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Tax Alert

Luxembourg

Investment tax credit - New Circular in force

The tax credit according to Article 152bis L.I.R. is now applicable for investments used on the territory of a Member State of the European economic area agreement (EEA).

The new circular L.I.R. no 152bis/3 of 31 March 2011 arises from the litigation between the Luxembourg Tax Administration (Administration des Contributions Directes) and the Luxembourg maritime company Tankreederei I SA. The company, having asked for an investment tax credit on the basis of Article 152bis of the income tax law, had been rejected by the tax administration on the reasoning that the concerned vessels had been used abroad. Accordingly, the tax administration was only granting the investment tax credit to eligible investments which were physically used on Luxembourg territory.

In the Tankreederei I S.A. case (C-287/10), the European Court of Justice (ECJ) gave the following ruling, dated 22 December 2010 :

“Article 56 TFEU is to be interpreted as precluding a provision of a Member State pursuant to which the benefit of a tax credit for investments is denied to an undertaking which is established solely in that Member State on the sole ground that the capital goods, in respect of which that credit is claimed, are physically used on the territory of another Member State.”

Following this ruling, the granting of an investment tax credit within the meaning of article 152 bis L.I.R. is no longer limited to eligible investments physically used on the Luxembourg territory, but also applies to those physically used on the territory of another European Union (EU) Member State. With regard to the provisions of the European Economic Area Agreement, the principle outlined in the aforementioned ruling is transposable to eligible investments physically used

on the territory of a State that is party to this Agreement. The States that are party to the EEA Agreement are the 27 EU Member States, as well as Iceland, Liechtenstein and Norway. Thus, the benefit of the tax credit for investment is to be granted not only to eligible goods that are used on the territory of an EU Member State, but also in a general sense to those used on the territory of a State that is party to the EEA Agreement.

In the circular, the director of the Luxembourg tax administration highlights that legislative modifications have to be made in order for Luxembourg legislation to comply with article 56 TFEU and article 36 of the EEA Agreement. This means that those providing tax services are required to apply the principle outlined in the ruling mentioned above to all taxations that are not yet with *res judicata* effect. Previous instructions that are contrary to this ruling are null and void.

It is important to note that even though investments that are physically used on the territory of another State that is party to the EEA Agreement are now eligible for the tax credit for investment within the meaning of article 152 bis L.I.R., those investments still have to be used in an establishment located in Luxembourg.

For further information we suggest you to contact our tax advisors at Ernst & Young. We would be pleased to assist you in assessing the opportunities of the new circular.

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