

**Withholding tax in the era of BEPS, CIVs and digital economy**  
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## Overview of Withholding Tax

# Overview of Withholding Tax

## 1.1 General overview of income tax system

- Taxation via withholding depends on category of income
- Employment income / pension income: progressive WHT based on tax schedule (RTS)
- Dividends, interest, directors' fees: flat WHT (15%, 20%, 20%)
- Other income e.g. trade profits: no WHT

## 1.2 The role of withholding tax in domestic law: collection mechanism vs. final tax

### 1.2.1 Withholding tax as prepayment or final tax

- Role of WHT depends on category of income and amount of income subject to WHT and situation of taxpayer
- RTS: final or not depending on number of salaries in household and amount of income ( $\leq$  €100k / €36k); complex mechanism which goal is to limit return filing
- WHT on dividends and directors' fees: final if low amount ( $\leq$  €1.500)
- If return mandatory because one threshold crossed or in presence of income not subject to WHT, all income is taxed at progressive rates + WHT generally treated as prepayment

# Overview of Withholding Tax

## 1.2.1 Withholding tax as prepayment or final tax (ct'd)

- WHT on interest income (Relibi, Relibi bis): final
- Other examples of final WHT: occupational pension schemes (20%), salaries of staff engaged privately for domestic services (10%)

## 1.2.2 Withholding tax where the recipient is a corporation

- WHT on dividends and directors' fees: levied in both cases, except participation exemption regime
- Relibi: by essence limited to individual recipients; anti-abuse clause if company interposed for purpose of avoiding WHT
- RTS: by essence corporation cannot be recipient

# Overview of Withholding Tax

## 1.3 Legal status of withholding agent

- Regular withholding agent: debtor of income (all WHT except Relibi)
- Relibi withholding agent: paying agent, not always debtor of income

### 1.3.1 Exemption of withholding in case of difficulty in identifying obligations /

#### Legal right of withholding agent to request information

- Few provisions available as debtor deemed to own most information necessary for WHT
- RTS:
  - General obligation to levy WHT, and to levy at maximum rate if data to apply progressive rates (tax card) is missing
  - Obligation extends to remuneration granted by third parties; employer's responsibility waived if employer has reasonably not been able to gather necessary data
  - Exemption for difficulty to get proper information limited to minor cases (e.g. clergymen).
- WHT on dividends and directors' fees: no rules as necessary information owned by debtor
- Relibi: general obligation to levy in case of doubt e.g. on beneficial owner; reference to CRS reasonable due diligence procedures to assess withholding obligation

# Overview of Withholding Tax

## 1.3.2 Personal liability of WHT agent

- WHT agent has personal liability for calculation, collection, declaration and payment of WHT
- Recipient of income remains debtor of income; WHT agent has legal right of refund
- Exceptions available, e.g. WHT on contributions to occupational pension schemes

# Overview of Withholding Tax

## 1.4 Procedural issues

### 1.4.1 Refund procedures for over-withheld taxes

- Excess of WHT over final tax burden generally refundable, but exceptions apply (WHT on dividends not refundable except in PER context, RTS not fully refundable in case of part-year tax residence)
- If no filing obligation, RTS may be recomputed based on year-end wage tax adjustment -*décompte annuel*- procedure
- Relibi refundable through request by paying agent
- GTA provides general procedure of refund that can apply to WHT
- No applicable credit interest



# Overview of Withholding Tax

## 1.4.2 Recourse for revenue authorities

- Principle: no recourse of tax authorities from income recipient, except if (1) WHT not duly levied by agent or (2) recipient aware of non-payment to authorities but did not inform them
- RTS: specific assessment procedure through wage tax audits; recourse from both agent (employer) and recipient (employee); usually agent called, except if he can demonstrate payment of tax by recipient as result of final assessment
- Relibi: recourse only from paying agent due to banking secrecy

# Withholding Tax for International Transactions

# Withholding Tax for International Transactions

## 2.1 Under Domestic law

- General overview of the system

### Taxation of non-residents on

- Trade profit
- Farming and forestry profit
- Profits from independent activities
- Employment and pension income
- Investment income
- Rental income
- Capital gains on the sale of participations or immovable property

- Type of income subject to withholding tax

- Directors' fees
- Income from literary, artistic and professional sport activities\*\*\*
- Employment and pension income
- Dividend distributions
- Other income realised by non-residents each time such a measure seems to be required to preserve the tax receivable. Amount withheld is considered as an advance on the final tax

# Withholding Tax for International Transactions

- Source rules for different types of income
  - Profits from independent activities
    - (1) Authors, artists and sportsmen: activity physically exercised in Luxembourg, or deemed to benefit to the Luxembourg economy (ex: literary or artistic work do perceive value in Luxembourg if they are published or produced in Luxembourg or painting sold in Luxembourg)
    - (2) Directors: activity physically exercised in Luxembourg, or deemed to benefit to the Luxembourg economy
  - Employment income:
    - (1) the professional activity is or has been exercised in Luxembourg,
    - (2) the professional activity is or has perceived value (*mise en valeur*) in Luxembourg, unless trader, industrial enterprise or a transportation company and it can be demonstrated that the Luxembourg source income is liable to tax abroad at a rate which is equivalent to the individual income tax applicable in Luxembourg
    - (3) the income is paid by a Luxembourg public scheme or by the Luxembourg national railway
  - Pension income:
    - (1) Results from former employment carried out or perceiving value in Luxembourg
    - (2) Paid by the Luxembourg public fund (*caisse publique*) or the Luxembourg national railway
    - (3) Stems from pension funds form as an *association d'épargne-pension* (provided pension contributions were deducted from taxable revenue in Luxembourg)
  - Investment income:
    - (1) Payer is the Luxembourg State, Luxembourg municipality, Luxembourg public institution, private collective institution having its statutory seat or central administration in Luxembourg

# Withholding Tax for International Transactions

- Tax base and tax rate
  - Tax rates depend on the type of income
  - No difference between payments made Luxembourg residents or non-residents except
    - § Conditions of the Luxembourg participation exemption regime
    - § No withholding tax applies on income derived by Luxembourg resident authors, artists or sportsmen
  - Investment income:
    - (1) Dividend distributions: 15% (17.65%)
    - (2) No withholding tax on liquidation proceeds and on certain specific vehicles (SICAR, SIF, UCIs, RAIF, Family wealth management companies)
  - Profits from independent activities
    - (1) Authors, artists and sportsmen: 10% (11,11%)
    - (2) Directors: 20% (25%) - withholding tax is final if revenue < / = EUR 100,000 - day-to-day management: withholding tax on employment income
  - Employment income:
    - (1) Differs depending on the employee's salary and personal circumstances.
  - Pension income:
    - (1) Differs depending on the pension and personal circumstances.

# Withholding Tax for International Transactions

- WHT obligations for non-residents
  - In principle no WHT obligation for non-residents except:
    - (1) Non-resident payers in the context of income derived by authors, artists, sportsmen
    - (2) Non-resident employer is required to withhold tax on employment income in Luxembourg if it has a permanent establishment or a permanent representative in Luxembourg or it exercises an itinerant activity
  - Possibility for employers to elect, on a voluntary basis, to be subject to the WHT regime
  
- Recourse of the tax authorities
  - In principle the WHT may not be claimed by the tax authorities from the income recipient unless
    - (1) WHT has not been duly levied by the agent
    - (2) The income recipient is aware that the WHT levied has not been paid in due time to the tax authorities but has not informed them thereof
  - Tax authorities have the same rights in performance, lien and mortgage as for the recovery of the income tax of the agent personally

# Withholding Tax for International Transactions

## 2.2 Withholding tax under treaty law

- Type of income permitting withholding tax
  - Dividends:
    - (1) Luxembourg treaties generally follows the upper WHT of 15% provided for under the OECD Model Treaty
    - (2) Number of treaties concluded by Luxembourg provide for a full WHT exemption subject to certain conditions under the participation exemption regime
  - Interest:
    - (1) No WHT under Luxembourg law
    - (2) Treaties provide for a 15% WHT
    - (3) But availability of WHT exemption in most of the treaties
  - Royalties
    - (1) No WHT under Luxembourg law
    - (2) Most of the treaties provide for no WHT
  - Special provisions with regards to artists and sportsmen (but not authors) without setting a minimum tax rate
    - (1) Right to tax income allocated to the country of source of the income under most of the treaties and may then be subject to WHT under the Luxembourg tax law (i.e. 10% WHT)
    - (2) Treaties with Germany, Turkey, Qatar, Singapore, China or Poland exclude the taxing right of the source state where either (i) the activity is financed by funds of the residence state or (ii) the activity is substantially supported by public funds of one or both of the contracting state or (iii) the activity is part of a cultural exchange programme
- Withholding tax rate under the treaties override internal tax rates

# Withholding Tax for International Transactions

## 2.3 Procedural aspects for withholding tax in international settings

- Exemption from WHT in the event of difficulty identifying obligations/ legal right
  - No specific provisions in a international context
- Who decides the prima facie application of treaty?
  - Luxembourg payer is allowed to apply the WHT rate as provided for under applicable double tax treaties on its own judgement
  - In practice, payer would ask to be provided with a certificate of residence of the beneficiary of the income
  - Application for the reduced WHT rate by filing form 900E
  - Beneficiary of the income may ask for the refund of the WHT collected by filing the relevant tax return to the extent the conditions are met



## Withholding Tax on CIVs

# Withholding Tax on CIVs

- There is no discrimination between Luxembourg CIVs and foreign CIVs
- 15% WHT on distributions toward CIVs unless
- Application of the Luxembourg participation exemption regime
- Number of rather recent double tax treaties concluded by Luxembourg provide for a clear confirmation of the application of the relevant double tax treaty to Luxembourg and foreign CIVs:
  - Germany, Austria, China, Bahrain, Lichtenstein, United Arab Emirates, Guernsey, Hong-Kong, Jersey, Malta, Poland, Portugal, Qatar, Romania, Saint Martin, Vietnam and Israel
- Few double tax treaties are not applicable to domestic CIVs, either because:
  - ü the foreign country refuses the benefit of the treaty:
    - Belgium, Brazil, the Netherlands or the UK or
  - ü because of a clear provision in the relevant treaty:
    - US or France

# Withholding Tax in the Digital Economy

# Withholding Tax in the Digital Economy

## 4.1 General overview of actual or potential revenue loss caused by the advent of digital economy

- Awareness of Luxembourg officials and tax experts quite low
- Currently no legislative action, no case law or public discussion

## 4.2 Classification of income from digitised transactions

- No specific provisions, general tax provisions shall be referred to
- 3 possible classifications: business income (art 14 ITL), income from independent personal services (art 61 ITL - IPS), royalties (art 98 ITL)

# Withholding Tax in the Digital Economy

## 4.2.1 One-time download of computer software or other digital content

- Examples: e-book, mp3, software
- Key question: what is the payment made for ?
- Payment made to acquire of data in the form of a digital signal: close to the purchase of physical item
- Income from IPS: no as payment not for a service
- Royalty: no as payment not for the use or right to use a copyright, patent etc
- Trade profit: yes as activity of provider responds to definition
- PM trade profit definition: profit generated by any independent and for-profit activity, that is performed on an ongoing basis and that constitutes participation in general economic life

## Withholding Tax in the Digital Economy

### 4.2.2 Cloud computing, continual use (downloading, accessing, viewing, streaming, etc.) of computer software and other digital content

- Examples: purchase of a means of access to online software (e.g. Office Online), to a digital space (e.g. Dropbox), and to an online database (e.g. Deezer)
- Key question: what is the payment made for ?

Example	Purpose of payment	
Office Online	Be able to use software to work on documents	Service delivered by the provider
Dropbox	Be able to store data on personal and secure space	
Deezer	Be able to read, search, organise and share data	

## Withholding Tax in the Digital Economy

### 4.2.2 Cloud computing, continual use (downloading, accessing, viewing, streaming, etc.) of computer software and other digital content

- Income from IPS: no as services provided are of a technical nature that cannot be provided by individuals in their personal capacity
- Trade profit: yes as activity of provider responds to category
- PM trade profit definition: profit generated by any independent and for-profit activity, that is performed on an ongoing basis and that constitutes participation in general economic life
- Royalty: not assessed as ancillary to trade profit

# Withholding Tax in the Digital Economy

## 4.3. Applicability of WHT

### 4.3.1 Wider resort to WHT

- Currently no WHT applies to categories of income concerned by digital transactions
- No tendency to expand WHT to cover digital transactions

### 4.3.2 WHT obligations for consumers in B2C transactions

- Very unlikely to impose obligations on end consumers
- Idem for financial intermediaries

### 4.3.3 Information reporting and net basis taxation

- Not an alternative to WHT in Luxembourg
- Not relevant in the context of digital transactions as no WHT applies



End of session / Questions