

# Tax on Inbound Investment

*Contributing editors*

Peter Maher and Lew Steinberg



2016

GETTING THE  
DEAL THROUGH 

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# Tax on Inbound Investment 2016

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**Peter Maher and Lew Steinberg**

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# Luxembourg

Frédéric Feyten and Michiel Boeren

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## Acquisitions (from the buyer's perspective)

### 1 Tax treatment of different acquisitions

**What are the differences in tax treatment between an acquisition of stock in a company and the acquisition of business assets and liabilities?**

An asset deal generally allows a buyer to achieve a step-up in basis in respect of the acquired assets and liabilities, whereas a share deal does not result in such a step-up (although there will obviously be a step-up in basis for the acquired shares). Depending on the nature of the assets and liabilities, an asset deal may result in a non-resident buyer to be considered to have a taxable presence in Luxembourg via a fixed place of business or permanent establishment which would bring the buyer within the scope of Luxembourg taxation, namely, direct taxes such as (corporate or personal) income tax, net wealth tax and indirect taxes (VAT). The acquisition of shares in a Luxembourg company does not necessarily result in a taxable presence in Luxembourg, however when acquiring a substantial participation in a Luxembourg company the buyer becomes subject to the Luxembourg non-resident capital gains taxation which could, albeit rarely, result in a gain to be subject to Luxembourg non-resident capital gains tax (as explained in more detail in question 16).

### 2 Step-up in basis

**In what circumstances does a purchaser get a step-up in basis in the business assets of the target company? Can goodwill and other intangibles be depreciated for tax purposes in the event of the purchase of those assets, and the purchase of stock in a company owning those assets?**

As mentioned above, the buyer enjoys a step-up in basis only in case of an asset deal. Goodwill and other intangibles can be depreciated for Luxembourg tax purposes only when they are specifically identified and acquired within the framework of an asset deal and depending on their nature (intangibles that do not reduce in value may not be depreciable). In case of a share deal, goodwill held by the acquired company can neither be depreciated by the buyer nor by the acquired company itself if such goodwill has not been acquired separately but has been built up over time. In the event that a Luxembourg acquisition company acquires shares, such shares may under certain conditions be depreciated or written down, subject to the application of Luxembourg's recovery rules when the value of the shares rebounds.

### 3 Domicile of acquisition company

**Is it preferable for an acquisition to be executed by an acquisition company established in or out of your jurisdiction?**

For an asset deal there is not much difference between an acquisition of such assets by a foreign company or by a Luxembourg company, when the business continues to be carried out in Luxembourg via a permanent establishment. A permanent establishment in Luxembourg of a foreign company is generally subject to the same income tax and net wealth tax as is the case for a Luxembourg company. However, where profit repatriations from Luxembourg permanent establishments or branches to the foreign head office are not subject to Luxembourg withholding tax, dividend

distributions made by Luxembourg companies are in principle subject to 15 per cent dividend withholding under Luxembourg domestic tax rules, unless a reduced rate or exemption applies on the basis of a tax treaty or pursuant to Luxembourg domestic tax law. Dividend withholding tax exemptions available under Luxembourg domestic tax law are addressed in question 13.

For a share deal, a Luxembourg acquisition company may allow for a better way to push down the acquisition debt to the business of the target company, for example, via a legal merger or via the establishment of a tax consolidation, pursuant to which tax group members can pool their individually determined taxable amounts into one taxable amount (allowing the offsetting of losses by one member against profits from another member). A Luxembourg permanent establishment of a foreign company can act as the consolidating parent in a Luxembourg tax consolidation, provided the foreign company is a capital company (ie, a joint stock company with a capital divided and represented by shares) which is subject to a tax in its country of residence which is comparable to Luxembourg corporate income tax (ie, a tax levied on a compulsory basis by a public authority at a statutory rate of at least 10.5 per cent on a taxable basis that is comparable to the taxable basis determined under Luxembourg domestic tax rules).

For buyers who are not protected by a tax treaty or who do not qualify for dividend withholding tax exemption, it may make sense to acquire the shares of a Luxembourg target company via a Luxembourg acquisition company so as to ensure a tax efficient profit repatriation in the future via a proper funding (combination of debt and equity) of the Luxembourg acquisition company.

### 4 Company mergers and share exchanges

**Are company mergers or share exchanges common forms of acquisition?**

Mergers are common as a way to push down the acquisition debt to the level of the business of the (acquired) company. Interest expenses on acquisition debt (not pushed down via a downstream merger) are in principle tax deductible within the limits of Luxembourg thin capitalisation rules and provided the interest is at arm's length and does not, for example, share in the profits of the debtor. However, such interest is, in any tax year, only tax-deductible to the extent it exceeds the amount of exempt dividend income received from the target in the same tax year. In other words, up to the amount of the exempt dividend income, the interest is not tax-deductible, whereas any excess interest is deductible and could produce tax losses available for carry-forward (Luxembourg tax law does not permit loss carry-back).

Furthermore, any such deductible interest remains subject to Luxembourg's recapture rules: as and when shares in the target are transferred at a (deemed) gain, such gain will, up to the amount of recapture, be subject to Luxembourg income tax irrespective of the fact that the target may satisfy the conditions of the Luxembourg participation exemption. To the extent that the gain exceeds the amount subject to recapture, the gain is exempt from Luxembourg income tax provided the conditions of the participation exemption are satisfied. The amount of the taxable gain can be offset by the tax losses available for carry-forward. Consequently, unless the amount of interest on acquisition debt has effectively been offset against other items of taxable income, the application of the recapture

rule should not, by itself, result in an effective tax liability for the acquiring entity.

Since the Luxembourg tax consolidation regime does not result in a full tax integration of its members, the above basically remains applicable even if a tax consolidation exists. A tax consolidation therefore does not achieve the same result as a debt pushdown carried out via a legal merger. Moreover, the tax consolidation regime requires a consolidation for at least five years. Failing to meet this condition would result in the tax consolidation to be retroactively denied.

## 5 Tax benefits in issuing stock

### Is there a tax benefit to the acquirer in issuing stock as consideration rather than cash?

Luxembourg imposes a 15 per cent dividend withholding tax and 0.5 per cent annual net wealth tax (the tax basis of which equals the estimated fair market value of the taxable assets of the company minus its deductible liabilities). However, Luxembourg generally does not impose withholding tax on at arm's length interest, unless the interest would fall within the scope of the Luxembourg law of 23 December 2005 (which introduced a 10 per cent withholding tax on interest payments made by Luxembourg paying agents to the benefit of Luxembourg resident individuals or certain residual entities in which such Individuals have an interest) or would have a profit sharing nature. Consequently, there is generally no Luxembourg tax benefit for the buyer to finance the acquisition of the target via the issuance of new shares (unless the seller is co-investing). In fact, from a Luxembourg (tax) perspective, it is generally more efficient and flexible to finance the acquisition with debt (or a combination of debt and equity) within the limits of Luxembourg thin capitalisation rules.

## 6 Transaction taxes

### Are documentary taxes payable on the acquisition of stock or business assets and, if so, what are the rates and who is accountable? Are any other transaction taxes payable?

Asset deals are subject to VAT (the general rate of which equals 17 per cent), and may be subject to registration duties or transfer taxes, as is the case for real estate situated in Luxembourg (the transfer of real estate situated in Luxembourg City is subject to up to 10 per cent registration and transcription duties). An exemption of VAT is available in case of a transfer of a whole business or a business unit (acquisition of a going concern). VAT and real estate transfer taxes are borne by the buyer of the assets.

The transfer of shares in a Luxembourg company is not subject to any stamp duties or registration. Under very exceptional circumstances, the transfer of a Luxembourg real estate company could be assimilated to the transfer of the underlying real estate itself and therefore trigger real estate transfer taxes.

## 7 Net operating losses, other tax attributes and insolvency proceedings

### Are net operating losses, tax credits or other types of deferred tax asset subject to any limitations after a change of control of the target or in any other circumstances? If not, are there techniques for preserving them? Are acquisitions or reorganisations of bankrupt or insolvent companies subject to any special rules or tax regimes?

Under Luxembourg tax law, tax losses can be carried forward indefinitely, whereas loss carry-back is not possible. Luxembourg tax law does not contain specific change of control rules that prohibit loss carry-forward. However, tax losses can only be carried forward and claimed by the legal person that has incurred such losses. Consequently, tax losses may be lost in case of mergers or demergers. Generally, and where possible, the reorganisation ensures the loss making company to be the surviving entity. Alternatively, tax-neutral rollovers (which are available under certain conditions) are carried out only partially in view of utilising the tax losses before they would be lost.

A change of shareholders of a Luxembourg company, which has tax losses available for carry-forward, does not automatically result in such tax losses to be lost. This may be different in cases of abuse. On the basis of certain case law and a circular letter issued by the Luxembourg tax

authorities, loss carry-forward and usage of such losses could be denied in case of a change of shareholder if, on the basis of facts and circumstances, it appears that the transfer has been solely carried out for the purpose of using the tax losses. Examples of facts and circumstances that could indicate such abuse would be the discontinuation of the activity having given rise to the losses; the absence of any real value of the (assets of the) transferred company (no economic substance); a change of activity concomitantly with the transfer of the shares, etc.

Debt waivers made in the framework of a financial reorganisation (eg, aimed at preventing the debtor becoming insolvent) may also lead to a reduction of losses carried forward.

## 8 Interest relief

### Does an acquisition company get interest relief for borrowings to acquire the target? Are there restrictions on deductibility where the lender is foreign, a related party, or both? Can withholding taxes on interest payments be easily avoided? Is debt pushdown easily achieved? In particular, are there capitalisation rules that prevent the pushdown of excessive debt?

Genuine business expenses are deductible insofar as they remunerate real services provided to the company, they are not economically linked to exempt income, they are arm's-length and, as regards interest expenses, they are not profit-sharing.

Expenses which are economically linked to exempt income are not tax-deductible. Under the above conditions, financing expenses incurred by the buyer are thus deductible for Luxembourg income tax purposes (subject to recapture; see question 4).

Luxembourg tax law does not contain specific thin capitalisation rules. However, as of 1 January 2015, Luxembourg introduced transfer pricing legislation inspired by the arm's-length principles laid down in article 9 of the OECD Model Tax Convention. Bearing in mind this principle, a company can thus be funded in compliance with thin capitalisation rules if it is funded under a debt-equity ratio under which an unrelated party would have funded the company having as sole collateral the assets held by the company. If such ratio cannot be demonstrated by the taxpayer, the tax authorities tend to apply an 85:15 debt-equity ratio in respect of the financing of participations. This ratio aims at avoiding excessive interest charges only. Consequently, debt funding in excess of this ratio is still acceptable provided the interest rate is reduced accordingly so that the total amount of interest would still be in line with an 85:15 debt-equity funding and provided the outcome thereof can still be considered arm's-length. Simultaneously with the introduction of the arm's-length principle, Luxembourg introduced rules that impose an obligation on taxpayers to document their transfer pricing (policy) and be able to demonstrate to the tax authorities the arm's-length nature of the transfer prices used.

Interest expenses that are economically linked to exempt income are not deductible. However, for participations that qualify for the Luxembourg participation exemption regime, interest on acquisition debt is considered not linked to exempt income, and is thus fully tax deductible, insofar as the amount of interest for any given tax year exceeds the amount of exempt income (dividends or capital gains) derived from such participation during the same tax year. Such interest, therefore, continues to be tax deductible, albeit subject to recapture (as mentioned in question 4).

Luxembourg does not levy a withholding tax on arm's-length interest, unless the interest is paid on certain types of profit sharing debt instruments and arrangements or in case the interest would fall within the scope of the Luxembourg law of 23 December 2005 (as mentioned in question 5).

Other than in view of the application of the Luxembourg law of 23 December 2005, the residence of the lender is of no relevance for the above. Contrary to other jurisdictions, Luxembourg does not have special rules which would deny or limit the deduction of interest depending on whether or not the beneficiary of such interest would be taxable on the interest income (this may be different for certain hybrid instruments once Luxembourg has enacted the amendments to the EU Parent-Subsidiary directive aiming at preventing cross-border hybrid mismatch arrangements within the EU). The deduction is dependent on the ordinary Luxembourg tax rules, including the application of transfer pricing legislation. Consequently, for a debt pushdown structure, the same rules regarding deduction limitations and thin capitalisation rules, as mentioned



above, apply. For debt pushdown techniques ('reverse' or 'downstream' merger, tax consolidation, etc), reference is made to what is stated in question 4.

## 9 Protections for acquisitions

**What forms of protection are generally sought for stock and business asset acquisitions? How are they documented? How are any payments made following a claim under a warranty or indemnity treated from a tax perspective? Are they subject to withholding taxes or taxable in the hands of the recipient?**

Protection takes the form of generally and internationally accepted representation and warranties combined with amounts left in escrow and or earn-out payments. An indemnity payment received is generally treated as a correction of the initial acquisition price (whether for asset deals or share deals), and should not lead to taxable income. Likewise, withholding tax issues should not arise unless payments (such as guarantees) represent interest payments due in which withholding taxes may arise under, for example, the EU Savings Directive as mentioned above.

## Post-acquisition planning

### 10 Restructuring

**What post-acquisition restructuring, if any, is typically carried out and why?**

Post-acquisition restructuring that typically comes to mind would be debt pushdowns, however Luxembourg does not have a very active domestic mergers and acquisitions market and mergers and acquisitions transactions involving Luxembourg entities very often concern targets in foreign jurisdictions.

### 11 Spin-offs

**Can tax-neutral spin-offs of businesses be executed and, if so, can the net operating losses of the spun-off business be preserved? Is it possible to achieve a spin-off without triggering transfer taxes?**

A tax-neutral spin-off is possible subject to certain conditions. A tax-neutral spin-off requires:

- the transfer of a business or an autonomous part of a business, the remaining portion being a business or autonomous part of a business as well;
- a safeguarding of a later taxation of the capital gains deferred as a result of the tax-neutral spin-off (ie, the tax book value of the assets subject to the spin-off are rolled over to the transferee); and
- the attribution of new shares issued to each shareholder on a pro rata basis whereby any cash payment may not exceed 10 per cent of the par value (or accounting par value) of the newly issued shares.

In case the tax book value of assets is continued following the spin-off, the historical acquisition date of such assets will also be continued.

Subject to similar conditions, a tax-neutral demerger of a Luxembourg company may be available when businesses or autonomous parts thereof are split towards two Luxembourg companies, towards one or more EU resident companies as well as a combination thereof.

### 12 Migration of residence

**Is it possible to migrate the residence of the acquisition company or target company from your jurisdiction without tax consequences?**

Yes, this is possible, subject to the below.

In principle, a migration of the residence of a Luxembourg company is considered a liquidation of that company for Luxembourg tax purposes, triggering a tax liability on any unrealised profits included in the assets of the migrated company. However, insofar the assets of such company remain attributable to a permanent establishment carried on in Luxembourg, the migration can be carried out at tax book value, which prevents a tax liability to arise on the unrealised profits connected to such assets. Similarly, a tax-neutral transfer of a Luxembourg permanent

establishment from a company established in an EU country (other than Luxembourg) to another company established in an EU country can be carried out, for example, upon a transfer resulting from a contribution of a business or an independent part thereof, upon merger, demerger or spin-off.

Furthermore, where assets are being transferred from Luxembourg to another EEA country, for example, upon migration of the Luxembourg company to such country, the taxpayer will, upon request, be entitled to a deferral of income taxation (attributable to the unrealised profit included in such assets at the time of transfer to another EEA country) for as long as it continues to be the owner of such assets and for as long as it continues to be a resident of another EEA country. The tax amount subject to deferral does not bear interest, and the taxpayer is allowed to renounce its request for tax deferral.

### 13 Interest and dividend payments

**Are interest and dividend payments made out of your jurisdiction subject to withholding taxes and, if so, at what rates? Are there domestic exemptions from these withholdings or are they treaty-dependent?**

Luxembourg does not levy a withholding tax on arm's-length interest, with the exception of interest paid on certain types of profit sharing debt instruments and arrangements and interest payments that fall within the scope of the Luxembourg law of 23 December 2005 (as mentioned in question 5).

In principle, 15 per cent dividend withholding tax will be due on profits distributions made by Luxembourg resident companies (see question 3). However, a domestic dividend withholding tax exemption applies if:

- the dividend distribution is made to:
  - a fully taxable Luxembourg resident company;
  - an EU entity qualifying under the EU Parent-Subsidiary Directive;
  - a Luxembourg branch of such EU entity or a Luxembourg branch of a company that is resident of a treaty country;
  - a Swiss resident company subject to Swiss corporate income tax without benefiting from an exemption; or to
  - a company which is resident in an EEA country or a country with which Luxembourg has concluded a tax treaty and which is subject to an income tax comparable to the Luxembourg corporate tax (ie, subject to a statutory tax rate of at least 10.5 per cent and a comparable tax base); and
- the recipient of such dividend has held or commits itself to continue to hold a direct participation in the Luxembourg company of at least 10 per cent of the share capital or such number of shares that represent a historical acquisition price of €1.2 million for an uninterrupted period of at least 12 months.

In addition to the foregoing dividend withholding tax exemptions, the liquidation of a Luxembourg company is treated as a capital (gain) transaction and is, therefore, not subject to Luxembourg dividend withholding tax. Only in very limited situations (and subject to treaty protection) non-resident shareholders may fall within the scope of the Luxembourg non-resident capital gains tax rules when transferring shares in a Luxembourg company (as mentioned below in question 16).

### 14 Tax-efficient extraction of profits

**What other tax-efficient means are adopted for extracting profits from your jurisdiction?**

In the event that a dividend withholding tax exemption would not be available under Luxembourg domestic tax law (as summarised in question 13), profits can be extracted from a Luxembourg company tax efficiently by means of the (full or partial) liquidation of a Luxembourg company. Alternatively, profits can be repatriated by means of interest payments being made under convertible or income-sharing type of debt, bearing in mind the previous remarks regarding debt-equity ratios and provided the interest is considered at arm's length.

As is the case with a liquidation of a Luxembourg company, a repurchase and cancellation by a Luxembourg company of part of its own shares forming the entire participation of a shareholder (referred to as 'partial liquidation'), who thereby ceases to be a shareholder, is equally treated as a capital (gain) transaction and is therefore equally not subject

## Update and trends

### Codification of Luxembourg ruling practice

As from 1 January 2015, Luxembourg has codified its tax ruling practice. The new ruling procedure is open to all taxpayers (ie, corporate and individual taxpayers).

Under the new rules, advance tax agreements (ATAs) will be valid for a period of maximum five years, subject to an earlier expiry of the ATA if:

- there appears to be an incorrect description of the relevant facts and circumstances (based on which the ATA has been concluded);
- a change in the (relevant) facts and circumstances (directly or indirectly impacting the outcome of the ATA concluded); or
- the decision laid down in the ATA would no longer be in line with national or international (eg, European Union) law or legislation.

The rules further dictate that an ATA cannot foresee in an exemption of tax or a reduction of tax. And finally, the review of requests for ATA will be subject to the payment of a fee ranging between €3,000 and €10,000, depending on their nature and their complexity. The level of the fee is determined by the tax authorities on a case-by-case basis upon a high level review of the ATA request. Following the payment thereof, the request for ATA will be formally accepted by the tax authorities for review. The fee remains at all times non-refundable (ie, irrespective of the outcome of the decision by the tax authorities). The main underlying aim for charging the fee is to achieve a reduction in the number of ATA requests to be submitted to the Luxembourg tax authorities.

As regards corporate taxpayers, in order to ensure a uniform and equal treatment of taxpayers, requests for an ATA have to be addressed to the competent tax inspector, who will in turn submit the request to a newly established ruling committee. After review, the ruling committee will advise the competent tax inspector on how to decide on the request for ATA.

ATA requests should contain:

- a precise description of the applicant of the ATA request as well as any other (related or non-related) parties involved;
- a detailed description of the activities (or contemplated activities) that are covered by the ATA and have not yet produced their effect;
- a detailed analysis of the applicable legal provisions as well as the legal position taken by the applicant in respect thereto; and
- a written confirmation by (or on behalf) of the taxpayer that all relevant facts and circumstances included in the ATA request are accurate.

With the exception of the fee, the new rules also apply to pending requests for ATA submitted prior to 1 January 2015.

### Codification of the arm's-length principle

With effect from 1 January 2015, Luxembourg formally introduced transfer pricing rules in its domestic tax legislation, thereby formally codifying the internationally applied arm's length principle. Whereas Luxembourg already had implicit transfer pricing law in place on the basis of which not at arm's length transactions between parties having a special economic relationship, could be challenged by the tax authorities and be (partly or fully) characterised as hidden (capital) contributions or hidden (dividend) distributions, the introduction of the at arm's length principle in article 56 of the Luxembourg tax law, constitutes a clear principle.

The new text of article 56 of the Luxembourg tax law, outlining the at arm's length principle, is aligned with article 9 of the OECD

Model Tax Convention, containing a more specific definition of related parties, reads as follows 'when an enterprise participates, directly or indirectly, in the management, control or capital of another enterprise, or where the same individuals participate, directly or indirectly, in the management, control or capital of two enterprises and where, in either instance, the two enterprises are, within their commercial or financial relations subject to conditions made or imposed which differ from those which would be made between independent enterprises, the profits of these enterprises are to be determined under conditions prevailing between independent enterprises and taxed in consequence'.

This definition applies to cross-border and Luxembourg domestic transactions, and the wording applies to both upward and downward pricing adjustments. In addition, taxpayers will be required to have information and documentation available in their administration to support the terms and conditions applied in any transaction between related parties.

### Luxembourg proposes new tax measures to parliament

On 5 August 2015, the Luxembourg Minister of Finance presented a bill of law to the Luxembourg parliament. The bill of law includes, inter alia, a proposal to expand the rules on the Luxembourg tax unity regime (highlighted under question 3 of this article). At present, a tax unity is possible provided at least 95 per cent of the shares in a Luxembourg-resident capital company is owned (directly or indirectly) by another Luxembourg resident fully taxable capital company or allocable to a Luxembourg permanent establishment maintained by a foreign capital company provided such foreign capital company is fully subject to income taxation that corresponds to Luxembourg income taxation. According to the proposal, the tax unity regime will now be expanded to enable Luxembourg-resident companies that neither have a (joint) Luxembourg parent (capital) company nor a (joint) non-resident parent company with a Luxembourg permanent establishment to which the shares in the Luxembourg resident companies can be allocated, to still form a tax unity, provided such Luxembourg resident companies have a (joint) foreign parent (capital) company established in another EEA country or their shares can be allocated to a permanent establishment of such a foreign parent (capital) company. Such foreign parent (capital) company of permanent establishment must be fully subject to income tax that corresponds to Luxembourg income taxation. A similar expansion is proposed for Luxembourg permanent establishments of foreign (capital) companies that are fully subject to income tax that corresponds to Luxembourg taxation. If adopted, these rules will become applicable as from the beginning of the 2015 tax year and can apply provided a request is submitted no later than on the last day of the 2015 tax year.

In addition, the bill of law expands the scope of the tax deferral system in the event of a migration of resident of a Luxembourg company abroad (as highlighted in question 12 of this article). At present, the deferral is available, upon satisfaction of certain conditions, when the residence of the Luxembourg company is migrated from Luxembourg to another EEA country. The bill of law now proposes to allow the tax deferral when the residence of the Luxembourg company is migrated from Luxembourg to a country with which Luxembourg has concluded a tax treaty for the avoidance of double taxation when such treaty provides for an exchange of information clause that is substantially similar to article 26, paragraph 1 of the OECD Model Tax Convention.

to Luxembourg dividend withholding tax. A liquidation of a Luxembourg company or a repurchase of shares may in very limited cases (and subject to treaty protection) be subject to Luxembourg non-resident capital gains tax (as explained in question 16).

## Disposals (from the seller's perspective)

### 15 Disposals

#### How are disposals most commonly carried out – a disposal of the business assets, the stock in the local company or stock in the foreign holding company?

As mentioned, Luxembourg does not have a very large domestic mergers and acquisitions market. Mergers and acquisitions transactions generally encompass the acquisition, via Luxembourg companies, of target companies in foreign jurisdictions by foreign investors. Consequently,

the disposition of the investment is either carried out by means of a disposition of the shares in the target company itself (eg, by the Luxembourg company) or via the disposition of the shares in the Luxembourg company (by the investor, ie, an indirect sale of the target company). Subject to meeting the conditions of the Luxembourg participation exemption, the capital gains should not be subject to Luxembourg income tax. Similarly, subject to the non-resident capital gains tax rules (as mentioned in question 16), the non-resident shareholder should not be subject to Luxembourg taxation upon a sale of the shares in the Luxembourg company.

**16 Disposals of stock**

**Where the disposal is of stock in the local company by a non-resident company, will gains on disposal be exempt from tax?  
Are there special rules dealing with the disposal of stock in real property, energy and natural resource companies?**

Only in a very limited number of cases may non-resident shareholders of Luxembourg companies become subject to Luxembourg non-resident capital gains tax upon a transfer of shares in a Luxembourg company.

Gains realised by non-resident shareholders on the alienation of a substantial shareholding interest in a Luxembourg company, including distributions received upon the (full or partial) liquidation of a Luxembourg company, are taxable if the gain is realised within a period of six months following the acquisition of such shares. A shareholding is considered 'substantial' where it represents more than 10 per cent of the shares held in a Luxembourg company.

Where a non-resident individual, having a substantial shareholding in a Luxembourg company, has been a tax resident of Luxembourg for more than 15 years before becoming a non-resident of Luxembourg, such non-resident Individual may be subject to Luxembourg non-resident capital

gains taxation if he or she transfers Luxembourg shares within a period of five years following his or her migration from Luxembourg.

Moreover, depending on where the non-resident shareholder is a tax resident, protection against Luxembourg non-resident capital gains tax may be available under an applicable tax treaty.

**17 Avoiding and deferring tax**

**If a gain is taxable on the disposal either of the shares in the local company or of the business assets by the local company, are there any methods for deferring or avoiding the tax?**

As mentioned, the disposition of shares in a Luxembourg company should only exceptionally result in non-resident capital gains tax (see question 16).

The disposition of business assets by a Luxembourg company generally results in taxation on the unrealised profits. Luxembourg tax law provides for some rollover relief, for example, when a Luxembourg company converts a receivable into shares issued by the debtor or for share-for-share mergers. Similarly, under certain conditions, business assets of a Luxembourg company can be transferred tax-neutrally to another legal owner by means of a legal merger or a demerger (see question 11).



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