

Regularisation of tax liabilities from the past and asset structuring in the future under the Liechtenstein-Austrian tax agreement

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Introductory remarks

Following lengthy negotiations at the governmental level, Liechtenstein and Austria signed a tax agreement on 29 January 2013 that is intended to permit cooperation between the two countries in the area of taxation. This agreement will enable Austrian taxpayers to regularise past tax liabilities and at the same time ensure regular taxation in the future¹. The agreement is likely to enter into force and effect on 1 January 2014.

Since Liechtenstein's legal system is, unlike that of Switzerland, based to a significant extent on the use of private asset structures such as foundations, establishments and trusts, it was, of course, necessary to take these structures into account in order to be able to move forward with the agreement. The ultimate goal was to give Austrian tax residents a simple, attractive solution that would enable them to regularise undeclared assets or capital income regardless of whether they hold bank accounts or are

founders or beneficiaries of asset structures in Liechtenstein.

The most important advantage of the new tax agreement is that clients who are affected can regularise their tax situations as regards asset structures in Liechtenstein and continue to maintain the relationships of confidence and trust with their Liechtenstein trustees that have developed over the years without the slightest legal uncertainty.

At the same time, the tax agreement will also allow clients to opt for a Liechtenstein asset structure in combination with attractive structuring options that are permissible under current tax law:

- Liechtenstein's link with the Swiss currency
- Exhaustive possibilities for asset protection
- Flexible asset and succession planning
- Diversification of assets in several countries

This is made possible in particular by arrangements that take into account the legal systems of both jurisdictions and are as a result consistent with specific Austrian tax laws as well as standing practices in Liechtenstein.

¹ Please contact us if you would like to receive further information on the wording of the agreement. You will also find the text on the website of the government of the Principality of Liechtenstein at [www.regierung.li/Ministerium für Finanzen/Entwicklung intern. Steuerabkommen](http://www.regierung.li/Ministerium_für_Finzen/Entwicklung_intern_Stuerabkommen)

Fiscal regularisation

1. Decision tree

Clients can achieve fiscal regularisation in one of three ways. The decision tree below can help determine whether a client must regularise his or her tax situation on the basis of the tax agreement.

2. Who is affected?

The *persons* affected within the meaning of the agreement include the following:

- 1) *natural persons*, regardless of nationality,
- 2) *who were resident in Austria for tax purposes on 31 December 2011*,
- 3) *have assets* (bank account or securities account) on deposit with a *Liechten-*

stein paying agent (bank or trustee) as of *31 December 2011* and *1 January 2014*,

4) *and are beneficiaries* of such assets.

Regarding *asset structures*, the tax agreement is applicable in the case of:

- 1) *natural persons*, regardless of nationality,
- 2) *who were resident in Austria for tax purposes on 31 December 2011*
- 3) *and are beneficiaries* of assets held by an asset structure
- 4) *that was under management by a Liechtenstein trustee on 31 December 2011 and 1 January 2014.*

Beneficiaries for such purposes will regularly include the contributors (founders) and recipients (beneficiaries) of the assets of Liechtenstein asset structures.

The fact that the bank account is held in the name of the Liechtenstein asset structure is irrelevant in such cases; the only thing that is important is who the ultimate beneficial owner of the asset structure is.

However, persons who are not the beneficial owners of assets held by an asset structure or who became resident in Austria for tax purposes only after 31 December 2013 are not affected.

3. What asset structures are affected?

All *domiciliary companies* are affected. These include the following:

- Establishments and foundations
- Trusts and trust companies
- Similar structures that are not engaged in any trade manufacturing or other commercial business activity.

4. What assets are affected?

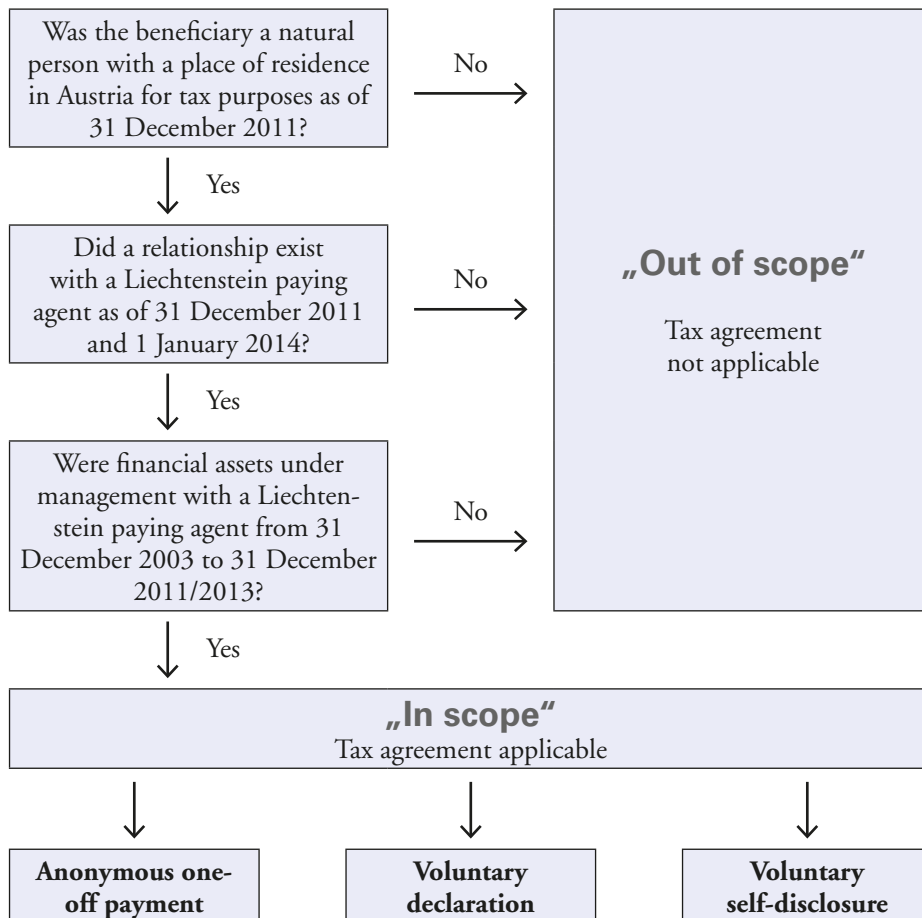
The agreement essentially applies to assets that are either held directly in bank accounts or securities accounts with a Liechtenstein bank or held by an asset structure in Liechtenstein or in another country and managed by a Liechtenstein trustee and qualify as what are referred to as “bankable assets”.²

5. What assets are exempted?

Assets held in bank accounts or securities accounts that are subject first and foremost to the Swiss-Austrian tax agreement are, however, exempted. Assets that are subject to Austrian capital gains withholding tax are also exempted. Finally, the contents of safe deposit boxes are also exempted.

6. Can I benefit from the tax agreement as a new client?

The tax agreement governs retrospective taxation of assets as well as future taxation of capital income and asset structures. The agreement applies to persons interested in regularisation of tax issues from the past who were clients prior to 1 January 2012. In the case of new cli-



² In particular, reference is made to assets as defined by Art. 4(1)(g) of the Asset Management Act (Vermögensverwaltungsgesetz – VVG). This definition coincides with the definition of financial instruments contained in Directive 2004/39/EC on markets in financial instruments (MiFID)

ents, i.e. clients who have established asset structures on 1 January 2012 or thereafter or are beneficiaries thereof, fiscal regularisation is no longer possible.

New clients may, however, still of course opt for voluntary disclosure in Austria, which enables them to avoid prosecution and avail themselves of the benefits of the tax agreement in the future.

7. Distinctions between anonymous regularisation, voluntary declaration and voluntary self-disclosure with immunity from prosecution

The tax agreement leaves it up to the clients themselves to decide whether to opt for anonymous regularisation. Depending upon the individual case, there are various reasons for considering anonymous regularisation. Those who feel that this is the right option basically need undertake nothing. They are not required to take any steps, but must simply ensure that the funds required are available for a one-off payment to be made on 31 May 2014.

In contrast, those who do not prefer the protection of anonymity may find that voluntary declaration is the right option. This requires that the client “actively” notify the paying agent of the voluntary declaration in writing by 31 May 2014. Voluntary declaration is the equivalent of voluntary self-disclosure with immunity from prosecution.

Clients who would like to regularise their tax situations proactively now, i.e. before the tax agreement goes into effect, can opt for voluntary disclosure, which is accompanied by immunity from prosecution. In the case of both voluntary declaration and voluntary self-disclosure accompanied by immunity from prosecution, we recommend that those affected seek the guidance of an Austrian tax expert or lawyer before initiating the disclosure process.

8. Advantages and disadvantages

As is often the case, each individual situation must be assessed separately. The best solution is always the one that best takes into account the needs of the respective client. In any case, the following considerations may facilitate the decision-making process:

Anonymity: There may be good reasons to opt for an anonymous approach. However, clients who avail themselves of this option must be prepared to make a one-off payment of 15%–30% (up to 38% under special circumstances). In the final analysis, the client “pays” for settlement of the following types of tax liabilities:

- Income tax
- Value added tax
- Estate and gift tax
- Foundation entrance tax
- Insurance tax

It is also necessary to point out that the one-off payment results in *anonymous and worldwide* settlement of taxes due on bankable assets insofar as they are held by an asset structure with a Liechtenstein paying agent. As a result, Liechtenstein can be used to achieve total regularisation of past tax liabilities on an anonymous basis.

Voluntary declaration/voluntary self-disclosure: These options allow clients to regularise their individual situations vis-à-vis the financial authorities in Austria in a transparent manner. Our experience has shown that these options are as a rule more economical than an anonymous one-off payment. Here too, it is necessary to examine closely the circumstances involved in the individual case together with an Austrian tax expert.

9. „Out of scope” options

Clients may decide to forgo the opportunity to take advantage of the tax agreement.

In such cases, they should be aware that paying agents must report assets

withdrawn from Liechtenstein to the Liechtenstein tax administration by 31 May 2015. The tax administration will forward this information to the responsible Austrian tax authority if the assets are transferred to any of the 10 most common territories. These reports will not include personalised data, but rather statistical data on the individuals involved. Group requests directed at these countries/territories or Liechtenstein by Austria would then be only one of the conceivable reactions to such measures.

Taxation of future income under the tax agreement

1. General

All natural persons resident in Austria for tax purposes as of 1 January 2014 may avail themselves of the possibility of anonymous settlement of tax liabilities in connection with future income.

Whereas all asset structures will be treated as “transparent” under the agreement for the purposes of regularisation of past tax liabilities, a significant distinction will be made as regards taxation of future income as of 1 January 2014.

This distinction will involve the difference between transparent and non-transparent asset structures, the criteria for making this distinction being based exclusively on the perspective of the Austrian tax authority.

2. Transparency

In the case of transparent asset structures, annual income (dividends, interests, capital gains, etc.) will be attributed to the respective beneficiaries for tax purposes and tax in the amount of 25% withheld at source, as is the case with tax on capital gains in Austria. Paying agents will be responsible for remitting the 25% withholding tax on such income.

Such clients can also opt for voluntary declaration and include income from

transparent structures in their private tax returns.

3. Non-transparency

In the case of non-transparent asset structures, income is not attributed to the client, but rather to the asset structure. As a result, income is retained within the asset structure without any tax implications in Austria (fiscal protection). Tax in the amount of 25% then becomes due only upon distribution of income to the beneficiary or beneficiaries.

Note should be taken of the fact that the fiscal protection is effective only if the asset structure is an independent legal entity and resident within the meaning of the tax agreement (cf. AG, GmbH, foundations and establishments). Liechtenstein trusts, however, are not legal entities and are considered transparent for tax purposes.

4. Distinction between transparency and non-transparency for tax purposes

Transparency will consistently be assumed if an asset structure exhibits one of the following qualities:

- Existence of an explicit or implied mandate agreement with a trustee
- Right to recall foundation council by founder, beneficiary or related parties at any time
- Membership of founder, beneficiary or other related party on the foundation council with the right to issue instructions to the foundation council

If these criteria are not met *cumulatively*, the asset structure is considered non-transparent.

5. No foundation entrance tax in the case of transparent asset structures

No foundation entrance tax is due when a transparent asset structure is established. Clients who do not need the fiscal protection provided by an asset structure for tax purposes can opt for a transparent asset

structure. Despite its fiscal transparency, it is still possible to achieve optimum asset protection and diversification in terms of tax exposure with such an asset structure.

6. Foundation entrance tax in the case of non-transparent asset structures

In return, foundation entrance tax is due in the case of asset structures that are considered non-transparent. If the structure is disclosed to the Austrian tax authorities, the foundation entrance tax rate is 5%. The rate increases to 7.5% in the case of Liechtenstein private asset structures.

A structure is considered to have been disclosed if the most recent versions of all documents pertaining to the internal organisation of the foundation or comparable pool of assets and the management and the use of the assets (such as in particular foundation deed, addenda and comparable documents) are made known to the Austrian tax authorities.

If an asset structure is not considered to have been disclosed, foundation entrance tax in the amount of 7.5% is due (10% in the case of Liechtenstein private asset structures), which is the “price” that is paid for such non-disclosure.

Despite the discrimination against Liechtenstein private asset structures as compared with Austrian private foundations, i.e. foundation entrance tax rate generally in the amount of 2.5%, it is still possible for legal persons to achieve interesting results under the new taxation rules that entered into effect with the new Liechtenstein Tax Act on 1 January 2011.

Examples of fiscal asset structuring

1. Transparent asset structuring

Franz wants to establish a foundation and creates a transparent foundation. He wants to retain complete control of the foundation because he basically does not trust anyone else. Austrian law does not

allow such comprehensive control in the case of Austrian private foundations. A Liechtenstein family foundation allows him to retain such control. The traditional instruments for such purposes are: (i) mandate agreement between Franz and the Liechtenstein trustee as well as (ii) right of Franz to control and recall the foundation council at any time at his sole discretion.

Liechtenstein family foundations are considered fiscally transparent under Austrian law. As a result, the income from Franz’s family foundation is attributed to him. He declares the income in his income tax return and pays capital gains tax in the amount of 25% on that income. Since the foundation is considered fiscally transparent, neither is foundation entrance tax due when the assets are initially contributed to the foundation nor are funds taxed upon distribution. For practical purposes, the tax authority treats the assets of the foundation as a private bank account.

This gives Franz investment flexibility; he can invest the assets of the family foundation in other countries, take advantage of provisions of double taxation agreements that make it possible to avoid deduction of tax at source and protect his assets by availing himself of the advantageous provisions of Liechtenstein legislation governing forced heirship.

2. Non-transparent asset structuring – disclosed

Franz wants to establish a foundation and creates a non-transparent family foundation in Liechtenstein. He is not bothered by the fact that the structure, his role as founder and the identity of the beneficiaries will be disclosed to the Austrian tax authority.

Franz can opt either for an Austrian private foundation or a Liechtenstein family foundation.

Franz decides in favour of an Austrian private foundation. Foundation entrance tax in the amount of 2.5% is initially due

upon formation of the foundation. The foundation then pays corporate income tax or interim tax in the amount of 25% of the income generated. Qualifying dividend income is not subject to tax. Franz then pays capital gains tax in the amount of 25% of retained earnings (not including assets initially contributed to the foundation) upon distribution and liquidation.

Franz is not convinced that taxation of private foundations in Austria (PF-AT) is more advantageous. He tends towards a non-transparent, disclosed family foundation in Liechtenstein (FF-LI). Foundation entrance tax in the amount of 5% is due upon formation of the foundation. The foundation's income – dividends, interest income and foreign rental income – is exempt from taxation. Franz then pays capital gains tax in the amount of 25% of retained earnings (not including assets initially contributed to the foundation) upon distribution and liquidation.

Simple calculations show Franz that the tax burden incurred from the time of formation of a Liechtenstein family foundation to the time it is liquidated is, relatively speaking, lower despite the higher foundation entrance tax (the “break-even point” in the example occurs after three years):

	FF-LI	PF-AT
Foundation entrance tax	5.00%	2.50%
Income tax per year	1'200	25.00%
Liquidation	25.00%	25.00%
Invested assets	1'000'000	
Annual return	40'000	4.00%

Liquidation of an Austrian private foundation entails no tax liability since the income tax paid in the course of the preceding 10 years is applied in its entirety towards the tax due upon liquidation, which is not possible in the case of a Liechtenstein family foundation. However, the tax disadvantage is marginal, especially if the effect of interest is taken into account.

3. Non-transparent asset structuring – NOT disclosed

Franz wants to create a non-transparent, NOT disclosed foundation.

A punitive tax in the amount of 25% becomes due upon formation of a non-transparent foundation in Austria that is not disclosed. In Liechtenstein, the foundation entrance tax rate of 7.5% becomes due in the case of the formation of a non-transparent but not disclosed foundation.

In addition to the lower foundation entrance tax, Franz also benefits from the fact that ongoing taxation is lower, as is shown in the case described above.

Conclusions

1. Fiscal certainty for the past and for the future

The tax agreement will enable clients who are resident in Austria for tax purposes to regularise their tax situations and achieve fiscal certainty as regards their asset structures in the future. They

will be able to decide whether to opt for anonymous or transparent regularisation. Admittedly, the anonymous solution is as a rule more expensive, but it can prove to be the ideal way to take into account personal needs in terms of discretion. Voluntary disclosure of asset structures with immunity from prosecution is more economical and is preferred by clients under “normal” circumstances.

2. Attractive taxation of Liechtenstein asset structures in the future

Despite the discriminatory effect at the level of the foundation entrance tax, Liechtenstein family foundations will still represent an attractive option for Austrian clients regarding asset and succession planning. They permit interesting fiscal solutions as well as structuring options that are not driven by fiscal considerations but rather by a desire to achieve legal certainty and continue relationships based on trust and confidence that have developed over the decades between clients and trustees.

3. Challenge for trustees and banks

This tax agreement is likely to enter into effect on 1 January 2014. Trustees and banks are currently implementing the necessary processes. This includes identification of clients and asset structures affected as well as compilation of the statistical data for submission to the Austrian tax authorities. The challenge involved here is to implement these processes and at the same time inform and continue to serve and assist clients.

	Foundation entrance tax		Income tax per year										Liquidation	
	1	2	3	4	5	6	7	8	9	10				
FF-LI	50'000	1'200	1'200	1'200	1'200	1'200	1'200	1'200	1'200	1'200	1'200	1'200	1'200	84'500
PF-AT	25'000	10'000	10'000	10'000	10'000	10'000	10'000	10'000	10'000	10'000	10'000	10'000	10'000	0
Assets FF-LI	950'000	988'800	1'027'600	1'066'400	1'105'200	1'144'000	1'182'800	1'221'600	1'260'400	1'299'200	1'338'000	1'376'800	1'415'600	1'253'500
Assets PF-AT	975'000	1'005'000	1'035'000	1'065'000	1'095'000	1'125'000	1'155'000	1'185'000	1'215'000	1'245'000	1'275'000	1'305'000	1'335'000	1'275'000
Tax advantage FF-LI	-25'000	-16'200	-7'400	1'400	10'200	19'000	27'800	36'600	45'400	54'200	63'000	71'800	80'600	-21'500

4. How can ATU assist you?

ATU can provide you with the information you need on all important aspects regarding the tax agreement and keep you up to date on new developments. We can provide concrete advice that exhaustively covers the advantages and disadvantages of one-off payment, tax withheld at source, declarations and voluntary disclosure. Finally, we can analyse your situation, quantify available options and recommend a qualified tax professional who can provide the advice and assistance required in connection with voluntary self-disclosure in Austria.

The author of this article, Hansjörg Wehrle, of Allgemeines Treuunternehmen, will be pleased to provide you with further information.

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