

Exchange of information by Liechtenstein in tax matters

In view of significant recent developments concerning tax that affect the Principality of Liechtenstein, we believe it is important to keep you updated on events in this area.

A. Tax Information Exchange Agreement (TIEA) with the US

A large number of countries, including Bermuda, the Cayman Islands, Jersey, Guernsey, the Isle of Man, Aruba, Antigua, the British Virgin Islands and the Netherlands Antilles, have already concluded a TIEA with the US. With effect from 1 January 2010, Liechtenstein will join this list. The TIEA will apply retroactively to the tax years 2009 and after.

TIEAs are concluded with countries with which the US is not ready to conclude double taxation agreements (DTAs) in line with the OECD model convention. The TIEA with Liechtenstein has the same features as those concluded with the other countries. In particular, it requires the founders and beneficiaries of foundations, trusts and companies to be disclosed in response to a specific request from the other state. Exchange of information is not automatic. The request must be individual and phrased in specific terms: general enquiries or “fishing expeditions” are not permitted. The request is likely to be complied with if the country submitting it already has concrete information regarding a tax offence in connection with a bank or structure. Moreover, requests will only be responded to if the requesting state adequately demonstrates that it has failed to obtain the necessary information despite having exhausted all the available means of doing so. This will be the only reason for turning to the contracting partner. Until now, the US has adopted a very cautious approach to making such requests to other countries.

Liechtenstein has decided to join other countries in signing a TIEA in order to ensure that the nation's banks continue to have access to US securities trading. The conclusion of the TIEA means that the requirements for an extension of Liechtenstein banks' QI status have been satisfied.

Privacy will continue to be protected after the TIEA comes into force. The agreement reached is designed to further enhance the existing good relations with the US, ensure stability for the financial centre and secure legal certainty for bank and fiduciary clients.

During 2009, the Liechtenstein government will lay before Parliament the provisions necessary for compliance with requests for administrative and legal assistance, thus paving the way for the agreement to take effect on 1 January 2010.

The media both at home and abroad have seized on the TIEA, with some viewing it as an abandonment of the protection of privacy and bank-client confidentiality.

Since Allgemeines Treuunternehmen works closely with Swiss financial intermediaries, we firmly believe that the media coverage needs to be put into its correct perspective.

It is particularly important to note that the signing of the TIEA will result in very few noticeable changes to the basic conditions for Liechtenstein foundations or companies with a Swiss bank account. International clients engaging in cross-border asset protection will essentially continue to operate in the same environment as before.

The actions that Liechtenstein will in future take under the TIEA are already familiar in Switzerland, in the form of administrative assistance to the US under the double taxation agreement. Taken together with the MoU (Memorandum of Understanding) between Switzerland and the US, this document makes clear that such assistance will extend to cases of tax fraud¹, which in practice involves specific forms of wrongdoing. The MoU contains a number of practical examples.

Luxembourg, meanwhile, has signed a legal assistance agreement with the US that goes further than the administrative assistance provided by Switzerland, in that it extends to areas other than tax fraud. Furthermore, Luxembourg has abolished the requirement for the offence to be classified as criminal in both Luxembourg and the US.

In conclusion, therefore, the TIEA between the US and Liechtenstein is likely to have little appreciable impact in practice, given the value attached to collaboration with Swiss financial intermediaries in the international context – especially when investments are made by Liechtenstein foundations and companies in Switzerland or Luxembourg.

B. QI (Qualified Intermediary) – agreement between the banks and the US IRS in particular

Another matter of topical relevance is the bilateral agreements that Swiss and Liechtenstein banks have entered into with the IRS in order to obtain QI status. These agreements are currently being amended, renewed or interpreted differently to take account of the changed circumstances. One issue being discussed is whether, from 2010 onwards, the IRS will expand the scope of its bank audits to include due diligence files and require the involvement of US-domiciled auditors in the proceedings. If this plan is implemented, it is likely to have a far more noticeable effect on international investors than tax cooperation between administrative bodies and courts.

¹ Tax fraud need not necessarily involve the use of forged or falsified documents. It can be assumed to have taken place if a taxpayer engages in activities designed to confuse and mislead the tax authorities with a view to illegally and substantially reducing the amount of tax paid. However, the case law indicates that specifically fraudulent activities, tricks or what is termed a “scheme of lies” are invariably required. One simple lie does not in itself satisfy the requirement for fraudulent intent. (Swiss Federal Supreme Court Decision 125 II 250 cons. 3b with notes)

C. Anti-fraud agreement between Liechtenstein and the EU

Liechtenstein is currently in negotiations with the EU regarding the latter's anti-fraud agreement, with a view to enabling the country to join the Schengen area along with Switzerland (possibly from November 2009). The wording has been unilaterally published by the EU. Liechtenstein has distanced itself from this move, because the interpretation of certain clauses of the agreement has not yet been approved. The TIEA influenced the agreement, though as of January 2009 the two do not cover exactly the same ground. As a member of the EEA, Liechtenstein will ultimately be able to make demands of its own to the EU, with a view to underlining its own interests.

Thank you for attention in this matter. Should you have any questions, please do not hesitate to contact us.

Allgemeines Treuunternehmen