Executive summary

The Luxembourg Tax Administration (LTA) has released a new administrative Circular¹ (the Circular) providing details on the issuance of certificates of residence for Luxembourg undertakings for collective investment (UCIs).

The new Circular now also covers Reserved Alternative Investment Funds (RAIFs) set-up in accordance with the provisions of the law of 23 July 2016.

It also updates the list of double taxation treaties (DTTs) accessible to UCIs.

In general, the issuance of these residency certificates is key when determining whether a Luxembourg UCI may have access to a DTT’s provisions and benefits.

Regardless of the availability of such residency certificates, not all of the DTTs concluded by Luxembourg are applicable to UCIs. Accordingly, a case-by-case analysis of a DTT’s application remains necessary.

Detailed discussion

UCIs covered by the Circular

The Circular is applicable to the following UCIs:
UCIs within the meaning of the law of 17 December 2010, as amended, which transposed the Undertakings for the Collective Investment in Transferable Securities Directive 2009/65/EC (UCITS IV) into Luxembourg law.

Specialized Investment Funds (SIF) within the meaning of the law of 13 February 2007.

RAIFs within the meaning of the law of 23 July 2016, in as far as they comply with risk diversification rules (i.e., RAIF-SIF²). The Circular does not cover RAIFs investing solely in risk capital (i.e., RAIF-SICAR³); however, they would generally have access to DTTs in the same way as any other fully taxable Luxembourg company or SICAR.

Access to DTTs
Access to Luxembourg's DTTs may depend upon the legal form of a UCI i.e., whether it is: (i) a contractual vehicle without legal personality (fonds commun de placement or FCP); or (ii) an investment company with variable capital (société d'investissement à capital variable or SICAV) or with fixed capital (société d'investissement à capital fixe or SICAF).

FCPs
UCIs incorporated under the form of an FCP have no legal personality and are treated as transparent for tax purposes. Consequently, unless there are specific DTT provisions to the contrary, they are not considered as resident for treaty purposes and the tax administration cannot issue certificates of residence.

Some of Luxembourg's recently signed DTTs specifically allow FCPs (or other transparent entities) to be treated as tax resident consequently a certificate of residence can be issued. These are DTTs with: Andorra, Brunei, Croatia, Estonia, Germany, Guernsey, Isle of Man, Jersey, Saudi Arabia, Seychelles, Tajikistan and Uruguay.

In the particular case of the Luxembourg-Ireland DTT, it is worth noting that an FCP has direct access to the treaty provisions even without the issue of a certificate of residence.

SICAV/SICAF
UCIs incorporated under the form of an investment company may choose between alternative legal forms, some being considered as opaque for tax purposes (e.g., public limited company or private limited company) and others as transparent (e.g., limited partnership or special limited partnership).

Luxembourg takes the approach that a UCI in the form of a tax opaque company should qualify as a resident under Luxembourg domestic tax law, even if it is exempt from income tax by virtue of particular provisions. Therefore, Luxembourg tax residency certificates may generally be issued by LTA with respect to such UCIs.

However, this view is not shared by all countries that have signed a DTT with Luxembourg.

The Circular outlines three scenarios:

A DTT exists and is applicable to UCIs, based on one of the following cases:

- Explicit agreement with the respective competent authorities: Denmark, Indonesia, Ireland, Morocco and Spain
- Clear wording within the treaty: Andorra, Armenia, Austria, Azerbaijan, Bahrain, Barbados, Brunei, China, Croatia, Czech Republic, Estonia, Germany, Georgia, Guernsey, Hong Kong, Isle of Man, Israel, Jersey, Laos, Liechtenstein, Macedonia, Malaysia, Malta, Moldova, Monaco, Panama, Poland, Portugal, Qatar, Romania, Saint-Martin, Saudi Arabia, Serbia, Seychelles, Singapore, Slovenia, Sri Lanka, Tajikistan, Taiwan, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, Uruguay, Uzbekistan and Vietnam
- Interpretation of the LTA: Finland, Kazakhstan, Slovak Republic and Thailand

The LTA can issue a certificate of residence in the above cases.

A DTT exists but does not apply to UCIs, on the basis of:

- Agreement between the respective competent authorities: Belgium, Brazil, Japan, Netherlands, Norway, South Africa and United Kingdom
- Interpretation of clear wording within the treaty: Canada, Hungary, Iceland, India, Latvia, Lithuania and Switzerland
- Specific treaty provisions: France (article 10bis), Mauritius (Protocol), Mexico, Sweden (Protocol) and the United States (Memorandum of Understanding)
- Interpretation by the LTA: Russia and Ukraine

In addition, Luxembourg's DTTs concluded with Bulgaria, Greece, Italy and the Republic of Korea remain unclear as to whether SICAVs or SICAFs are entitled to treaty benefits.

In the particular case of the Luxembourg-Ireland DTT, it is worth noting that an FCP has direct access to the treaty provisions even without the issue of a certificate of residence.
Where any of the above cases applies, the LTA cannot issue a residence certificate unless it is possible under Luxembourg domestic tax law, as described in the final scenario below.

- A certificate of residence issued under Luxembourg domestic tax law

Regardless of the existence of a DTT, or of the interpretation on whether an existing DTT is applicable, the LTA can always issue a certificate of residence for a SICAV or SICAF where the following conditions are met:

- It takes the form of a tax opaque company, in line with domestic provisions
- Its registered office or central administration is located in Luxembourg

How to apply

Requests for a certificate of residence are to be submitted to the relevant Luxembourg direct tax office. It must include, inter alia, the fiscal number of the company and be accompanied by a certificate from the Luxembourg Financial Sector Supervisory Commission (Commission de Surveillance du Secteur Financier - CSSF) confirming that the applicant has the form of a SICAV/SICAF and is subject to its supervision (except for the RAIF-SIFs which are not subject to CSSF supervision).

For RAIFs the request should include the fiscal number, the date of incorporation and registered office.

The taxation office may also generally request further information or supporting documents which it considers necessary for the issuance of the certificate of residence under the Luxembourg domestic tax law, such as the explicit reference to the relevant DTT provision or the documentation of the income derived by the UCI in relation to which the application of a specific DTT provision is requested.

Endnotes

2. RAIF-SIFs are subject to an annual subscription tax of 0.01% (based on the net assets value of the RAIF) and are exempt from Luxembourg corporate income taxes and net wealth tax (like a SIF).
3. RAIF-SICARs, incorporated as under the form of an SA (société anonyme), S.à r.l. (société à responsabilité limitée) or SCA (société en commandite par actions) are generally fully subject to Luxembourg corporate income taxes but, like a SICAR (risk capital investment company), benefit from an exemption of any income derived from securities.
For additional information with respect to this Alert, please contact the following:

**Ernst & Young Tax Advisory Services Sarl, Luxembourg City**

- Dietmar Klos, **Tax Leader Financial Services** dietmar.klos@lu.ey.com
- Marc Schmitz, **Tax Leader** marc.schmitz@lu.ey.com
- Olivier Bertrand, **Transaction Tax Leader** olivier.bertrand@lu.ey.com
- Katrin Lakebrink, **Transaction Tax** katrin.lakebrink@lu.ey.com
- Christophe Joosen, **Transaction Tax** christophe.joosen@lu.ey.com
- Adriana Boixados Prio, **Transaction Tax** adriana.boixados-prio@lu.ey.com
- Hans Van Haelst, **Transaction Tax** hans.van-haelst@lu.ey.com
- Per Ohlin, **Transaction Tax** per.ohlin@lu.ey.com
- Vincent Remy, **Transaction Tax - Financial Services, Luxembourg liaison in London** vincent.remy@lu.ey.com
- Manuela Abreu, **Financial Services** manuela.abreu@lu.ey.com

**Ernst & Young LLP, Financial Services International Tax Desk, New York**

- Jurjan Wouda Kuipers, **Desk Leader** jurjan.woudakuipers@ey.com
- Hicham Khoumsi hicham.khoumsi1@ey.com
- Michel Alves De Matos michel.alvesdematos@ey.com
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EYG no. 07129-171Gbl
1508-1600216 NY
ED None

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