JONES DAY

COMMENTARY

MARCH 2018

IN SHORT

The Situation: On March 20, 2018, the governments of France and Luxembourg signed a new double tax treaty that will replace the current tax treaty dated April 1, 1958 (as amended through 2014).

The Result: The most significant changes in the new tax treaty relate to the implementation of the latest OECD standards, the definition of tax residency, and the withholding tax treatment of dividend distributions.

Looking Ahead: The revised tax treaty could enter into force as early as January 1, 2019, if ratification is completed before the end of 2018. Existing and prospective structures may be affected.

On March 20, 2018, the governments of France and Luxembourg signed a new double tax treaty ("New Treaty") that will replace the current tax treaty dated April 1, 1958 (as amended through 2014).

The rationale behind the New Treaty seems to be a realignment of the tax treatment of certain France–Luxembourg cross-border structures with the latest French and international standards aimed at reducing abusive planning and preventing base erosion.

Some of the major features of the New Treaty are as follows:

- The redefinition of a "resident" person eligible to treaty benefits by: (i) excluding persons and entities that are not liable to tax; and (ii) introducing the criterion of the place of effective management as the tie-breaker to resolve tax residency disputes (Article 4).
- The introduction of a revamped "permanent establishment" definition aimed at tackling strategies used to prevent the recognition of a permanent establishment through agency or commissionaire arrangements, or the exception applicable to activities of a preparatory and auxiliary character (Article 5).
- The insertion of the concept of "beneficial ownership" with respect to dividend, interest, and royalty income for the purposes of eliminating the avoidance of withholding taxes (Articles 10 to 12).
- The introduction of a dividend withholding tax exemption applicable to distributions paid from a corporation liable to tax, when the beneficial owner is a corporation that has owned directly at least 5 percent of the share capital of the distributing corporation for a period of 365 days, including the dividend payment date (15 percent in other cases) (Article 10).
- The increase of the dividend withholding tax rate applicable to distributions paid out of income or gains derived from real estate properties by real estate investment vehicles (e.g., SIICs and OPCIs for France) from the current rate of 5 percent to the standard domestic rate (currently of 30 percent or 15 percent for dividends paid to eligible Luxembourg investment funds). Where the relevant nonresident investor holds less than 10 percent of the real estate investment vehicle, such rate is reduced to 15 percent (Article 10).
- The insertion of specific anti-abuse rules and of a general anti-abuse rule based on the "principal purpose" test (Article 28).

THREE KEY TAKEAWAYS

1. The New Treaty was designed to include the latest international standards aimed at reducing the likelihood of abuse in international tax planning.
2. The New Treaty could have a significant impact on French real estate investment structures involving French real estate investment vehicles (e.g., OPCIs) held by investors based in Luxembourg.

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3. Investment structures involving Luxembourg will likely need to be adapted going forward.

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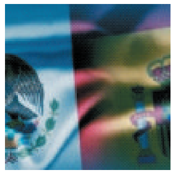

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