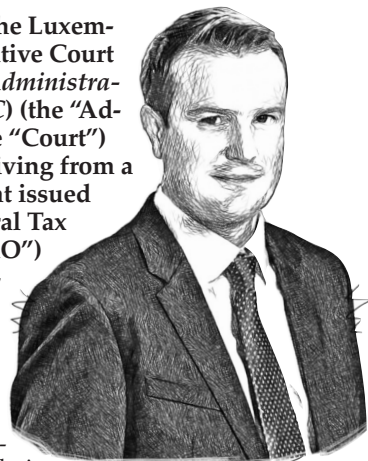


Tax controversy series

Administrative Court - Decision on provisional tax assessments

On 6 August 2025, the Luxembourg Administrative Court of Appeal (*Cour Administrative*, 6 août 2025, n°52321C) (the “Administrative Court” or the “Court”) clarified implications deriving from a provisional tax assessment issued under § 100a of the General Tax Law (*Abgabenordnung*, “AO”) and confirmed that tax offices have full discretion to decide whether to revisit a tax assessment at a later point in time.



In this context, the most interesting question raised in this decision is probably the following: when a provisional tax assessment has been issued based on a return containing an error, can a taxpayer require the tax office to proceed with a further review and issue a (diverging) final tax assessment even after the deadline to contest that provisional assessment has elapsed?

Summary of the case

On 19 October 2017, the taxpayer filed the tax return for FY 2016 (the “original tax return”) for which it received, a couple of weeks later, the corresponding provisional tax assessments¹⁾.

The taxpayer later discovered that some information reported in the original tax return was incorrect. Notably, it had declared a participation that it treated as an exempt asset for net-wealth tax purposes under the Luxembourg participation-exemption regime, while indicating on Form 506A that the dividend distributed by the subsidiary in FY 2016 would remain fully taxable. Realizing the mistake, it attempted to correct it and proceeded to file an amended version to also request the application of the Luxembourg participation exemption regime on the dividend received.

Hence, the taxpayer filed a rectified tax return on 12 February 2018, a few days too late.

Indeed, the tax office swiftly notified the taxpayer on 19 February 2018 that, since the deadline to either request a rectification or file an administrative claim (i.e. within 3 months as of the issuance of the tax assessment) had elapsed (on Wednesday 7 February 2018, i.e. only a few business days before the 12 February 2018, being a Monday), such revised return would not be considered, and no new tax assessments would be issued.

The taxpayer did not reply to the tax office but reached out to the Director of the Luxembourg direct tax authorities (“LTA”) almost 3 years later, on 15 December 2021. The letter sent, considered by the Director as a formal hierarchical appeal, was however deemed inadmissible due to late filing. In addition, the Director indicated that, in any case, tax agents should enjoy discretionary power to decide whether a provisional tax assessment should be subject to further review.

Unsatisfied with the outcome, the taxpayer filed an appeal with the Administrative Tribunal which, however, confirmed the Director’s decision (*Tribunal administratif*, 18 décembre 2024, n°48041). An appeal to the Administrative Court followed.

Decision of the Administrative Court

The Administrative Court only addressed the question of whether tax offices should be legally obliged to amend provisional tax assessments issued based on § 100a AO when a taxpayer files a revised return. In this respect, the arguments sustained by the latter may be summarized as follows:

- The concept of *res judicata*²⁾ invoked by the LTA should not apply and no final character should be attached to the provisional tax assessment, as the latter has expressly been issued “subject to later review” within the statute of limitation period (i.e. 5 years).

- The request introduced earlier (i.e. request to consider the rectified return) should not be assimilated to either a rectification or an administrative claim but rather as a notification addressed to the relevant tax office that the original tax return was incorrect and hence the presumption of veracity should not apply.

- Parliamentary proceedings of the Luxembourg law of 19 December 2008 (which introduced § 100a AO) establish that the LTA have discretion to issue either a provisional assessment under § 100a AO or a final assessment under § 204(1) AO, yet that discretion should not be interpreted to include the decision of whether to undertake a subsequent review — especially when the assessing authority has been notified of an error. Were that the case, it would contravene the principle of fairness enshrined in § 2 of the tax adaptation law (*Steueranpassungsgesetz*, “SAnpG”).

The Court, however, had a diverging interpretation of the intention of the legislator. Quoting the parliamentary documents relied upon by the taxpayer, the judges noted in that respect that “the decision to issue an assessment on the basis of a tax return [was] discretionary and [did] not need to be accompanied by reasons” and that in an assessment issued following the filing of a tax return, the LTA should “reserve the right to carry out subsequent enquiries and audits of the file, but is not under an obligation to do so”³⁾ (4).

On this basis, the Court ruled that the legislator vested the LTA with discretionary powers on two levels:

1. At the point a tax return is filed: The LTA should be at liberty to either apply the procedure under § 100a AO (i.e. issuance of an automatic provisional tax assessment) or to carry on the review of the taxpayer’s tax situation and deliver a final assessment.
2. After issuance of a provisional tax assessment: The relevant tax office should have discretion to decide whether the tax position of the taxpayer re-

quires further review and whether a final tax assessment should be issued.

In line with previous decisions, the Court further held that provisional assessments are subject to the same remedial routes as final assessments — a rectification request under § 94(1) AO, an administrative claim under § 228 AO, or a hierarchical appeal under § 237 AO — but all remedies are subject to the same three-month limitation period, effective from the date of the issuance of the assessment. Because the taxpayer filed the amended return on 12 February 2018, after the three-month period had expired on 7 February 2018, and failed to respond to the tax office’s 19 February 2018 letter, the Court found that the taxpayer had not pursued available remedies in a timely manner and dismissed the appeal.

Hence, coming back to our initial question in the introduction, the short answer is no. A taxpayer, who has unfortunately missed the three-month limit to challenge a provisional tax assessment issued on the basis of a tax return filed with a mistake to his disadvantage, cannot require the tax office to reexamine the situation and issue a final tax assessment.

Key takeaways

This case law is interesting as it deals with a situation that we, as tax advisors, come across regularly. Although we may regret that it does not result in a positive outcome for the taxpayer, the decision is consistent with the position already taken by the LTA and the administrative Courts alike⁶⁾, which is that the content of a provisional tax assessment issued in accordance with § 100a AO may only be revisited at the LTA’s discretion.

In the case at hand, the judges explained that, in line with the legislator’s intention, the Luxembourg law allows taxpayers, in principle, to be assessed on the mere basis of what has been reported in their tax returns (in cases where the tax offices choose not to conduct a subsequent review). An assessment issued in those circumstances should therefore not be characterized as substantively adverse, since it would reflect the taxpayer’s own declaration. The corollary is that taxpayers are not entitled to require a reassessment simply because they deem the outcome unfavorable.

Accordingly, this decision makes clear that proactivity is the taxpayer’s best ally: any request to amend a tax return or the corresponding assessment must be submitted within three months of the tax assessment’s issuance, failing which the taxpayer will be precluded from pursuing any available remedies.

As with all decisions, this decision, though predictable, remains potentially open to criticism. Describing the tax assessment issued under § 100a AO as “provisional” and subject to later review by the tax office may somehow create a misleading sense

of legal certainty. Such formulation can indeed be read as suggesting that errors arising from an incorrect return could be corrected at any time so long as no final tax assessment has been issued.

Moreover, the discretionary power granted to the LTA to either revisit or leave unamended such provisional tax assessments, even after having been notified of a mistake made by the taxpayer, risks the perception of arbitrariness, inconsistency and bad faith in administrative conduct. In that regard, it could legitimately raise questions whether the administration would have shown the same reluctance to amend the tax assessment had the taxpayer, conversely, erroneously claimed the benefit of the Luxembourg participation exemption regime.

In its legal reasoning, the Court explicitly discarded the taxpayer’s claim that this solution would contravene the principle of fairness enshrined in § 2 StAnpG.

As a closing remark, we will note that the Court indirectly suggests what approach the taxpayer should have followed. Indeed, the Administrative Court spontaneously mentioned that its findings regarding the principle of fairness as enshrined in § 2 StAnpG do not render impossible the objective unfairness requirement that could be needed, for instance, in a request for courtesy reduction under § 131 AO⁶⁾. This statement from the Court, that was not strictly required in its legal reasoning, could be perceived as a free piece of advice kindly given to all taxpayers ending up in the same situation in the future about the right procedure to follow to maximize their chances of success (i.e. the request for courtesy reduction procedure).

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1) Provisional tax assessments issued based on § 100a AO are generated automatically, as they merely reproduce the information provided in the corresponding tax returns. They also leave the door open for the tax office to audit, and potentially challenge, the submitted tax returns within a 5-year period which starts running on the 1st January which follows the year during which the tax liability arose.

2) In French: *force de chose jugée*.

3) Unofficial translation by the authors. Original french version: « La décision de procéder par voie d'imposition suivant déclaration est discrétionnaire, elle ne doit pas être motivée », et à travers un bulletin d'impôt sur déclaration, le bureau d'imposition « se réserve le droit de procéder ultérieurement à l'instruction et au contrôle du dossier, mais sans pour autant y être obligé ».

4) Doc. parl. N°5757, commentary, p. 15.
5) Cour administrative, 13 février 2020, n° 43115C

6) « Cette conclusion relative à l'analyse du critère de l'équité prévu par le § 2 StAnpG dans la cadre de l'examen de la validité d'une décision d'un bureau d'imposition de ne pas procéder à un contrôle ultérieur suite à l'émission d'un bulletin sur déclaration reste cependant sans incidence sur la vérification, dans le cadre d'une demande de remise gracieuse sur pied du § 131 AO, de l'existence d'une iniquité objective qui pourrait, le cas échéant, résulter entre autres des délais et effets de la procédure d'imposition sur la situation du contribuable (cf. Cour adm. 13 mars 2020, n° 43115C, Pas. adm. 2024, V° Impôts, n° 895). »