the distribution of profits. On the other hand, the deputy manager (*délégué à la gestion journalière*), in charge of day-to-day management of the company, is subject to taxation on salaried income for this activity. It may therefore be tempting to increase the salaried portion of the deputy manager, as salaries are tax deductible for the payer, and to reduce his/her director's fees. In this case, the tax administration usually considers that when directors' fees are paid to other managers or directors of the company, who are not in charge of daily management, the daily manager is also subject to taxation on directors' fees, at least for the amount awarded to the members of the board.

1.3. Source and nexus

Article 156 ITL lists the situation in which the income of a non-resident is considered as domestic income for tax purposes.

1.3.1. Source of income

According to article 156.1 ITL commercial profit is taxable in Luxembourg (a) if it is realised directly or indirectly via a PE or a permanent representative in Luxembourg, except where the permanent representative is, for instance, a commissionaire; or (b) if this activity is exercised in Luxembourg by an artiste or sports professional.

Income from an independent professional activity is taxable in Luxembourg if the profession is exercised in Luxembourg or "put to use" (*mise en valeur*) in Luxembourg (article 156.3 ITL). The criterion of "put to use" means that the benefit of the activity is used in Luxembourg. The concept of "put to use" has been defined by the tax administration in a circular letter of 17 December 1992.[14] This is not defined in the law itself, but results from the, rather scarce, parliamentary documents and administrative comments. It is explained that although the activity is not exercised in Luxembourg itself, the result of the activity directly serves the economic interest of the country. This would, for example, be the case if an invention

[13] In various circular letters, the tax administration has indicated that ancillary independent professional activities have to follow their own specific treatment, and not the treatment of the main activity of the taxpayer, to which these other activities were unrelated (see circular letter L.I.R. no. 94/1 of 21 February 2003 applicable to part-time journalists; circular letter L.I.R. no. 94/2 of 11 February 2004 applicable to music teachers exercising this activity next to an other professional occupation; circular letter L.I.R. no. 94/2a of 19 April 2004; circular letter L.I.R. no. 94/3 of 24 June 2008).

[14] Circular L.I.R. no. 156/1.

were to be used in a Luxembourg business. The tax administration has also given the example of a Luxembourg tour operator using a representative in a foreign jurisdiction (with which Luxembourg would have no tax treaty, as otherwise the tax treaty would most probably trump the domestic taxation right) for organising tours for that tour operator abroad or visiting hotels. As this activity benefits the Luxembourg tour operator directly, the foreign representative may be considered as being taxable in Luxembourg, his activity being used or applied in the country. By way of contrast, the tax administration has given the negative example of an engineer participating in the construction of a building for a Luxembourg undertaking, but with the building located abroad. This engineer's activity would not be deemed "put to use" in Luxembourg.

Prior to 2005, certain royalty income was also taxable in Luxembourg. Royalties for patents registered or put to use in Luxembourg and rent for equipment of a factory used in Luxembourg were, for instance, subject to taxation either by way of general assessment or by way of withholding tax, depending on the nature of the income. Royalties on patents registered in Luxembourg or put to use in Luxembourg were subject to withholding tax, while rentals for lease for equipment put to use in Luxembourg were subject to taxation by way of general assessment.

Today, only royalties for certain artistic, sports and literary activities are subject to withholding tax at source, as indicated above. The "put to use" criterion is only applied for artistic and literary activities, but not for sports.

Under Luxembourg domestic tax law, there is no source of income rule comparable to the place of location of the equipment (which was abolished in 2004 in domestic law as indicated above), or the place of provision of services, which would exist by reference to the OECD services PE alternative or to article 5.3(b) of the UN MC.

However, the above "put to use" criterion could *a priori* apply for certain transportation services, for example if a Luxembourg transportation company were to carry out transportation services abroad in a non-treaty jurisdiction, as this transportation activity could be considered as being put to use in Luxembourg even though goods and passengers themselves are not transported within the country. The economic benefit would indeed be derived in that case by the Luxembourg transportation company. One has to bear in mind that this criterion is unfortunately very vague, but should not result in any difficulties where a tax treaty applies.

As a conclusion, the nexus to Luxembourg must be stronger for business income (where a PE or permanent representative is required) than for independent professional activities, where the activity has to be exercised in Luxembourg or put to use in the country.

Finally, these nexus rules do not contain any monetary threshold conditions.

1.3.2. Nexus for source taxation

Under Luxembourg tax law, a PE is any fixed place of business or equipment which facilitates a business undertaking. The law then gives certain examples of PEs:

- the place of management;
- branches, factories, storage places, purchase and sales facilities, mooring places, as well as any other equipment used by the business undertaking or its permanent representative for the exercise of the business;

- building and construction sites lasting six months, or where it is expected that they last for six months, are also considered a PE.

A railway company is considered to have a PE in the municipalities where its management is located, where it has a train station or where it has repair sites. Mining companies are deemed to have a PE in any municipality where they have equipment on the ground. Underground equipment is not considered.

Companies supplying gas, water, electricity or heat are not deemed to have a PE in municipalities where only pipelines or pipes are located.

The domestic definition of PEs serves both in the international context, when applying article 156.1 ITL, referred to above, and in the domestic context when allocating municipal business tax between various municipalities. For that reason, reference is made to the location of a PE in a given municipality of the country. It is not necessary for personnel to be present in the relevant premises to make them qualify as a PE.

It has been stated in a parliamentary question[15] that a server located in Luxembourg could not be considered a PE on the grounds of its ancillary activities (data transmission). *A contrario*, a server which participates in the exercise of the core business of the enterprise could possibly become a PE. It is likely that Luxembourg would follow the OECD analysis in this respect, and in the Luxembourg–San Marino DTT it is specifically stated that a server may become a PE.

The Luxembourg definition of PE is of German origin. Luxembourg has indeed adopted most of the German tax legislation established during the German occupation in World War II, and the present legislation, the *Steueranpassungsgesetz*, was kept in force after the end of the war. Luxembourg income legislation was only replaced in 1967 by a specific Luxembourg income tax law, which explains why the Luxembourg courts and tax administration quite often turn to German case law and doctrine to interpret Luxembourg legislation.

Interestingly, the original definition of a PE is in German, while later editions, such as the current reference to construction sites in 1959, have been added in French.

A permanent representative is also considered a PE, but only if the permanent representative has a commercial infrastructure of the entrepreneur at his disposal. This definition is found in relation to municipal business tax.[16] On the other hand, a PE would not exist if the permanent representative either had no business premises at his disposal nor used his own business premises but not those of the entrepreneur. This definition is found in the commentaries of the municipal business tax legislation.

This provision is slightly contradictory with article 156.1 ITL and the OECD wording in this respect, which stipulates that the commercial income of a foreign enterprise is taxable in Luxembourg, if that enterprise has a permanent representative in the country, but without imposing any conditions on the existence of business premises of the representative. *A priori*, this discrepancy may be explained, because when the income tax law was introduced in 1967 the definition of PE in the municipal tax business law had not been amended.

15 *Réponse ministérielle* Mosar (parliamentary question of MP Laurent Mosar, no. 480 of 2 September 1998).

16 *Gewerbesteuer = Richtlinie 9 – Betriebsstätte*, under § 2 *Gewerbesteuergesetz*.

Unfortunately, the concept of permanent representative is not defined in income tax legislation itself, except in a negative manner by excluding permanent representatives who are commissionaires, independent trade representatives or wholesalers (*négociants en gros*).

1.4. Gross v. net taxation

As explained above, expenses are usually deductible if they are borne in the business interest of the payer and not related to exempt income. No deduction is available for taxes withheld at source, but taxpayers receiving Luxembourg source royalty payments on literary or artistic activities may request for taxation by way of general assessment to take into account expenses and other elements such as family status.

An important issue under Luxembourg law is whether a foreign business undertaking carrying out an activity in Luxembourg is automatically taxed in accordance with the rules applicable to business profits. There may be differences in relation to tax assessment rules.

A foreign taxpayer is indeed considered realising income in Luxembourg which is taxed according to the rules applicable to the nature of income and not in view of the characterisation of the taxpayers in his home jurisdiction. Hence, a commercial undertaking, realising rental income in Luxembourg, is taxed by application of the rules to property income, and not by the rules applicable to commercial profits, even if the taxpayer is a commercial company in its jurisdiction of origin, unless such income is derived via a PE. If a PE exists, profits derived by the foreign undertaking are always considered as commercial profit.

This has been held by the Luxembourg administrative court[17] in the situation of a foreign professional advisory firm. This firm was providing legal and tax advice in Luxembourg; this activity was considered as being that of a self-employed undertaking and therefore had to be taxed by the application of rules for independent professional activities. The tax administration, followed by the administrative court, considered, however, that this non-resident taxpayer, who had the form of a commercial company in his jurisdiction of origin, had a PE in Luxembourg, as it had personnel and business premises in the country. Thus, the rules for commercial companies were applicable, despite the fact that the activities at hand were intrinsically those of a self-employed person.

This concept of *appréciation isolée* (isolated appreciation) has two consequences, namely that:

- if the activity in Luxembourg is considered to be a business activity, the activity is also subject to municipal business tax;
- the rules for commercial taxation may be different from those of other categories of income, for instance with respect to the possibility to depreciate an asset.

There has been a subsequent case on isolated appreciation, where the non-resident company did not have a Luxembourg PE and only derived income from landed

[17] *Tribunal administratif*, 10 May 2010, no. 25961, confirmed by the administrative court (*Cour administrative*), 16 December 2010, no. 26997C.

property. There the rules for rental income were applied and not those for commercial profits.[18]

If a commercial activity is carried out in Luxembourg, the foreign business undertaking is taxable only on the net profits derived in the Luxembourg PE. These profits have to be determined by application of separate accounting that complies with the principle of Luxembourg GAAP. Indeed, tax law follows accounting law, as described above, so that the principle of Luxembourg commercial accounting prevails.

Luxembourg implicitly accepts indirect profit allocation methods as well, where the profits of the foreign enterprise are split between the foreign head office and the Luxembourg PE by using a notional profit allocation method. However, in that case, the Luxembourg PE may not benefit from a loss carryforward. This has been confirmed by the European court of justice in the *Futura Singer* case.[19] In that decision, it was held that Luxembourg could link the benefit of a loss carryforward to the requirement that the Luxembourg PE established proper accounting. However, Luxembourg is not allowed to request that these accounts are held in the country itself. They may, for example, be located at the level of the foreign head office.

In summary, if a PE is subject to taxation in Luxembourg, taxation is applied on a net basis, with the possibility of deducting all expenses allowed by the Luxembourg income tax legislation. A different approach would result in discrimination in the treatment of the PE compared with domestic taxpayers, which would be contrary to EU law and the Luxembourg DTTs.

1.4.1. Fees for technical services

There is no withholding tax which applies in Luxembourg on fees for technical services. If fees for technical services are rendered by a service provider from abroad, such fees would usually not be taxable in Luxembourg. Indeed, on the one hand, for commercial profits no nexus to Luxembourg could be established, and on the other hand, the provision of such fees would *a priori* not qualify as income from an independent professional activity, where Luxembourg would have the right to tax if such profession were exercised or put to use in the country.

A nexus would exist for independent professional services, if the activity were exercised in Luxembourg or "put to use" in Luxembourg. The law does not define what is meant by an activity exercised in Luxembourg; in the reporter's view, and absent any form of threshold, any activity physically performed in the country, even without a fixed base, would be taxable in Luxembourg.

The difficulty here resides in the qualification of income from an independent professional activity and in the need to oppose this concept to a commercial activity. Article 91 ITL considers as income from independent professional activities scientific, artistic, educational, medical and legal, etc., activities, as well as the activities of a director, an auditor or similar functions in a company or a corporate society.

18 *Tribunal administratif*, 11 May 2011, no. 27182.

19 ECJ, 15 May 1997, case C-250/95, [1997] ECRI-2471; see also *Cour administrative*, 29 January 1999, no. 10673C.

It is usually considered that an independent professional activity includes all activities which require an intellectual input, as opposed to merely repetitive activity, where business infrastructure and commercial organisation are the key elements.

Fees for technical services also do not qualify for the 80 per cent exemption on certain IP/IT rights except where they may be embodied into such rights to become an intrinsic and non-divisible part thereof.

1.5. Compliance and administration

If commercial profits are taxable in Luxembourg via a PE, the compliance obligation lies with the business undertaking which has this PE itself. Luxembourg tax law does not provide for the obligation to designate a specific representative in Luxembourg. Basically, the tax filing requirements on such a foreign establishment are identical to those of a Luxembourg company, in terms of tax forms and filing deadlines.

If payments are subject to withholding tax in Luxembourg, the primary withholding tax obligation lies with the payer. Luxembourg tax law specifically provides that the payer may itself bear the costs of withholding, in which case the withholding tax rate is grossed up.

In the case of application of a withholding tax, the tax is assessed on the gross amount except in cases where an option for tax assessment is offered.

The beneficiary of the payment is jointly liable for the withholding tax, if the withholding tax has not been applied correctly or if the beneficiary was aware that the payer levied the withholding tax, but did not remit the amount to the tax administration.

The withholding tax applies in complete satisfaction of the Luxembourg income tax liability, except where the beneficiary is a commercial undertaking having a PE in Luxembourg (or a non-resident individual subject to income taxation in Luxembourg on salaried income). In that case, the withholding tax is creditable against income taxation resulting from income tax assessment, and any excess withholding tax is refundable. Article 152.I (17) ITL also provides that the non-resident taxpayer may request taxation via assessment, in which case excess withholding tax is also refundable (article 154.7 ITL).

2. Treaty issues

As a general comment, Luxembourg follows the OECD MC when negotiating DTTs with other contracting states. Luxembourg has not released its own model convention, although there are certain features which Luxembourg typically tries to include in its DTTs, such as a withholding tax exemption on interest payments, while the OECD MC proposes a 10 per cent withholding tax.

Luxembourg usually eliminates double taxation by exempting income realised via a PE located in the other contracting state. Once Luxembourg is allocated the right to tax a certain item of income, this income is taxable by application of

Luxembourg domestic rules, regardless of the qualification of this income under a tax treaty. For instance, an item of income which is considered royalties under a double tax treaty, would not necessarily benefit from the 80 per cent IP/IT exemption provided for by article 50*bis* ITL. The domestic conditions in this respect would have to be complied with. Similarly, where a treaty awards the right to tax to Luxembourg, Luxembourg could use this taxation right only if the item of income was taxable under domestic law.[20]

Under domestic law, double taxation is avoided by the allocation of a tax credit for the foreign tax paid on foreign source income. By virtue of the DTTs signed by Luxembourg, income taxable in the other contracting state is, in general, exempt in Luxembourg, save for the progressivity clause, except for interest income, dividends and royalties, which are taxable in Luxembourg with a credit for the foreign withholding tax.

The Luxembourg tax credit may not exceed the Luxembourg income tax assessed on the foreign source income taxable in Luxembourg. This limitation applies either on a per-country basis or on a global basis. On a per-country basis, the Luxembourg tax credit may not exceed the Luxembourg income tax due on the net income from a particular jurisdiction, after deduction of foreign taxes from the relevant jurisdiction.

The domestic rules on foreign tax credit relief apply, according to the tax authorities, only to national corporate income tax and not to municipal business tax.

If the limitation is calculated on a global basis:

- the total amount of withholding tax suffered on all foreign interest and dividends is credited against all foreign source dividend and interest income for which an election for the global method has been made (but excluding domestic income) and not only the income taxable in Luxembourg coming from the country which has applied the withholding tax;
- the foreign tax creditable may not exceed 25 per cent of the foreign income (meaning that foreign withholding tax in excess of 25 per cent is ignored for the purposes of the tax credit);
- the foreign tax may be credited only up to 20 per cent of the Luxembourg tax assessed on the taxpayer's total income (thus the taxpayer also has to earn profits that are fully taxable in Luxembourg); and
- withholding tax is only creditable against corporate income tax paid on foreign dividend and interest payments originating from jurisdictions in respect of which the global calculation option has been made.

The option to allocate tax credits on a per-country basis or on a global basis may be made every year. A tax credit which has not been credited against Luxembourg taxes may be treated as a tax-deductible expense, bearing in mind that business losses may be carried forward without limitation of time.

Finally, certain tax treaties provide for tax-sparing credits, for which only the per-country method is available.

The analysis of certain Luxembourg DTTs below does not purport to be exhaustive, and it includes those which have been signed but may not yet have entered into force.

20 See, for instance, *Tribunal administratif*, 18 July 2011, no. 26898.

2.1. Income from services under article 7

Luxembourg tax treaties generally define the PE concept along the lines of article 5 of the OECD MC.

2.1.1. Specific treaty provisions on business services

There are, however, several Luxembourg DTTs which include the concept of a "services PE". This provision usually seems to follow article 5.3(b) of the UN MC and not no. 42.23 of the commentaries on article 5 of the OECD MC. This provision is in the reporter's view included at the initiative of the other contracting state. It should be borne in mind that given the size and nature of the Luxembourg economy this is not a politically sensitive issue, as the country has no large professional service firms which risk being caught by the services PE concept and becoming taxable in the other jurisdiction.

For example the DTT of 16 June 2006 with Azerbaijan includes in the PE definition (article 5.3(b)) the provision of services, including consultancy services, by an enterprise acting via its employees or other personnel hired to that effect, under the condition that these activities exceed for the same or for connected projects at least 6 months over a 12-month period. A similar definition is included in the DTTs with Armenia, China, Thailand, Moldova, Panama, Portugal, Vietnam, India and Hong Kong, sometimes with different duration thresholds.

The Singapore DTT of 6 March 1993 provides for a very condensed services PE, which exists for the furnishing of services, including consultancy services, by a resident of a contracting state through employees or other personnel. As the treaty does not include any duration requirement this may possibly be very far-reaching. However, the reporter does not believe that this wording means that no duration test has to be met. The "permanence" test to create a PE should still be met, and one could possibly refer to what is normal for the provision of consulting services in DTTs, so that a 6-month duration could be a benchmark.

The DTT with South Africa provides in article 14 (independent professional services) that a fixed base is deemed to exist if an individual is present in the other state for periods exceeding 183 days in any 12-month period. This provision thus introduces the services PE, but only for individuals and not in the general PE definition.

The treaty with Panama also includes (standard) wording for services PEs (article 5.3(b)) and contains an anti-abuse provision on the computation of the presence in the other state:

> "the period during which activities are carried on in a contracting state by an enterprise associated with another enterprise shall be aggregated with the period during which activities are carried on by the enterprise with which it is associated if the first-mentioned activities are connected with the activities carried on in that state by the last-mentioned enterprise, provided that any period during which two or more associated enterprises are carrying on concurrent activities is counted only once. An enterprise shall be deemed to be associated with another enterprise if one is controlled directly or indirectly by the other, or if both are controlled directly or indirectly by a third person or persons."

If necessary, the competent authorities of the contracting states shall by mutual agreement settle the mode of application of this provision (article 5.4). This provision is comparable, although not identical, to the anti-avoidance wording suggested by no. 42.45 of the commentaries on article 5 in the OECD MC.

"Supervisory activities" are often included in the context of the construction PE, for instance in the treaties with Armenia, Azerbaijan, China, Korea, South Africa, Estonia, Lithuania, Latvia, Indonesia, Hong Kong, India, Malta, Mauritius, Moldova, Russia, Singapore, Thailand, Panama, Qatar and Vietnam.

The DTT with South Korea makes an interesting distinction by setting the time threshold for the construction PE at 12 months and at 6 months for supervisory activities in connection with a building site or construction or assembly or installation project. Similarly, in the DTT with Malaysia, the construction PE timing threshold is 9 months, while supervisory activities in relation to a construction or assembly site result in a PE if a 5-month period is exceeded.

Several treaties add additional locations to the list of PE examples, such as the treaty with Qatar which includes a sales point, a farm or a plantation as well as a construction site (including supervisory activities). The construction PE is thus not found in a specific paragraph, such as has been the case for the OECD MC (article 5.3) since 1977 (departing from the 1963 MC).

This is also true of the DTT with Tunisia of 27 March 1996, which includes construction in the examples list (this is also the case in the DTTs with Germany, France, Austria and more recently, Qatar). Interestingly, as suggested in the UN MC commentaries, this treaty with Tunisia also includes assembly and supervisory activities which relate to the sale of equipment or machinery where the assembly or supervisory work exceeds 10 per cent of the value of the machinery or equipment (the treaty adds a 3-month period as an additional condition in this respect). The DTTs with India, Mauritius, Thailand and Qatar also include farms and/or plantations, while the DTT with Romania includes vineyards and the one with Bahrain, refineries.

"Force of attraction" may be found in certain treaties (mostly in developing economies), such as in the treaty with Azerbaijan. Force of attraction applies for goods and services and other activities by an enterprise in the other contracting state where a PE of that enterprise exists, if the goods and services sold directly, or the activities performed directly, are similar to those sold via the PE, except where the enterprise can demonstrate that it is unreasonable to consider that the PE could have performed these activities itself or sold the goods and services itself. Hence, there is an anti-avoidance concept underlying this situation (see specific reference to the avoidance of abuse in some DTTs, such as the one with Trinidad and Tobago, but e.g. not with Thailand), along with an attempt to maintain the other country's tax base.

Similar wording exists in the DTTs with Trinidad and Tobago, Barbados, Azerbaijan, Thailand, Vietnam, Barbados, the Baltic States, Mexico and Indonesia, but the scope is sometimes narrower.

The Mexico DTT includes in its business profits category sales in the other state of goods or merchandise of the same or a similar kind as the goods or merchandise sold through a PE (not addressing services or other activities) and the DTTs with Thailand and Indonesia, for instance, do not address services.

Force of attraction is also found in article 7.1 of the DTT with Thailand of 7 May 1996 for sales in the other state of goods or merchandise of the same or a similar kind as those sold through a PE and other business activities carried on in that other state of the same or a similar kind as those effected through the PE. If force of attraction applies, royalties will be sourced in the country which is allowed to tax business income, if these royalties are effectively connected with a PE or with business activities which are taxed by attraction in the jurisdiction where a PE exists. This is similar to article 12.4 of the UN MC, as is the approach used in the treaty with Indonesia, and Trinidad and Tobago. However, not all DTTs which provide for force of attraction create this fictitious source for royalty income (see, as a contrary example, the DTT with Vietnam).

2.1.2. Other activities

Most Luxembourg treaties follow the OECD MC (article 17) as regards cultural and sports activities.

The treaty with Brazil of 8 November 1978 indicates that an enterprise of a contracting state will be deemed to have a PE in the other contracting state where it provides services of artistes and athletes specifically mentioned in the article of the treaty which covers artistes and sportsmen. The purpose of this addendum seems to be to avoid a possible contradiction between two provisions of the treaty, and therefore corresponds to a certain extent to article 17.2 of the OECD MC (article 17.2 may also apply if the person to whom income of an artiste or sportsman accrues is a resident of a third country).[21]

Several Luxembourg double tax treaties (e.g. those with each of Austria, Brazil, France, Germany, India, Indonesia, Moldova, Mongolia, Singapore, Thailand, Tunisia and Uzbekistan) include the concept of insurance PE (referred to in no. 39 of the OECD commentaries on article 5), which creates a PE where an insurance undertaking collects premiums in the other contracting state or insures risk located therein. A couple of these treaties specify that reinsurance companies are excluded from the insurance PE concept (such as that between Luxembourg and India, as well as those with Mongolia, Singapore and Uzbekistan). There are two possible reasons for this: Luxembourg has developed a significant niche for reinsurance companies and is therefore keen to ensure that these companies do not become taxable in the other contracting state. Second, reinsurance companies usually do not directly collect premiums themselves from the insured party; they are collected via an independent intermediary (fronting) insurance company. Hence the concept of premium collection is not directly applicable for a reinsurance undertaking, and the ultimate risk location may also be difficult to determine if the risks of an international group active in several jurisdictions are reinsured.

In relation to the exploration of the seabed and its subsoil, to drilling activities or to the exploitation of natural resources situated there, several scenarios exist (and they are sometimes combined in the same treaty): (a) in the examples list (equivalent of article 5.2 MC, places of exploration of natural resources are listed as constituting a PE (see article 5.2(f) MC, which only covers extraction); (b) quite often in the construction site PE several treaties add a drilling rig or a ship used for the

[21] See item 11.1 of the commentaries.

exploration and exploitation of natural resources, mostly on the condition that a certain timing threshold is observed. It is also notable that some treaties cover exploration and drilling (see the DTTs with Barbados and Qatar), while others address only exploration (such as the DTTs with Armenia and with Mauritius); (c) several treaties, like those with Iceland and with Norway,[22] add any areas beyond the territorial sea within which a country, in accordance with international law, exercises jurisdiction or sovereign rights with respect to the seabed, its subsoil and its superjacent waters and their natural resources, within the territorial scope of the treaty; this deems that a PE may be located on the continental shelf. The treaties with the Baltic States and with Norway have a specific provision on activities at sea, where activities on the continental shelf may be deemed a PE under certain conditions.

Exploration activities may for instance deem a PE in the DTT with Spain, which also covers activities which are complementary or auxiliary to such exploration activities, without a duration test. The DTT with the United States includes in the construction PE any installation or drilling rig or ship used for the exploration of natural resources, which constitutes a PE only if it lasts for more than 12 months. A similar provision is found in the treaties with Indonesia, Russia, Malta, Trinidad and Tobago and Barbados. Not all such treaties, however, include a duration threshold (see the DTTs with Malta, Qatar and Trinidad and Tobago).

The DTT with Bahrain includes an oil refinery in the PE examples list of article 5.2. The treaty with Malta includes a substantial equipment PE in its article 5.5.

The France–Luxembourg DTT of 1 April 1958 provides, in the royalties article (article 10.1), that royalties paid for the use of immovable property or for the working of mines, quarries or other natural resources shall be taxable only in the contracting state in which the property, mines, quarries or other natural resources are situated. Normally, under the OECD MC, one would expect these payments to be considered as income from landed property under article 6.2. The result is the same in terms of allocation of the right to tax, as the French DTT does not provide for a withholding tax on royalties.

2.2. Income from services treated as royalties

2.2.1. Supply of knowhow

A couple of Luxembourg DTTs include a provision regarding technical services in the article on royalties[23] or in a specific article.

By contrast, almost all treaties include a provision on knowhow (information concerning industrial, commercial or scientific experience) in the royalties article, just as in article 12.2 MC. In some of these DTTs the withholding tax rate is, however, lower for the provision of knowhow than for royalties on intellectual property in the strict sense.[24] For instance, the treaty with Brazil provides for a 25 per cent

22 Significant details and rules on taxation of activities at sea are included in a protocol to this treaty.

23 See section 2.3 below.

24 As an exception one may mention the DTT of 1 March 1982 with Finland, where a 5 per cent withholding tax is permitted on royalties for the use of, or the right to use, any patent, trademark, design or model, plan, secret formula or process, or any industrial, commercial or scientific equipment and for royalties for information concerning industrial, commercial or scientific experience while there,

withholding tax on the gross amount of royalties arising from the use, or the right to use, any trademarks, cinematograph films or films or tapes for television or radio broadcasting and of 15 per cent for all other royalties, including information concerning industrial, commercial or scientific experience or studies. A similar distinction exists in the DTTs with, for instance, each of Azerbaijan, South Korea, Estonia, Latvia, Lithuania and Greece.

In the royalties article, certain treaties include payments for the right to use industrial, commercial or scientific equipment, such as the DTTs with Turkey, China, Spain, Greece, Singapore, Malta, Lettonia, Latvia and Malaysia.

The DTT of 2 June 2008 between Luxembourg and India contains specific wording which excludes the deduction of certain payments for knowhow, royalties, stewardship with reference to article 7 (business income). Similarly, a branch cannot be taxed on payments of this kind charged to its head office. A similar provision is included in the treaties with each of Indonesia, Mexico, Moldova, Thailand, Mauritius and Tunisia. This provision is based on article 7(3) of the UN MC.

2.2.2. Secondment of employees

The reporter is not aware of any special provision in a Luxembourg DTT which specifically addresses employment secondment, under which such secondment might be regarded as giving rise to royalties or to technical services, or of guidance by the Luxembourg tax authorities in this respect. The secondment may be considered as a supply of knowhow or of technical services, however, depending on the facts at hand.

2.3. Fees for technical and other services

Two scenarios are apparent: such fees are addressed in certain DTTs in the royalties article itself or in a specific provision of the DTT.

In the tax treaty with Bulgaria, the provisions of the royalties article (providing for a 5 per cent withholding tax) also apply to payments received for the performance of technical services, where such payments are connected with the use or the granting of the right to use rights or goods referred to in the royalties article.

The DTT with India includes fees for technical services in the royalties article, and all royalties receive a 10 per cent withholding tax. The term "fees for technical services" as used in the royalties article of the treaty with India means payments of any kind, other than those mentioned in the articles on independent professional services and employment income as consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.

The DTT with Indonesia also includes technical services in the royalties article, but at a different withholding tax rate (10 per cent as opposed to the 12.5 per cent for "ordinary" royalties). Fees for technical services means payments of any kind

cont.

may be no withholding tax, and exclusive taxation in the residence country of the beneficiary, for royalties for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films and films or tapes for television or radio broadcasting.

to any person, other than payments to an employee of the person making the payments, in consideration for any services of a managerial, technical or consultancy nature.

The treaty with Malta includes in the royalties article the supply of any assistance that is ancillary to, and is furnished as a means of enabling the application or enjoyment of, any copyright, patent, design or model, plan, secret formula or process, trademark or other like property or any scientific, technical, industrial or commercial knowledge or information. Hence the technical services are linked to the generation of royalties. Similarly, the treaty with Portugal states that the term "royalties" shall also include payments for technical assistance which is supplied in connection with the use of, or the right to use, any right, property or information to which it is deemed royalties are payable under the same article.

In the DTT with Malaysia of 21 November 2002, there are two distinct articles, one for royalties (article 12) and one for technical services (article 13; covering technical, management and consultancy activities), both providing for an 8 per cent withholding tax in the source country.

Article 12 of the Morocco DTT of 19 December 1980 includes remuneration for technical and economic studies in the royalties article.

The Panama DTT of 7 October 2010 includes an article on the taxation of services (article 14). This provision seems to replace the independent professional article. It provides for a 5 per cent withholding tax at source. It covers professional services (which themselves include independent, scientific, literary, artistic and educational activities, as well as medical, legal, engineering, architectural, dental and accounting activities), consultancy services, industrial commercial advice and technical, management services or similar services. Services are sourced in one contracting state if they are rendered therein or where the income from such services arises in a state (i.e. when the payer is a resident of that state, except where the payer has in a contracting state a PE in connection with which the liability to pay the income from such services was incurred, and such income is borne by the PE).

The DTT of 14 December 1993 with Romania includes an article on the taxation of commission, providing for a maximum withholding tax of 5 per cent. The term "commission" means payments made to any person as remuneration for services rendered as a broker, a general commission agent or any other person assimilated to such a broker or commission agent by the taxation law of the state in which these payments arise. The scope of this provision does differ from those for the technical fees which are found in certain other Luxembourg DTTs, but the Romanian DTT does not provide for a specific withholding tax on technical services in the royalties article or elsewhere.

The treaty with Trinidad and Tobago (article 13) contains yet another variation as it addresses management charges, which are charges by an enterprise made for the provision of management services or charges made for the provision of technical services and managerial skills. A 5 per cent withholding tax applies.

2.4. Independent professional services

Luxembourg has included the equivalent of former article 14 of the OECD MC in its more recent DTTs, even those negotiated after 2000, with a couple of exceptions, however, which no longer include this provision, such as the DTTs with the

United Arab Emirates, Moldova, San Marino, Hong Kong, Bahrain, Israel, Armenia, Monaco and Liechtenstein.

As a general rule, the provision on independent professional services applies to both individuals and corporate service providers. For instance, the DTT with Brazil states that the article on independent professional services applies even if the activities mentioned in that article are performed by a civil company. The distinction between this provision and the article on business income is based more on the nature of the activity than on the provider.

The DTT of 9 June 2003 with Turkey specifically adds a paragraph on the taxation of independent professional services by an enterprise in article 14. This paragraph is similarly drafted to the one on the taxation of independent professional services of an individual and refers to a PE instead of a fixed base; the DTT sets an alternative duration test. Interestingly, article 14.2 states that an enterprise, which is required to pay tax on independent professional services income under article 14 may elect to be taxable under article 7 on business income, as if the income were attributable to a PE, but this does not impact the source country's right to levy withholding tax on such income.

The DTT with Singapore of 6 March 1993 includes in the equivalent article personal services salaries, wages and other similar remuneration in respect of employment as well as income in respect of professional services or other independent activities, and applies the same allocation rules for such items of remuneration. There is also no explicit condition which states that this article only applies to individuals.

By way of exception, the DTTs with the Baltic States, the United States, Sweden, South Africa, Germany, Russia and India state that the independent professional services article only applies to individuals.

Article 15 of the DTT with France refers to income deriving from a "personal occupation" when addressing "liberal professions", which seems to refer implicitly only to income from individuals.

The DTT of 15 October 2007 with Georgia is also ambiguous in this respect. While article 14 generally refers to income derived by a resident of a contracting state (without distinguishing whether this resident is an individual or a company) in respect of professional services or other activities of an independent character, the protocol is that a fixed base shall be considered to have been formed once a natural person is registered for performing independent personal services. It is unclear whether this condition of registration is not required for companies whose activities are listed in article 14.2 (independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants) or whether the protocol restricts the application of article 14 on independent professional services solely to individuals. Article 14 of the DTT with Mexico also refers to individuals, but the protocol to this provision states that income earned by a company from furnishing personal services through a fixed base is also covered by article 14.

However, as recognised by the 2000 report entitled *Issues related to Article 14 of the Model Tax Convention* issued by the Committee on Fiscal Affairs of the OECD, there seems to be no different tax consequences resulting in Luxembourg from the application of either the article on business income or on independent professional income.

Under domestic law, if the provider of services is a company, the tax result would be the same. This is due to the fact that a company would be taxed under domestic law by application of the rules on business income, as soon as Luxembourg is awarded the right to tax, even if by nature the income would belong to the category of independent professional services.[25]

If, however, the provider were an individual, the nature of the services would be the determining factor. There could be a different outcome regarding the final tax burden. On the one hand, an individual rendering independent professional services would not be subject to municipal business tax. On the other hand, accounting obligations applicable for an independent professional service provider may be weaker than for a company, subject to Luxembourg GAAP, but as a consequence the individual may be prevented from carrying forward loss in the absence of proper accounts (article 114(2).2 ITL) and from the various depreciation rules applicable to companies.

Most DTTs refer in the article on professional services only to the existence of a fixed base in the other contracting state, but there is a significant minority of treaties that do include a duration test, such as, for instance, the DTTs with each of Azerbaijan, South Korea, Estonia, Indonesia, India, Malta, Morocco, Mexico, Mongolia, Uzbekistan, Portugal, Russia, Barbados, Qatar, South Africa, Thailand, Trinidad and Tobacco, Tunisia, Turkey and Vietnam. This duration test then becomes an alternative nexus to the fixed base.

In some of these treaties, such as that of 7 May 1996 with Thailand, the duration test is supplemented by another territorial link to the source country for income from independent services where the remuneration for these activities in the other contracting state is paid by a resident of that state or is borne by a PE or a fixed base situated therein.

The treaty with Trinidad and Tobago requires the remuneration to be borne by a PE or a resident of the source country, provided that income from independent activities exceeds in the year of income a sum of 6,000 euro or its equivalent in Trinidad and Tobago currency. This monetary threshold creates a third nexus for source taxation.

25 *Tribunal administratif*, 10 May 2010, no. 25961, confirmed by *Cour administrative*, 16 December 2010, no. 26997C.