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Permanent establishments and tax rulings: Luxembourg Tribunal stresses the need for substance and proper documentation

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In a judgment of 27 March 2026, the Luxembourg Administrative Tribunal confirms that the failure to produce evidence of genuine activity exercised through a US branch precludes recognition of a permanent establishment under the Luxembourg-USA double tax treaty (the "**Convention**"), and that a taxpayer cannot rely on an advance tax ruling whose conditions it has not satisfied.

Background

A Luxembourg company ("**LuxCo**") opened a US branch for the purpose of managing and administering intra-group financial assets allocated to it (the "**US Branch**"). In June 2015, LuxCo obtained an advance tax ruling from the Luxembourg tax authorities ("**LTA**") confirming the US Branch's treatment as a permanent establishment, subject to the condition that evidence of its recognition by the US tax authorities (the "**IRS**") be provided within two years.

Following a tax review, the LTA issued in December 2021 revised tax assessments for 2016 to 2019, on the basis that the documents submitted were insufficient to recognise a permanent establishment in the US. LuxCo's subsequent complaint to the Director of LTA was rejected, leading it to bring proceedings before the Administrative Tribunal.

Key findings of the judgment

1. Advance tax ruling: an unsatisfied condition cannot simply be ignored

This point concerned exclusively the question of how LuxCo was required to prove that it had satisfied the condition imposed by the advance tax ruling – namely, the production of satisfactory evidence of the recognition of the permanent establishment by the IRS.

LuxCo contended that the condition was impossible to fulfil, as the IRS did not issue the document required by the tax office. The Tribunal rejected this argument in unequivocal terms:

- LuxCo had not submitted any piece of evidence to demonstrate that it had contacted the IRS in order to obtain the required document. Its assertion as to the impossibility to obtain such a confirmation from the IRS remained a bare allegation;
- Whether LuxCo had known from the outset – or had subsequently become aware – that the IRS did not issue the required document, there was no indication that it had ever informed the tax office that it was materially impossible to satisfy the condition. Instead, LuxCo had adopted a purely passive attitude. Such a step could have enabled the tax officer to reassess the matter and, if appropriate, to issue a new advance tax ruling, either without that condition or subject to an alternative condition.

By filing its tax returns for 2016 to 2019 whilst knowing it did not hold the required document, and nonetheless applying the tax treatment provided for under the ruling, LuxCo could not be regarded as having acted in good faith. The Tribunal accordingly concluded that the ruling was not applicable to tax years 2016 to 2019.

2. Legitimate expectations: assessments issued on declaration do not bind the administration

LuxCo argued that the tax office had recognised the existence of the US Branch for 2015 without raising any challenge until 2021.

The Tribunal rejected this, noting that under § 100a AO, a tax assessment may be issued on the sole basis of the taxpayer's return, subject to subsequent review within the five-year prescription period. Such assessments do not reflect any examination of the taxpayer's file and cannot give rise to a legitimate expectation that the administration has endorsed the taxpayer's position.

3. No permanent establishment in the absence of evidence of genuine activity

The Tribunal examined whether the US Branch qualified as a permanent establishment under Article 5 of the Convention.

Read in conjunction with the OECD Model Commentary, the Tribunal recalled the cumulative conditions for a branch to qualify as permanent establishment under Article 5 of the Convention: (i) the existence of a place of business, (ii) that place of business being fixed, that is, established at a specific location with a sufficient degree of permanence, (iii) the enterprise carrying on all or part of its business through that fixed place of business, and (iv) that business not being merely preparatory or auxiliary in nature.

The Tribunal held that LuxCo had failed to establish that the cumulative criteria were satisfied. The primary and decisive ground was LuxCo's failure to demonstrate genuine activity through the US Branch: the evidence produced was wholly inadequate. Specifically:

- LuxCo produced only one bank statement per tax year to demonstrate activity over four full tax years. The Tribunal held that a single monthly bank statement per year was manifestly insufficient to establish the existence of genuine activity through a permanent establishment;
- Appointment documents for successive branch managers that established neither that those individuals had carried out any activity in the US nor that they had exercised any management functions; and
- A theoretical list of functions from the Services Agreements annex (with nothing to show those functions were ever performed). Despite the Services Agreements expressly providing for semi-annual invoicing on a cost-plus-5% basis, no invoices were ever issued, no payments were ever made and no corresponding expenses were ever recorded. The Tribunal agreed that this absence of payment and accounting records was, in itself, sufficient to establish that no concrete activity had been carried on through the permanent establishment.

The totality of these elements was sufficient to preclude recognition of a permanent establishment of LuxCo in the US for tax years 2016 to 2018

Furthermore, and albeit by way of an obiter observation, the Tribunal noted that the first and second criteria were not met either. As regards the existence of a fixed place of business, while LuxCo submitted two photographs depicting a room with a desk and a computer, the Tribunal held that these constituted, at most, a prima facie indication of the existence of a fixed place of business, but remained, in the absence of any further supporting evidence, mere circumstantial evidence. It followed that the first and second criteria relating to the existence of a fixed place of business in the US were therefore not satisfied in the present case.

4. Tax year 2019 and § 16(5) StAnpG: the Convention prevails, but domestic law may be used as an interpretive tool

The Tribunal confirmed that the existence of a permanent establishment for 2019 was to be assessed exclusively by reference to the Convention, given the primacy of international conventions over domestic law, a principle that § 16(5) StAnpG (introduced as from 1 January 2019, to resolve interpretation conflicts on the concept of permanent establishment arising between domestic law and treaty provisions) itself expressly preserves.

However, since the Convention does not define the phrase "*through which an enterprise carries on all or part of its business*", Article 3(2) of the Convention authorises recourse to domestic law for interpretive purposes. The LTA was therefore entitled to rely on § 16(5) StAnpG to require LuxCo to demonstrate that its activity in the US constituted, in isolation, an independent activity participating in the general economic life of that country, and to seek confirmation from the IRS to that effect. This did not constitute a reversal of the hierarchy of norms, but it was a direct consequence of the express authorisation in Article 3(2) of the Convention itself.

LuxCo maintained that obtaining such confirmation was materially impossible under US tax law. The Tribunal was unmoved: as with the advance tax ruling condition, LuxCo failed to produce a single piece of evidence (such as correspondence with the US tax authorities) to substantiate this claim.

In any event, the Tribunal noted that the denial of permanent establishment status for 2019 was not exclusively grounded in LuxCo's failure to obtain IRS' confirmation. The substantive analysis of the facts under Article 5 of the Convention, which LuxCo had not supplemented with any additional evidence for 2019, applied mutatis mutandis from the preceding years and was, in itself, decisive.

What this means in practice

- **On advance tax rulings:** Any condition attached to a tax ruling must be taken seriously. A taxpayer who considers a condition impossible to meet must proactively engage with the tax office – not simply apply the favourable treatment whilst knowing the condition is unsatisfied. Where a condition appears impracticable, the taxpayer should document its efforts and seek a revised or alternative ruling.
- **On the proof of a permanent establishment:** Formal availability of staff, office space and a bank account is not sufficient. Taxpayers must be able to produce concrete, verifiable evidence such as minutes, reports, correspondence, invoices and payment records, demonstrating that decisions were actually taken and activities actually performed locally.
- **On assessments issued on declaration:** Such assessments do not constitute a commitment by the administration or evidence that it has reviewed and approved the taxpayer's filing position.

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