International Fiscal Association

2015 Basel Congress

cahiers de droit fiscal international

VOLUME 100B Offprint

The practical protection of taxpayers' fundamental rights

1938-2015

Branch Reporters
Martina Benedetter*
Cordula Wytrzens**

Summary and conclusions

Liechtenstein is a small principality with approximately 37,000 inhabitants. In 2011, Liechtenstein tax law was subject to major amendments with the aims of increasing transparency, international compatibility and compliance with EEA law. Before and after the amendments of 2011, Liechtenstein tax law in its practical application has been characterised by a cooperative approach; this has led to several procedures which could be regarded as best practice by other lawmakers and administrations.

The cooperative approach also shows in the issue of tax assessments, in which the Liechtenstein Fiscal Authority tries to reach agreements with the taxpayer in several procedures; e.g. if a tax return is amended, a short statement has to be given on what and why it was changed. This enables the taxpayer to assess very quickly whether to raise an objection or not.

After the peer review of the OECD's Global Forum, Liechtenstein had to change the regulations on the exchange of information and allow under certain circumstances that a taxpayer would not be informed by the information-holder about the request for exchange of information. This can be seen as a serious breach of a taxpayer's fundamental rights but the Liechtenstein lawmaker has taken these concerns seriously and has taken action to ensure that these fundamental rights are guaranteed while complying with international standards.

During a mutual agreement procedure (MAP), it is ensured that a taxpayer is kept up to date at all stages of the process. Furthermore, the fiscal authority is always open to requests for meetings or if a taxpayer wants to submit additional information. After an MAP has been finished, tax assessments can be changed even if the limitation period has lapsed.

In the law-making process, individuals and representatives of relevant parties have opportunities to engage at several steps. They can be part of working groups which are often established by the government and participate in drafting the law. Once a draft law is published, anyone can join in the consultation process and state whether they think that a draft law is, in their opinion, discriminatory or disproportionate, hard to put into practice or even unconstitutional. After a draft law has passed Parliament, any citizen is also free to start a referendum and ask for a public vote within a certain time limit.

* Ecovis Kanzlei Thomas Hosp Liechtenstein
** Fiscal Authority of the Principality of Liechtenstein, Chief Tax Expert International Treaties

To sum up, the reporters were able to identify several procedures which can be regarded as good practice. The report will give an overview of some of the most interesting practices in the areas of legislation, tax assessments, MAPs and the exchange of information.

1. The issue of tax assessment

Liechtenstein's tax code contains the provision that the facts of a case should be assessed mutually by the fiscal authority and the taxpayer. In practice, this means that the taxpayer can get most of the relevant information by contacting the person in charge at the fiscal authority. On the one hand, taxpayers can contact their municipal tax office if they have questions or are not sure how certain facts of the case will be dealt with. On the other hand, even tax advisors may have some questions, because compared to other jurisdictions, there are not many published administrative directives or much case law which can be used as a source of information. To bridge this gap, there is the possibility of requesting an advance ruling from the Liechtenstein fiscal authority. In this request, the applicant has to give all the important facts of the case (involving the names of the taxpayers for whom the advance ruling would be applicable), concise questions on which there are doubts as well as his/her own legal opinion on how the questions raised could be resolved. The fiscal authority then confirms whether it shares the legal opinion given in the application. If this is not the case, the application will be denied. As a rule, such advance rulings are limited to a period of five to ten years. However, if the facts of the case or the law change, the ruling will expire automatically. Even if a ruling was issued, the ruling does not limit the fiscal authority in any way in its right to audit the taxpayer. If a situation arises whereby a taxpayer has not given all relevant facts of the case and the fiscal authority becomes aware of this, taxes will be assessed on the basis of a new factual analysis. Please note that rulings in Liechtenstein are only a way of discussing doubts about the application of tax laws and regulations and do not provide for any lumpsum taxation.

If the fiscal authority has to make amendments to the filed tax return, it is required by law to give an explanation on what and why it changed this part of the tax return. If only minor changes are made, there is generally just a short remark such as, for example, "the child allowance is only granted for children until 18". However, if more complex issues are affected such as a notional interest deduction, the tax inspector has to show how he calculated the deviating basis for the notional interest deduction and will use a special form in which the whole calculation is shown, with comments on what exactly was changed.

In the reporters' opinion, this procedure offers several advantages. First, it gives a quick overview of what has been changed and not only the deviating figures, which are often difficult to comprehend. Taxpayers can therefore assess more easily and quickly whether to file an objection or not. Since there is no legal obligation to be represented by a tax professional at this stage of appeal, an easy way to assess the changes is even more crucial for the taxpayer and therefore helps to reduce the (procedural) costs for him/her. Second, taxpayers can learn from these amendments and therefore improve the efficiency of the tax system as a whole if

they know what went wrong in their last tax return; they can thus avoid making the same mistake the next year. Again, this helps to reduce costs not only for the state but also for the taxpayer. Thirdly, if the assessment is under dispute, the explanations given by the fiscal authority can be the subject of appeal by the taxpayer. Because of these explanations, the competent court can easily recognise which facts are unchallenged by the claimant and which facts or which assumptions are in dispute.

2. Cross-border procedures

2.1. Exchange of information in tax matters

2.1.1. Ordinary procedure for the exchange of information

Figure 1 gives an overview of the ordinary procedure for exchange of information.

The fiscal authority, as the competent authority in Liechtenstein with respect to the exchange of information in tax matters, receives requests for information. Before obtaining the information from the holder of the information (who is as a rule not the taxpayer itself but third parties such as banks or trustees), the fiscal authority examines whether the request is in line with the applicable treaty and whether there is any reason to decline the request. It should be noted that Liechtenstein does not exchange information if the request is based on illegally obtained information, e.g. stolen bank data, or if it constitutes a fishing expedition by the requesting state. The exchange of information based on stolen data violates Liechtenstein's *ordre public* and therefore requests which are suspected to be based on such data are looked at critically. In those cases where the information holder can prove that the data originate from data theft or in which the requesting state is not able to provide evidence that its request is not based on stolen data, the request will be declined by the fiscal authority.

If the request for information is approved by the fiscal authority, the holder of the information and any other affected person resident in Liechtenstein are notified by the fiscal authority of the receipt of the request and the information contained therein. In Liechtenstein, the fiscal authority does not have to notify a person affected by the request who is not resident or domiciled in Liechtenstein. Such persons have to be notified by the holder of the information. Affected persons resident or domiciled abroad have the right to participate in the domestic proceedings. In certain cases the designation of a Liechtenstein process agent is necessary (e.g. service of decisions, etc.). The holder of the information has to submit the requested information to the fiscal authority. Nevertheless, bank secrecy, insurance company secrecy, attorney–client privilege and fiduciary secrecy provide for an enhanced protection of taxpayers' rights and limit the fiscal authority's possibilities of inspecting documents. In these cases the right to inspect documents is

Bericht und Antrag 2014/54, p. 13.
For a detailed analysis, see also Langer and Moosbrugger (2013), Liechtenstein, in Kristoffersson, Lang, Schuch, Pistone, Staringer and Storck (eds.), *Tax Secrecy and Tax Transparency*.

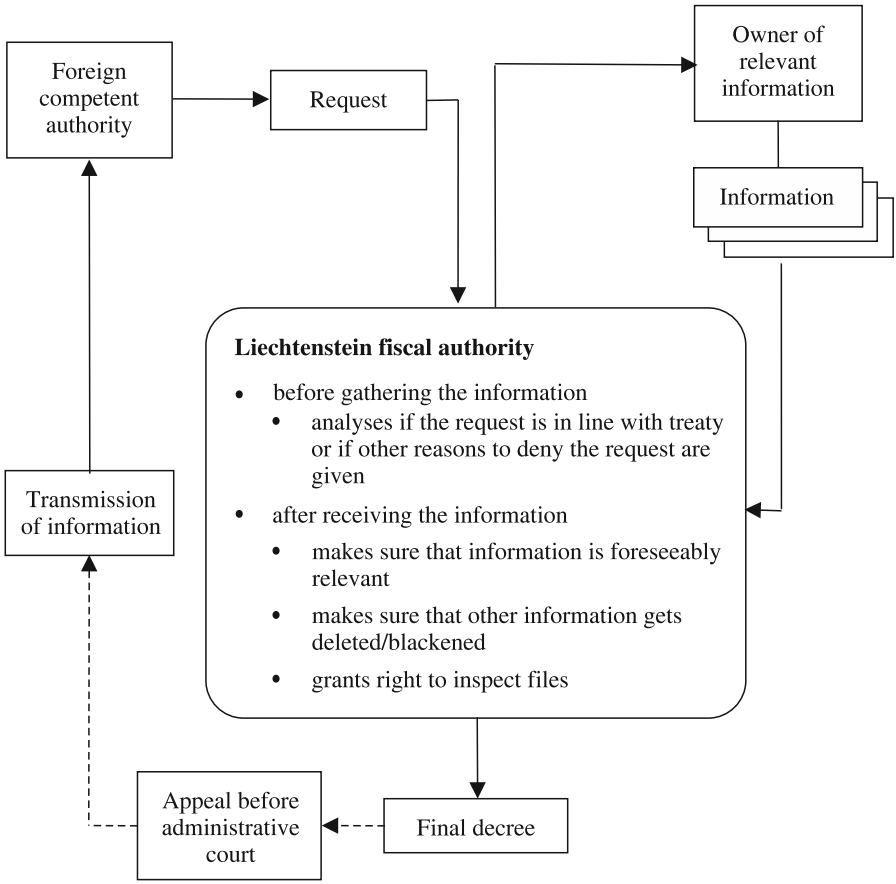

Figure 1. Overview of the ordinary procedure for exchange of information

limited to information concerning ordinary business transactions but does not include any trade, commercial or any other professional secrets.

If the holder of the relevant information does not comply within the given period of 14 days or does not give any information at all, coercive measures such as house or personal searches or confiscations are ordered by the fiscal authority. Once such an order has been approved by a judge of the Administrative Court, the coercive measure is executable immediately and can only be appealed with the final decree. The fiscal authority reviews the documents and filters out the foreseeably relevant information. Information that is not foreseeably relevant for the foreign procedure (determination, assessment, enforcement or collection of taxes with respect to persons subject to such taxes, or the investigation or prosecution of criminal tax matters) is either not to be transmitted or else rendered unrecognisable.

Before issuing the final decree, the entitled parties (affected persons and information holder) may participate in the procedure and exercise their rights (e.g. access to the procedural records), to the extent necessary to safeguard their interests worthy of protection. Access to procedural records or participation in the procedure may be restricted and may be denied with respect to procedural documents.

If the fiscal authority concludes that the request can be complied with, it issues a final decree on the admissibility of the request and on which information shall be transmitted to the competent foreign authority. The final decree is served to entitled persons (persons affected by the request and information holder). In the final decree it has to respond to all arguments put forward by the involved parties. It has to give reasons why certain arguments are taken into account and why some are not. Furthermore, it has to respond to all documents submitted as proof and applications for evidence and give reasons why certain evidence has not been taken into account and why some evidence has been included in the answer to the request for information (estimation of evidence). The Administrative Court has confirmed that this estimation of evidence is mandatory. In the first instance the final decree can be put before the Administrative Court. The judgment of the Administrative Court can be appealed to the Constitutional Court. If no appeal has been filed with the courts, the fiscal authority's final decree is legally binding and the information can be submitted to the requesting state.

The ordinary procedure shows that the rights of the taxpayer (and other persons affected by the request) are seriously taken into account. During the inspection of the files and in connection with the final decree, the entitled persons know the information that has been requested and which information will be submitted to the requesting state. It is also ensured through the estimation of the evidence and the detailed justification in the final decree that the entitled persons can verify why certain information or evidence has been considered or why this is not the case. It should be a minimum international standard that the entitled persons are informed about the information to be submitted and the reasons for doing so.

So far, taxpayers have not often been able to object to the exchange of information as a whole but more often only to the extent of the exchanged information. In a landmark decree, however, the Liechtenstein Constitutional Court ruled that exchange of information on which the act on international administrative assistance in tax matters is not applicable is unlawful and violates the principles set out in the Liechtenstein Constitution. In this case, information was requested by the US Department of Justice. The information in question went back to 2001 and consisted mostly of bank statements which were held directly by US citizens or via foundations or establishments that could be related to them. The Act on Administrative Assistance with the United States was amended not long ago to allow for the exchange of information going back to 2001. However, this is an unlawful retroactive effect which is in violation of the principle of temporal moderation as set out in the Liechtenstein Constitution. However, the court ruled that from 2009 on (the year of the Liechtenstein Declaration, in which Liechtenstein committed

See *Verwaltungsgerichtshof 2013/113* (not published).
Staatsgerichtshof 2013/011.

itself to international standards regarding the exchange of information) all taxpayers with bank accounts in Liechtenstein could have known that standards had changed and that therefore information relating to tax years beginning in 2009 and onwards could be exchanged.

2.1.2. Exception to prior notification

As explained above, during the appeal against the final decree at the latest, the taxpayer has to be notified and granted an inspection of files related to the request of information. During the peer review 2011, the Global Forum recommended that certain exceptions to prior notification should be permitted (e.g. in cases in which the information requested was of a very urgent nature or the notification was likely to undermine the chance of success of the investigation by the requesting jurisdiction). As a consequence, an adjustment of the Act on International Administrative Assistance in Tax Matters (*Steueramtshilfegesetz*) is taking place in Liechtenstein at the moment. The adjustment will also lead to procedural changes in administrative assistance.

As a first step, the Liechtenstein fiscal authority reviews whether the request is in line with the corresponding treaty and whether there is a reason to decline the request. Furthermore, it is examined whether the requirement of the exception of prior notification is met. If the requesting state does not want the taxpayer to be notified, the requesting jurisdiction has to give reasons why the conditions are met. If these prerequisites are fulfilled, the fiscal authority submits the request without any delay to a competent judge sitting in a single chamber of the Administrative Court. The fiscal authority asks for approval of the execution of the administrative assistance under maintenance of the prohibition of information.

The competent judge also reviews whether the request for information is valid. After the review, if the requirements are met, the judge analyses whether the request for information is in line with the Constitution and he makes sure that the request is not an unlawful investigation without grounds. At the same time, the judge checks whether the requirements on a prohibition of information are met. This legal procedure, which guarantees a specific evaluation of each request for information, is unique in international tax law. Liechtenstein thinks that such a procedure is needed because without the notification of the taxpayer of the right to inspection of the files, the right to a fair hearing and the right of appeal are limited.

The taxpayer himself can exercise his rights after the prohibition on information expires. It is intended that at least two years after the requested information has been submitted, the prohibition of information is annulled. This procedure results in an adjournment and not in a total denial of the right to the inspection of the files. The adjournment does not take place automatically, but has to be made credible by the requesting jurisdiction.

Regarding the procedure for involving a judge, Liechtenstein has already had good experience in the field of criminal cases. An independent judge ensures that there are no random and unlawful requests which include a prohibition of information. This should be an international standard; otherwise, there would be a total

See art. 28d StAHG, *Bericht und Antrag 54/2014.*

limitation on the right to inspection of the files, the right to a fair hearing and the right of appeal.

2.2. MAPs

2.2.1. Practical requirements for requesting an MAP

In Liechtenstein in order to initiate an MAP the taxpayer has to file an informal written request, which should include the basic facts of the pending case, with the fiscal authority. There are no further requirements since it should be easy for every taxpayer to contact the Fiscal Authority regarding an MAP. The reporters are of the opinion that this is a good practice because it allows easy access for the taxpayer to the MAP. It should be an international standard that access to an MAP is not arduous because of complex requirements set by the authorities.

The MAP case has to be presented to the fiscal authority within five years, since the (ordinary) limitation period is five years. Article 124 of the Tax Act states that a tax assessment can be reopened in the course of an MAP or arbitration. For instance, if a tax audit takes place in a contracting state, which under its domestic law covers seven years, this can override the ordinary limitation period of five years. The audit could result in a tax assessment that leads to double taxation. If the taxpayer wants to start an MAP, he can apply for it to the Liechtenstein fiscal authority and under the rules set out in the respective double taxation treaty. The aforementioned article has been introduced because an MAP takes quite a long time and it should be ensured that, as in the case above, the tax assessment can be changed so that there is no disadvantage for the taxpayer. This illustrates the good practice that the taxpayer should be safe from double taxation, as Liechtenstein allows cases that go beyond the ordinary limitation period. This should be an international standard, because in this way the taxpayer is protected from unjustified double taxation which might occur after the limitation period has lapsed.

2.2.2. Information from and participation by the taxpayer during the MAP

After receiving a request for an MAP, the fiscal authority looks at the related tax assessments and the submitted information and documents, e.g. financial statements. To understand the case and get more information about it, a meeting with the taxpayer and/or his representative is organised. No general statement can be made on which additional information or documents is needed by the fiscal authority since this depends on the individual case. But such additional information could be contracts, expert statements, transfer pricing documentation or calculation sheets.

On the basis of the information received, the Authority decides whether the case is open to an MAP and the taxpayer is informed about the decision. There are no cases in general which are not open to the MAP, as this is a case-by-case decision of the fiscal authority. If the MAP request is denied by the fiscal authority the taxpayer can ask for a short explanation as to why the case has been refused.

If the case is accepted for an MAP, the taxpayer is informed about all ongoing steps during the MAP. This means the exchange of information between the competent authorities or whether meetings between the authorities are taking place. During the MAP, depending on the complexity of the case, there is at least one meeting with the taxpayer to make sure that he is being updated. If the taxpayer asks for a meeting or wants to submit additional information, the fiscal authority is open to this and will consider this information. The documents received are kept confidential unless it is really necessary to disclose them.

This close cooperation between taxpayers and the fiscal authority can speed up the MAP and lead to a quicker result. In former years, there were cases in which the taxpayer tried to resolve the problem without involving or even informing the fiscal authority, and this led to confusion and misunderstanding and as a result made it more complicated to resolve such cases by an MAP.

Furthermore, there is close cooperation between the different divisions of the fiscal authority during the MAP, so that the person in charge of another division is also informed. Through this close cooperation of the involved parties, Liechtenstein ensures that a fair hearing takes place.

The reporters are of the opinion that the involvement of the taxpayer at an early stage of the MAP is a minimum international standard as it ensures that a fair hearing takes place and that the taxpayer receives all relevant information so that he can respond to it accordingly. It is obvious to the reporters that this is not always possible in countries that have to deal with a large number of MAPs.

2.2.3. Practical implementation of the MAP

Due to the close collaboration of the fiscal authority with the taxpayer the result of the MAP is not a surprise to the taxpayer and as a consequence of article 124 of the Tax Act a tax assessment that has already been issued can be overruled or revised. Also, as a result of the cooperation between the different divisions of the fiscal authority, the results of the MAP can be quickly put in place. This ordinarily takes just a few weeks.

3. Legislation

In 2011, Liechtenstein introduced a new tax Act, which replaced the existing one completely. The legislative process on the new Act involved at an early stage representatives of all relevant associations (e.g. from different industries as well as scholars), as a working group was established. The establishment of a working group is not required by law, but the government is free to do so. Selected representatives of relevant parties, which mean associations and government units, are invited to join the working group. The different representatives can actively participate in the drafting process of an upcoming law. At the drafting stage they can already comment on all aspects of the law and make sure that the law is for example neither discriminatory nor disproportionate. This working process can take some months only or several years, depending on the law. The use of working

groups for the legislative procedure is well established in Liechtenstein and has shown itself to be an efficient instrument in the legislative procedure, since at an early stage it can be ensured that all relevant parties are involved.

The draft law is submitted to the government by the responsible government unit. As a next step, the government has to approve the draft and start the public consultation process (*Vernehmlassung*). During the consultation process the draft law is presented to the public. The law is published on the government's homepage; furthermore, the associations are informed in writing about the start of the consultation process and the deadline for it; they are asked for written statements and opinions. Additionally, there is a press release about the beginning of the consultation process. The published draft law also includes a commentary, which gives explanations on every article of the law.

The duration of the consultation process is normally three months, but can be shortened under certain circumstances. During the three-month period the public has the possibility to give its opinion (*Stellungnahme*) of the draft law. Anybody can state why he or she is of the opinion that the law as a whole or certain articles are discriminatory or disproportionate, hard to put into practice or even unconstitutional. As a rule, this possibility is used by larger groups of stakeholders, such as the Chamber of Trade, Commerce and Industry, the Institute of Professional Trustees and Fiduciaries or the Bankers' Association. When the consultation process is finished, the government analyses and reviews the opinions and statements submitted. On the basis of the draft law, its commentary and the submitted remarks the government prepares a report and proposal (*Bericht und Antrag*) for Parliament. The report and proposal have to describe which statements have been made and how they have been taken into account. As a result, the draft law may be amended because of some of the remarks submitted. Furthermore, the report and proposal explains why this change, compared to the first published draft, has taken place. If, on the basis of a given statement, the government is not sure whether the law is proportionate or non-discriminatory, it can ask external experts to review that part of the law. By involving an independent expert, the government wants to make sure that all remarks are treated seriously and that the law meets all requirements.

At least six weeks before the parliamentary session in which the law is to be dealt with, the government submits the report and proposal to Parliament. This time period should give Members of Parliament enough time to prepare for the public discussion. Parliament has to deal with the proposed law in two different sessions. During the public discussion, Parliament can comment on the proposed law. If Parliament has certain objections, the government has until the second reading of the proposal to adapt the law if needed or to comment on why no change is needed.

After Parliament has approved the law, the referendum period starts. The referendum deadline ends 30 days from the official publication of the law. If citizens are of the opinion that the law is for example still discriminatory or disproportionate or for any other reason of the opinion that the law should not be implemented, they can ask for a public vote concerning the law; 1000 signatures of Liechtenstein citizens are needed within the 30-day period to ask for a public vote. The number of necessary signatures is raised to 1500 if constitutional law or international treaties are involved. If no signatures have been collected at all or if the

required number of signatures is not met, the law enters into force after the referendum deadline.

From the reporters' point of view, this legislative procedure is good practice and should become an international standard, as all relevant parties are already involved at an early stage through their participation in working groups regarding the drafting of a new law. There are several possibilities for citizens to make sure that they can comment on a new law. The reporters are aware that Liechtenstein is small and that this practice may be difficult to adopt in other countries.

ISBN 978 90 12 39505 2
9 789012 395052

Sdu