The provisions of the TIEA/MoU concluded between the Principality of Liechtenstein and the United Kingdom of Great Britain and Northern Ireland and their effect on Liechtenstein Foundations and Trusts

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Abstract

This article introduces the reader to the core provisions of the Tax Information Exchange Agreement and the Memorandum of Understanding concluded by the Principality of Liechtenstein and the United Kingdom on 11 August 2009. The author then explores situations in which a move to the United Kingdom might entail tax benefits for both foreign settlers and beneficiaries of a Liechtenstein Foundation/Trust.

Key points

- The TIEA between Liechtenstein and the United Kingdom fulfils the OECD standard according to Article 26 of the OECD Model Tax Convention 2008 and will be applied as of 1 April 2015.

- The MoU introduces a 5-year taxpayer assistance and compliance programme and a special disclosure facility for persons wishing to regularise their UK tax affairs.

- UK clients benefitting from Liechtenstein Foundations and Trusts can rely on the general qualifications of trusts and foundations.

- With the conclusion of the TIEA/MoU there are planning opportunities for foreign persons moving to the UK for a certain period of time.
Introduction

On 11 August 2009, the Government of the Principality of Liechtenstein (‘Liechtenstein’) and the Government of the United Kingdom of Great Britain and Northern Ireland (‘the UK’) signed an Agreement on Tax Information Exchange (‘TIEA’). As regards, the contents of this TIEA, it has to be pointed out that it only fulfils the standard OECD criteria according to Article 26 of the OECD Model Tax Convention 2008 and its provisions will apply as of 1 April 2015 onwards. Before that date, a request will only be dealt with if it is related to criminal tax investigations or a UK person has applied for any of the disclosure facilities (Ordinary Disclosure Facility ‘ODF’, New Disclosure Opportunity—NDO, Liechtenstein Disclosure Facility ‘LDF’).

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On the very same day, Liechtenstein and Her Majesty’s Revenue and Customs (‘HMRC’) signed an additional Memorandum of Understanding Relating to Cooperation in Tax Matters (MoU). The MoU deals with the introduction of a five year taxpayer assistance and compliance programme by Liechtenstein as well as with the corresponding introduction of a five year special disclosure facility for persons wishing to regularize their UK tax affairs by HMRC.

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The Liechtenstein special disclosure facility started in September 2009 for existing clients and in December 2009 for new clients and shall remain available until April 2015. It is not just existing clients of Liechtenstein financial intermediaries that can make use of this facility, but also new clients who establish relevant connections to Liechtenstein. Instead of the usual 20 year timeframe, the period of assessment to UK taxes will be limited to the 10 years not going back beyond 6 April 1999. Taxpayers are given the option of paying a simplified single composite rate of tax of 40 per cent on the income and net gains.

Core provisions of the Liechtenstein Disclosure Facility

Scope

Liechtenstein financial intermediaries will be under a duty to identify certain natural and legal persons who or which the respective intermediary knows or has reason to know may be liable to taxation in the United Kingdom. When such a person is identified, the financial intermediary will be under a duty to notify this person. Unless this person provides evidence to the financial intermediary and certain certification that the person is not liable to UK tax or is compliant with his UK tax obligations in relation to his Liechtenstein connected affairs within the five year period, the Liechtenstein financial intermediary will then be required to:

(a) cease providing relevant services to that person; or

(b) if the financial intermediary for legal reasons is unable to comply with this obligation, it shall follow any other directions according to procedures approved and agreed by the panel.

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HMRC on the other hand obliges itself to make available a special disclosure facility
to each person who notifies HMRC pursuant to the taxpayer assistance and compli-
ance programme. Where it is determined that the person is liable to taxation in the
UK, the basis for assessment will be on the terms of the special disclosure facility
limiting the penalty and the applicable period of assessment. The tax will be calcu-
lated either according to effective rates or under a so-called composite rate tax.

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assessment will be on the terms of the special disclosure facility limiting the pen-
alty and the applicable period of assess-
ment.

This special Liechtenstein disclosure facility will generally be available to all persons
with new or existing fiduciary, company or other holding structures or financial ac-
counts in Liechtenstein during the five year period. The Liechtenstein Disclosure Fa-
cility also applies to Foundations/Trusts set up in another jurisdiction but where the
majority of the board members are acting from within Liechtenstein.

Excluded from benefitting from this special disclosure facility are persons already
under investigation by HMRC as of the date of signing of the MoU. On the other
hand, persons who were previously under investigation by HMRC and who know-
ingly did not disclose their interest in any relevant property will be able to participate
in the disclosure facility but will not be able to benefit from the limited penalty pro-
vided for in the disclosure facility. Furthermore, any person previously contacted by
HMRC under the terms of the ODF or the NDO will be able to participate in the dis-
closure facility but will not be able to benefit from the limited penalty provided for in
the disclosure facility. The relevant penalty will not, however, be higher than the pen-
alty provided for under the NDO.

**Written guidance**

Liechtenstein and HMRC have generally agreed on the written guidance approach
for purposes of the MoU concerning companies, trusts and foundations as detailed in
the appendices to the MoU. This implies that, by joint declaration, exchange of let-
ters, issuance of frequently asked questions and answers, or otherwise written guid-
ance on Liechtenstein structures and their treatment as a general matter will be pro-
vided by HMRC, with a view to assisting Liechtenstein financial intermediaries to fulfil
their obligations under the MoU as well as to provide clarification to relevant persons
making use of Liechtenstein legal entities or fiduciary relationships. HMRC will con-
firm the generally agreed guidance.

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vided by HMRC.

For avoidance of doubt, nothing contained in appendices to the MoU is to affect the
ability of affected persons to rely on UK law or practice permitting alternative charac-
terization, recognition and treatment. The ultimate UK tax consequences for UK tax-
payers hence will depend on the particular facts as is the case where United King-
dom or other common law entities or fiduciary relationships, such as Trusts, are in-
volved.

**Characterization of Liechtenstein structures**

Liechtenstein Trusts (‘Treuhandschaften’) and Foundations (‘Stiftungen’) are charac-
terized, recognized and treated as trusts for UK tax purposes within the framework of
the provisions contained in the MoU.

This confirmation from HMRC assures UK clients benefitting from Liechtenstein
Foundations and Trusts that they can rely on the general qualifications of discretion-
ary, fixed-interest, interest in possession trusts/foundations or of any other possible
form the client may find in Liechtenstein practice. Careful planning is nevertheless
essential to achieve the adequate qualification and results with respect to UK taxa-
tion.
UK clients benefitting from Liechtenstein Foundations and Trusts that they can rely on the general qualifications of discretionary, fixed-interest, interest in possession trusts/foundations or of any other possible form the Client may find in Liechtenstein practice.

Cooperation between Liechtenstein financial intermediaries and their UK clients

Liechtenstein, knowing both the concept of foundations as well as of trusts, can offer any choice of structure that will fit into the UK legal and tax environment. The provisions of the MoU make the cooperation between UK clients and Liechtenstein professionals easier and more straightforward.

If a Liechtenstein financial intermediary (lawyer, trustee, accountant and banker) has a UK person (from the tax point of view) as his client, it is important to know that the MoU stipulates that tax compliance cannot just be established by the UK client and the Liechtenstein professional, even if they are both knowledgeable on the UK tax system. A Liechtenstein financial intermediary dealing with UK clients who have a private bank account or are parties to a Liechtenstein Trust or Foundation, must assure that these UK clients are in fact UK tax compliant. The Liechtenstein financial intermediary will therefore have to ask for and hence rely on one of the following confirmations on an annual basis:
(1) A letter to be issued by a UK tax adviser (accountant or lawyer) confirming that the UK client is tax compliant with a specific asset/specific assets, especially in case of remittances; or

(2) A certified or notarized copy of the UK tax return where the amount remitted from the Foundation/Trust and the amount reported on the return can be matched. The name of the Foundation/Trust should be mentioned; or

(3) Asking for a waiver from HMRC mentioning the name of the foundation/trust and the amounts remitted.

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Apart from assuring the tax treatment of Liechtenstein Foundations and Trusts, the TIEA/MoU with the United Kingdom also enables a proactive cooperation between UK and Liechtenstein professionals. The enactment of the amended UK Anti-Money Laundering Legislation which incriminates tax offences at a standard far beyond that of many other countries like Liechtenstein, has made cooperation between UK and Liechtenstein-based practitioners more and more difficult, regardless of the fact whether the clients are (deemed) UK domiciled and/or (ordinarily) resident. The MoU/TIEA, by facilitating and hence promoting the cooperation between UK and Liechtenstein practitioners, has changed this situation and the reputation of Liechtenstein has become different, and more positive.

Nevertheless, Liechtenstein shall safeguard its understanding of the relationship between tax authorities and tax payers, as it does not aim to regulate the Liechtenstein financial intermediaries in the same way as is this found in the UK. In consideration of these differences which will hence be present also in the future, the MoU for different reasons foresees that any UK clients benefiting from Liechtenstein financial intermediary services must leave the country if they will not be compliant by 31 March 2015.
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**Opportunities arising from the conclusion of the TIEA/MoU**

Although the UK tax laws changed again on the 6 April 2008 and restricted a lot of options which previously had favoured foundations/trusts, there are still various opportunities for foreign (offshore from the UK point of view) persons who (or whose family members) move to the UK for a certain period of time. As the UK differentiates between a resident and domiciled status, a foundation or trust can be very beneficial to any foreign client moving to the UK. Such a client, by making use of a foundation/trust, may be able to plan the moment when his taxes become payable.

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For example, a father living in a foreign country sets up a foundation/trust for his family members who are moving to the UK. Let us assume this happens after 5 April 2008, and all of the beneficiaries are 18 years or older. The settlor grants €2 million
to the structure. The beneficiaries of this discretionary structure are his family members who move to the United Kingdom, and let us furthermore assume they plan to stay there for various reasons for around 5 to 10 years. The structure will hold its bank account outside of the UK. Especially, in the first seven years, the situation is favourable for these beneficiaries. As long as no distribution is made by the foundation board or trustees and remitted to UK for the use of a beneficiary, no tax falls due. The beneficiary must however report upon distribution the amount remitted to the UK as income and/or gain (if no income is available out of the capital payment by the foundation/trustee) and will have to pay taxes which will start at 18 per cent and go up towards 40 per cent (or more, depending on the annual budget results submitted by UK Treasury). After seven years further restrictions will apply. And, as stated above, the Liechtenstein financial intermediary acting as foundation board or trustee must assure himself that a distribution to this person in fact is declared to UK HMRC for tax purposes.

The proposed foundation/trust solution guarantees that the beneficiaries will use the funds in the way which the settlor (father) has initially laid out since foundation board/trustees will implement the initial wishes of the settlor by exercising their full and unfettered discretion (if a discretionary structure). This structure offers options like protection from creditors (if a beneficiary goes bankrupt) and from forced heirship claims (within certain restrictions as for example the two year limitation period), assures protection against spendthrift family members, provides for succession into family businesses (in case of further ‘underlying’ structures), or simply offers tax planning purposes.

In addition, a foundation or trust upholds confidentiality, guarantees automatic ‘succession’ into the investments/assets upon the death of any beneficiary as they no longer belong to the founder/settlor nor beneficiary, and also the ‘transfer’ to the successor beneficiary is automatically provided for by the provisions of the by-laws or trust deed. No court intervention is required, and no special application to any authority must be made if any family member being a beneficiary of such a structure passes away in a foreign country. A costly application to relevant courts/authorities hence is not necessary and no delay is involved with the ‘transfer’ of investments/assets to successor beneficiaries. This, amongst others is the clear advantage created by the use of such structure: the settlor is freed of all worries on how to fulfil the legal requirements for the transfer of patrimonial rights of a deceased person. The passing away of settlor(s)/beneficiaries does not have any consequence with respect to the transfer of property rights, as the foundation itself/the trustees and no longer the settlor are the legal owners of the assets.
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Conclusion

Under the newly concluded TIEA/MoU, Liechtenstein Foundations and Trusts can provide planning opportunities by focussing on asset protection, capital preservation, estate planning, succession planning and tax minimization. And if a client can draw a benefit from such privileges in a foreign jurisdiction which at the same time is acceptable to his/her country of residence, then all the better.


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