

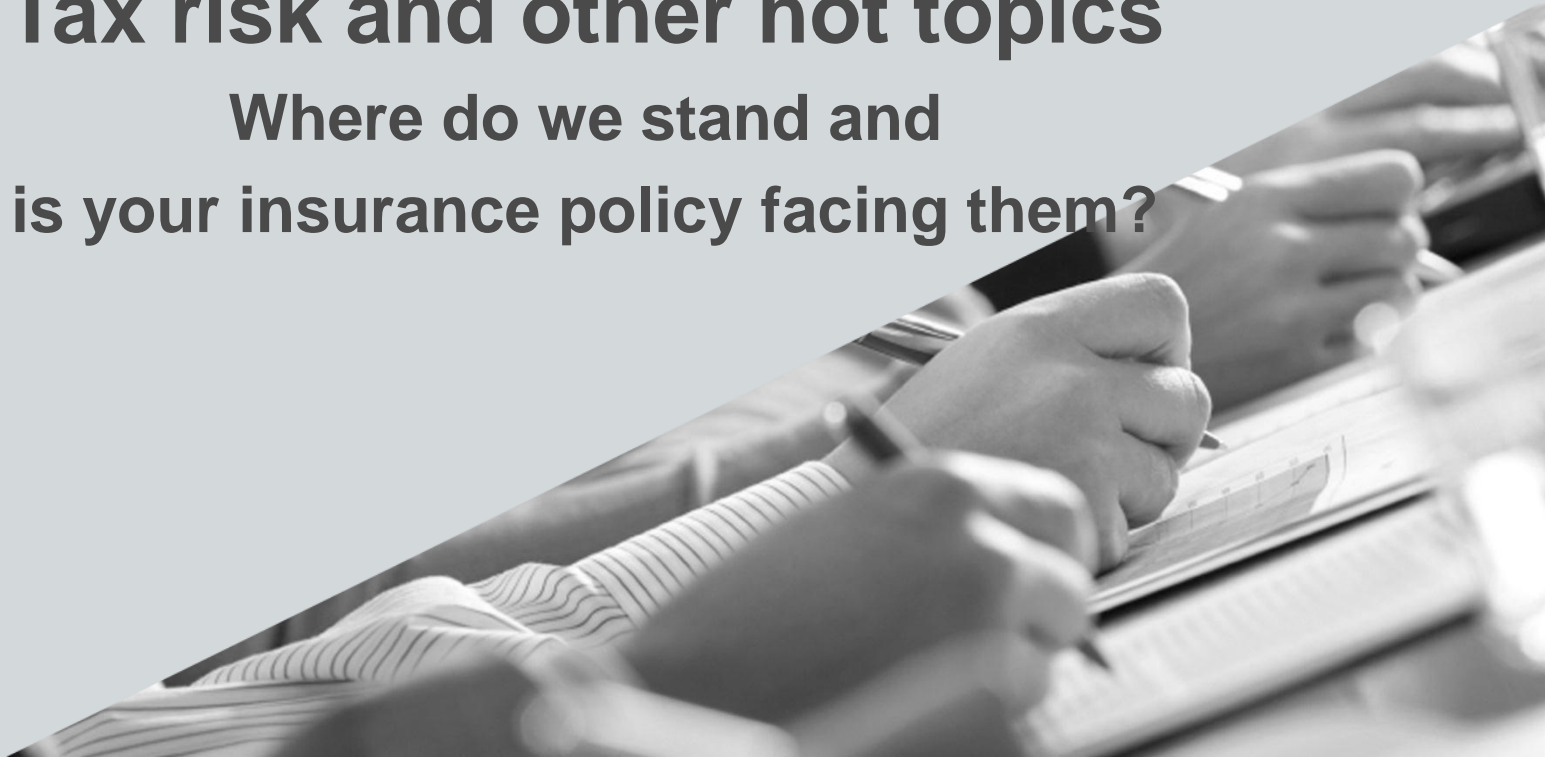


Institut Luxembourgeois
des Administrateurs

Directors' Liability

Tax risk and other hot topics

Where do we stand and
is your insurance policy facing them?



Directors' Liability

- **4.45pm** **Registration & welcome**
- **5.00pm** **Introduction, Carine Feipel, Member of the ILA Board of Directors**
- **5.15pm** **Presentation “Directors’ Liability: Tax risk and other hot topics”, Charles Roemers and Philippe Goutière**
- **6.20pm** **Closing remarks and questions**
- **6.30pm** **Networking cocktail**

Directors' Liability - Tax

Introduction

- Managers / Directors (hereafter “directors”) of Luxembourg companies can be held personally liable to pay outstanding tax liabilities of the companies managed by them
- Legal basis
 - ✓ Direct tax: Art. 109 *Abgabenordnung* (AO)
 - ✓ Indirect tax: Art. 67-2 VAT Law 12 February 1979 as amended

Directors' Liability - Tax

Conditions

1. Non-payment of taxes (IRC, ICC, IF, VAT)
No need for prior legal action against the company (joint liability) or for the company to be insolvent
2. A breach of the company's tax duties
3. Faulty breach (« *schuldhafte Verletzung* ») of the managers' duty to execute the tax obligations of the company (Art.103 AO /Art. 67-1 VAT Law)

Directors' Liability - Tax

Concept of faulty breach (“schuldhafte Verletzung”)

- The tax authorities assess the level of misconduct of the managers to determine if there is a fault
- Recent case law covers both active and passive misconduct of the managers
- The concept of faulty breach has a wider scope than that of tax fraud (Art. 396 AO and subs)

Directors' Liability - Tax

Persons concerned

- Directors *de jure* or *de facto* (Art.103 - Art.108 AO, Art 67-2 VAT law)
- Newly appointed Directors are liable for non-payments which occurred prior to the start of their mandate
- Managers who have ceased their functions remain personally liable for any faulty non-payment of taxes which occurred during their mandate (Art.110 AO)
- Discretionary choice of the tax administration in case multiple Managers may be held responsible for the same facts (all, several or a single Manager only) (Art.118 AO, §7 StAnpG)
- Discretionary decisions must be taken in equity (§2 StAnpG)

Directors' Liability - Tax

Recent case law

- CA 4/04/2017 – N°38878C:
 - ✓ the manager had a role of gullible victim which should not be qualified as faulty breach
 - ✓ he detected the misbehavior of the managing director late
 - ✓ he was not authorized to make a bank order
- TA 6/09/17 – N°38577:
 - ✓ no evidence that another person was in charge of the daily management of the company
 - ✓ managing director according to RCS publications
 - ✓ the fact that company was financially in trouble is irrelevant

Directors' Liability - Tax

Recent case law

- TA 4/10/2017 – N°38216 (conf. CA 27/03/2018 – N°40362):
 - ✓ After his dismissal or the expiration of his mandate, a director remains responsible for the daily management of the company until a new director is appointed
- CA 17/10/2017 – N°39481C:
 - ✓ A manager of category B not in charge of the daily management of the company according to the bylaws remains responsible of the tax obligations of the company

Directors' Liability - Tax

Recent case law

- TA 8/11/2017 – N°38242 (ref. CA 24/04/2018 – N°40520):
 - ✓ Corporate task split amongst the directors cannot be opposed to the tax authorities, because obligations deriving from § 103 AO are of public law
 - ✓ A prudent manager should anticipate the consequences of a possible refusal of the requested tax benefits
- CA 14/12/2017 – N°40076C:
 - ✓ State challenged the right for the tax payer to appeal against TA decision on the grounds that taxes had been paid in the meantime. State proven wrong on this specific point.

Directors' Liability - Tax

Recent case law

- CA 4/1/2018 – N°40079C:
 - ✓ “Heavier” burden on Manager/Service provider who is a professional in legal matters
 - ✓ A prudent manager should anticipate the consequences of a possible refusal of the requested tax benefits
- CA 23/1/2018 – N°40142C:
 - ✓ A manager relying on documents evidencing the work properly done by experts is acting as a normal manager (thus not personally liable)

Directors' Liability - Tax

Recent case law

- TA 5/2/2018 – N°38743:
 - ✓ Argument of “decision in equity” for the first time correctly presented to the TA. TA not adequately addressing this argument.
 - ✓ Due to the particulars of the case, the argument was raised on the basis that the guarantee call was directed against a single manager; argument should be used also in favour of a given manager in cases where all managers are sued.

Directors' Liability - Tax

In practice

- Accept the position if you have a certain level of expertise and only after a due diligence of the company
- Make sure your resignation is published
- Follow the business of the company
- Attend all board meetings
- Document in writing your queries

Directors' Liability - Tax

In practice

- Seek professional advice if there is any risk
- When called after resignation, examine closely the books of the company at the time of your resignation
- Resign quickly when not satisfied about the way the company is run (six month too long)
- With respect to the “decision in equity” argument, bring documented evidence of your role vis-à-vis the other managers
- Insurance
 - Ask yourself if you have adequate insurance

Directors' Liability - Insurance

What if you're called for the tax guarantee ?

- D&O insurance
 - ✓ To protect AFTER claim
 - ✓ Damages/losses
 - ✓ Existing policies: Run-off, Knowledge
- Transactional insurance
 - ✓ To avoid claim
 - ✓ W&I insurance / Tax Liability

Directors' Liability - Insurance

Any other Hot Topics?

- ✓ Fines & penalties
 - Insurable?

- ✓ GDPR
 - Directors' liability
 - Cyber insurance

Directors' Liability - Insurance

In practice

- How is the coverage structured vs. Group structure
 - ✓ Insured Limits
 - ✓ Subsidiaries, territory, directorships ...
 - ✓ Legal entity coverage or individuals only

- Warranty statement or declaration when starting/changing policies

Directors' Liability - Insurance

In practice

- In the policy wording, pay attention to
 - ✓ Definitions (Claim, Damages, Directors, Insured, Losses)
 - ✓ Pre & Post claims extensions
 - ✓ Exclusions (Professional liability / Significant shareholder ...)
- Avoid claims on D&O insurance thanks to
 - ✓ Governance
 - ✓ Other insurance solutions (Tax Liability, W&I, Cyber ...)
 - ✓ Indemnification agreement



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Thank you for your attention!

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