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The notion of tax and the elimination of international double taxation or double non-taxation

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Summary and conclusions

In Liechtenstein the notion of tax in domestic law is defined by the tax courts which make a clear distinction between taxes and fees. A tax is regarded as an involuntary payment of individuals or legal persons that is enforced without giving an adequate consideration whereas a fee is regarded as an obligatory payment in return for certain public services. Taxes can only be introduced by law while fees can also be levied based on an ordinance issued by the Liechtenstein government or by a public authority.

The Liechtenstein taxes which are regularly covered in treaties' distributive articles encompass personal income and wealth tax, corporate income tax, corporation taxes, coupon tax and real estate capital gains tax. As the taxable wealth is assessed on a notional income of 4 per cent of the assets in Liechtenstein and taxed together with the other income of an individual at combined progressive tax rates, it is not clarified in every treaty whether this notional income tax is regarded as a tax on income or as a tax on capital for treaty purposes.

Legal persons having their legal seat or their effective place of business in Liechtenstein are subject to unlimited corporate income tax liability. As a consequence, all legal persons such as public limited companies, foundations, establishments and registered trusts with legal personality fall within the residence concept of the Liechtenstein tax treaties. The only exceptions are private-asset structures because they are only subject to the minimum corporate income tax in Liechtenstein and are therefore considered not to be resident in Liechtenstein according to several tax treaties.

Partnerships are taxed transparently in Liechtenstein and generally do not fall within the residence concept in the Liechtenstein treaties. Trusts without legal personality are subject to corporate income tax in Liechtenstein only on their income from domestic real estate and domestic permanent establishments irrespective of whether they are constituted in Liechtenstein or in a foreign state. Consequently, they are not regarded as resident under most Liechtenstein tax treaties.

The taxation of fund income in Liechtenstein generally follows the concept that the fund vehicle itself is exempt from corporate income tax on its income. Instead of the fund vehicle, the owners of the fund are taxable on their share of the fund's

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assets and of the fund's generated income. For treaty application funds are deemed to be resident according to most Liechtenstein tax treaties in order to be able to claim treaty relief especially from foreign withholding taxes.

Liechtenstein tax law traditionally tries to avoid double taxation for its residents even without a tax treaty. Thus, income from foreign forestry and foreign permanent establishments derived by Liechtenstein-resident individuals or resident legal persons is exempt from domestic income tax unilaterally. For resident individuals, net wealth from foreign real estate and foreign permanent establishments is exempt from domestic wealth tax.

A credit for taxes paid to another state can be reached in Liechtenstein either based on a tax treaty or – if a tax treaty with the foreign state is absent or not applicable – unilaterally based on reciprocity. However, the foreign taxes must actually be paid and must be comparable to domestic taxes in order to be creditable. Income from foreign permanent establishments and foreign real estate is exempt from personal and corporate income tax by domestic laws without the requirement of reciprocity.

Liechtenstein tax law comprises one general anti-abuse rule and several special anti-abuse rules; all of them are part of the Liechtenstein Tax Act and therefore their scope is limited to direct taxes and capital transfer taxes, especially personal income and wealth tax and corporate income tax. In the fields of international information exchange and administrative assistance the scope of the taxes covered is widened in the tax treaties concluded by Liechtenstein and also includes estate, inheritance and gift tax and value added tax.

1. The notion of tax

1.1. Domestic law meaning of tax

1.1.1. General definition

In Liechtenstein legal persons are subject to a corporate income tax while for natural persons a combined system of a progressive personal income and wealth tax is applicable. All direct taxes, the adherent tax procedure and the fiscal penal law are regulated in the Liechtenstein Tax Act (SteG) which was amended to a large extent by the tax reform in the year 2011. Estate, inheritance and gift tax and capital taxes were abolished in Liechtenstein in 2011. The Liechtenstein value added tax is regulated in a separate Tax Act and is widely in conformity with the Swiss VAT Act because Liechtenstein has a joint value added tax system with Switzerland.[1] According to the customs union treaty of 29 March 1923 between Liechtenstein and Switzerland, Swiss customs duties and import tariffs are applicable for Liechtenstein as well. According to the same treaty several Swiss excise taxes also apply in Liechtenstein based on Swiss laws (e.g. petroleum tax, tobacco tax, beer tax, taxation of distilled spirits). Environmental taxes which include a steering

1 VAT Treaty Liechtenstein–Switzerland, 28 October 1994; Agreement Liechtenstein–Switzerland, 12 July 2012.

effect (e.g. taxes on waste deposits, extra-light fuel oil, ultra-low sulphur diesel and gasoline, carbon dioxide tax) are also the same in Switzerland and in Liechtenstein based on bilateral agreements but they are levied according to Liechtenstein's own laws.

In Liechtenstein tax law there is no legal definition of the term "tax". Therefore, the notion of tax is widely developed by the Liechtenstein tax courts. The Liechtenstein Constitutional Court once stated that taxes are unrequited compulsory payments. In accordance with the doctrine taxes are understood by the Constitutional Court as debts owed by the taxpayer without receiving a consideration in return, whereas fees are regarded as a consideration for administrative expenses.[2] Furthermore, taxes have to be paid to the state of Liechtenstein or to its municipalities without earmarking the funds. For instance, the rise of value added tax from 2011 is used to fund the old-age pension system. Irrespective of this earmarking value added tax is still classified as a tax and not as a fee.

Social security contributions which have to be paid partly by the employer and partly by the employee to the domestic old-age insurance and to the obligatory pension fund are not regarded as taxes in Liechtenstein because the payer receives services in return defined by law. Besides, social security contributions are not paid to the state or to the municipalities, which is another reason why they are not classified as taxes.

1.1.2. Taxes versus fees

In Liechtenstein, taxes can only be imposed by the legislator. Every law passed by the Liechtenstein Parliament and not declared as urgent can be made an object of a legally binding countrywide referendum.[3] However, Parliament can also decide to hold a voluntary referendum on a passed law. The Tax Act of 21 November 1921, which was the first Tax Act ever imposed in Liechtenstein and the ancestor of the current modern tax law, was subject to such a voluntary referendum on 24 December 1922. After some subsequent amendments the Tax Act was again voted on in another referendum on 27 April 1924 and also gained the consent of the majority of the Liechtenstein people in the second referendum. In the following years numerous referenda have been held on matters of taxation in Liechtenstein.

According to the Liechtenstein Constitution direct and indirect taxes must not be levied without the approval of the Liechtenstein Parliament. The fact that such approval has been given must be mentioned explicitly when raising a tax. However, such a levy does not need to be addressed as a "tax" but can also be called a fee or can be given another name.[4] For example, the levy which was due upon the foundation of Liechtenstein-domiciled legal persons without subdivided capital, especially of Liechtenstein-resident foundations and establishments with legal personality, was called a "fee" (in German *Gründungs- und Wertstempelgebühr*) until the year 2011 although this levy had all characteristics of a tax, especially that it

[2] Liechtenstein Constitutional Court of 11 November 1987, no. 1987/012.

[3] See in detail Benedetter and Wytrzens, "The practical protection of taxpayer's fundamental rights", *Studies on International Fiscal Law*, Vol. 100b, p. 503.

[4] See art. 68 para. 1 of the Liechtenstein Constitution.

has to be paid without receiving anything in return. In the tax reform of 2011 it was renamed as *Gründungsabgabe,* eliminating the term "fee".

The Liechtenstein Constitution also allows the legislator to impose a levy which is a combination or mixture of a tax and a fee.[5] As a consequence, for the legislator it is not necessary to make a distinction between taxes, fees and combined levies. Things are different when a levy is imposed by an ordinance which is not passed by Parliament. Ordinances must always be in conformity with the law and must not introduce taxes. If the Liechtenstein legislator empowers the government or a public authority to levy a fee for its services, the differentiation between taxes and fees has to be made because the government or a public authority can only issue an ordinance but not a law. Fees are regarded as a mere compensation for administrative costs. They must not be prescribed arbitrarily and may not stand in obvious disproportion to the public services provided in return. The cost recovery principle is understood by the jurisdiction as the upper limit for all fees.[6] If the amount of a levy exceeds the actual administrative costs considerably, this levy is classified as a tax and not as a fee and cannot be imposed by an ordinance.[7]

In an old case dating back to the year 1986, the Liechtenstein government determined the sum of CHF 2,000 as a fee for a formal decision about a trustee's licence. The applicable law entitles the government to assess the fee in full discretion in the light of all the relevant circumstances, but limited to a maximum amount of CHF 10,000. However, the assessment of CHF 2,000 was regarded as unconstitutional by the Liechtenstein Constitutional Court, because this then relatively high amount stood in obvious disproportion to the public service rendered as the decision of the government was relatively easy to reach without inflicting many costs. As a consequence, this levy was classified as a tax and not as a fee.[8]

Perhaps as a reaction to these court decisions, the Liechtenstein legislator nowadays tends to fix the amount of money which has to be paid for public services directly in the law. Moreover, the legislator sometimes specifies the criteria that have to be met when determining the exact amount of a fee. For instance, in a special rule for the fees of the Liechtenstein commercial register the legislator empowers the government to determine the fees by ordinance and explicitly states that the fees "should be adapted to the time involved and the meaning of the legal act".[9]

As a result, the domestic scope of tax is elementary because the imposition of taxes falls within the competence of the Liechtenstein legislator whereas fees can be imposed by a public authority if it is empowered by the legislator to do so.

1.1.3. Tax credit for foreign taxes

In Liechtenstein domestic law natural or legal persons are entitled to credit foreign taxes against their domestic tax liability according to article 22(2) SteG. The

5 Liechtenstein Constitutional Court of 11 November 1987, no. 1987/012.
6 Liechtenstein Constitutional Court of 5 May 1987, no. 1986/009.
7 Liechtenstein Constitutional Court of 11 November 1987, no. 1987/012.
8 Liechtenstein Constitutional Court of 5 May 1987, no. 1986/009.
9 See art. 984 para. 4 Liechtenstein Person and Company Law (PGR).

tax credit is granted on the basis of an applicable tax treaty or on a unilateral basis provided that reciprocity with the respective state is given. As a general rule, the creditable foreign taxes must be actually paid; a tax matching or a tax sparing credit is not granted under Liechtenstein domestic tax law.

Natural persons can claim a tax credit against their personal income and wealth tax liability. The creditable foreign tax must be comparable to the Liechtenstein wealth and income tax. Neither the law nor the legislative documents include a list of foreign taxes which qualify for a tax credit in Liechtenstein. Foreign income taxes should be generally creditable as an effect of the criterion of comparability. Since Liechtenstein does not levy inheritance and gift taxes any longer, foreign taxes on inheritances and gifts are most probably not regarded as being comparable even if they are part of a foreign income tax system.

According to Liechtenstein domestic tax law foreign taxes are creditable against both the state tax and the community surcharge. When calculating the amount of the tax credit Liechtenstein uses the ordinary credit method. Hence, the tax credit is limited by the tax burden that would apply in Liechtenstein for that type of income. Furthermore, the tax credit is granted under a per-item of income limitation due to article 22(2) SteG.[10]

Legal persons are entitled to a tax credit against their corporate income tax liability. Hereby, the same principles and limitations as for individuals are relevant. The creditable foreign tax must be comparable to the Liechtenstein corporate income tax. The tax credit is granted under a per-item of income limitation according to articles 22(2) and 63 SteG either on a treaty base or on a unilateral base with a reciprocity requirement. As a consequence, foreign withholding taxes on dividends paid to a Liechtenstein legal person cannot be credited because dividends are generally exempt from corporate income tax in Liechtenstein.

1.2. Taxes covered by tax treaties' distributive articles

1.2.1. General remarks

Liechtenstein has concluded 11 double taxation agreements which are currently applicable in 2016 (in alphabetical order with Austria, Germany, Guernsey, Hong Kong, Luxembourg, Malta, San Marino, Singapore, Switzerland, the United Kingdom, Uruguay). Whereas ten of those treaties are mainly structured like the OECD model the old treaty with Switzerland from 1995 only covers certain cases of double taxation. Besides, tax treaties with the Czech Republic, Georgia, Hungary and a revised treaty with Switzerland have been signed, but are not in force in 2016. Finally, Liechtenstein and Austria have concluded one "Rubik" agreement and one tax treaty on inheritance tax which are both in force.

All the classic tax treaties concluded by Liechtenstein contain the provisions of article 2 sections 1 and 2 OECD model which define the scope of taxes on income and on capital. Not covered by the Liechtenstein income tax treaties are in particular indirect taxes such as value added tax and inheritance and gift taxes.[11] Tax fines

[10] Draft Law (*Vernehmlassungsbericht*) of 5 June 2009, p. 108.

[11] See explicitly the comments on the tax treaty with Uruguay, Liechtenstein Government, Report and Application (BuA) no. 83/2011, p. 7.

and penalties, however, even if they are calculated as a percentage of the tax debt, are also not regarded as taxes under a tax treaty's distributive articles. Fines for the late filing of the tax return are also not viewed as part of the tax.

Following article 2(1) OECD model all Liechtenstein treaties are applicable on taxes "imposed on behalf a contracting state, its political subdivision or local authorities". In Liechtenstein the personal income and wealth tax consists of a progressive state tax of 1 to 8 per cent and an additional municipality surcharge of 150 to 250 per cent of the state tax depending on the competent municipality whose council fixes the surcharge annually. Both parts of the income and wealth tax are covered by the Liechtenstein tax treaties. The real estate capital gains tax also includes a municipality surcharge as it is always calculated with a municipal multiplier of two (i.e. 200 per cent of the state tax) regardless of in which municipality the real estate is located and regardless of the residence of the seller. Liechtenstein corporate income tax revenue is divided between the state (65 per cent) and the municipality in which the legal person has its seat or its permanent establishment (35 per cent). If the legal person has its seat and its permanent establishment in different municipalities or if it has several permanent establishments, the municipalities' share of tax revenue is split between the municipalities involved in accordance with the economic situation of the respective legal person concerned. The minimum corporate income tax is entirely revenue of the state. The only municipal tax whose revenue exclusively flows to the municipalities is the dog tax, after some other municipal taxes were abolished in the tax reform of 2011.

All Liechtenstein tax treaties are applicable to "any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes" according to article 2(4) OECD model. As Liechtenstein has only abolished but has not imposed any new taxes during the last decade, the problem of substantially similar taxes has not arisen for Liechtenstein taxes up to now. On the other hand, in the tax treaty with Austria there are still some Liechtenstein taxes listed which have been abolished in the meantime.

Most Liechtenstein tax treaties have been negotiated or concluded after the enactment of the tax reform in the year 2011. Therefore, the tax treaties are based on the taxes existing after the tax reform and the Liechtenstein taxes listed in the general provisions of the tax treaties are in accordance with the current tax law. The only exemption is the treaty with Austria which was concluded in 1969. Although some provisions of this treaty were revised in 2013 the list of taxes is still unchanged and corresponds with the former legal situation in both states. Therefore, Liechtenstein corporate income tax is not mentioned in the treaty with Austria but it was part of the corporation taxes which were covered by the treaty.

According to article 2(1) OECD model the convention shall apply to taxes "irrespective of the manner in which they are levied". Liechtenstein has incorporated this phrase into all its tax treaties. As a matter of fact, Liechtenstein personal income and wealth tax is levied in three different forms. It is levied as a wage tax based on the salaries of the employees, as a withholding tax or upon assessment. For the application of the tax treaties it is irrelevant in which manner the income and wealth tax is levied from a Liechtenstein point of view. For instance, the

Liechtenstein wage tax is reduced to 4 per cent for commuters by the tax treaty with Austria and is reduced to zero by the tax treaty with Switzerland.[12]

The Liechtenstein tax treaties do not give a specific description of the taxes covered by the distribution articles. All treaties include only the definition of article 2(2) OECD model that taxes on income and on capital are understood as "all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation". The only exception is the treaty Liechtenstein–Singapore where the taxes on the total amounts of wages or salaries paid by enterprises and the taxes on capital appreciation are not included in the treaty clause. Nevertheless the tax on capital appreciation is explicitly mentioned as being covered in the legislative materials on which the Liechtenstein government comments in this treaty.[13] In the Germany–Liechtenstein treaty the German trade tax is also listed among the German taxes covered.

Liechtenstein domestic tax law does not encompass any provisions about taxes payable in kind, because such taxes do not exist in Liechtenstein; all taxes have to be paid in cash. However, it cannot be ruled out that such payments in a foreign state may offer an entitlement to a tax credit in Liechtenstein under the same requirements as taxes in cash, as well.

All Liechtenstein tax treaties contain a list of specific taxes in which the following Liechtenstein taxes are enumerated: personal income tax, corporate income tax, real estate capital gains tax, the wealth tax and coupon tax. Additionally, in most Liechtenstein tax treaties corporation taxes are also listed. The German names of the taxes are put into brackets in the list. Liechtenstein does not levy taxes on the total amounts of wages or salaries paid by enterprises.

1.2.2. Personal income tax and wealth tax

All Liechtenstein tax treaties contain the provisions of article 2(1) OECD model and make it therefore necessary to discriminate between taxes on income and taxes on capital. A specific question is whether the notional income within the Liechtenstein combined personal income and wealth tax is regarded as a tax on income or as a tax on capital under article 2 OECD model. In Liechtenstein, gross taxable wealth less the deductions and exemptions is multiplied by a deemed interest rate of currently 4 per cent in order to calculate a notional (standardized) income which is then taxed together with the other income earned at a progressive income tax scale. The calculation can potentially be adjusted by the annual Finance Act so that the deemed interest rate can be higher or lower than 4 per cent for the respective year, but since 2011 there has been no change.

The taxation of the notional income in Liechtenstein stands at the crossroads of income and capital. In favour of a tax on income it can be held that the notional income is a part of the taxable worldwide income of the individual. However, debts

[12] See art. 15 para. 4 of the treaty Liechtenstein–Austria and art. 5 para. 2 of the treaty Liechtenstein–Switzerland.

[13] Liechtenstein Government, Report and Application (BuA) no. 25/2014, p. 12.

exceeding the taxpayer's assets do not lead to a negative notional income but to a notional income of zero. As a consequence, negative capital does not reduce income tax liability. Besides, certain personal deductions, for example for medical expenses, contributions to life insurance or payments of alimony are taken into account in the assessment of the combined personal income and notional income which is a typical aspect of an income tax and does not correspond to the nature of a wealth tax. Against the classification of the notional income tax as a tax on income speaks the fact that the wealth tax is mentioned as a separate kind of tax in addition to the income tax in all Liechtenstein tax treaties. Furthermore the tax on notional income is also due if the taxpayer has no positive actual income.

A classification of the taxation of the notional income under a tax treaty is made only in the protocol of the Liechtenstein–Germany treaty according to which the tax levied on the notional income is explicitly classified as a tax on personal income under article 2 of the treaty Liechtenstein–Germany[14] and of the treaty Liechtenstein–Hungary.[15] Hence, for this treaty the Liechtenstein notional income tax is regarded as a tax on income for treaty purposes and therefore the distributive articles on the taxation of income are applicable. As practical consequence, the German withholding tax on dividends – to the extent that it is levied in accordance with the treaty provisions – can be credited against the Liechtenstein personal income and wealth tax and vice versa. According to the explanatory note by the Liechtenstein legislator the creditability of the personal income and wealth tax to the German income tax leads to the enhanced attractiveness of Liechtenstein as an investment location. As a result, the Liechtenstein metod of taxing investment income in a standardized manner based on notional income is acknowledged by this special protocol provision.[16]

In almost all the tax treaties concluded by Liechtenstein personal income tax and wealth tax are listed among the Liechtenstein taxes covered by the treaty in the sense of article 2(3) of the OECD model, but these taxes are enumerated separately in two different bullet points as "income tax" and "wealth tax". However, apart from the treaties with Germany and Hungary an explicit classification of the notional income tax is not made either in treaty clauses or in protocol provisions or in the explanatory notes of the Liechtenstein legislator.

The tax treaty Liechtenstein–Singapore deals solely with taxes on income. Taxes on capital are not mentioned in article 2 of this treaty, because – as the Liechtenstein government explains – Singapore currently does not impose a wealth tax and does not intend to introduce one in the future.[17] Consequently, the treaty is lacking a distributive article for taxes on capital such as article 22 OECD model. However, the Liechtenstein wealth tax is explicitly mentioned among the Liechtenstein taxes which are covered by the treaty. This leads to the conclusion that the tax on notional income may be regarded as a tax on income under the Liechtenstein–Singapore treaty as well.

14 See protocol tax treaty Liechtenstein–Germany no. 1; Liechtenstein Government, Report and Application (BuA) no.25/2012, p. 12 *et seq*.

15 See protocol tax treaty Liechtenstein–Hungary no. 1.

16 Liechtenstein Government, Report and Application (BuA) no. 25/2012, art. 2.

17 *Ibid.*, p. 12.

Apart from the treaties with Germany and Hungary, under the other Liechtenstein treaties the classification of the notional income tax is not clarified and can only be resolved by treaty interpretation. As a consequence, the treatment of notional income tax in the Liechtenstein tax treaty network remains uncertain. Following current administrative practice the tax on notional income is treated as a tax on income under all Liechtenstein tax treaties. As a consequence, a foreign withholding tax at the rate stipulated in the respective treaty clause can be credited against Liechtenstein wealth tax.

1.2.3. Corporate income tax

Corporate income tax, in German *Ertragssteuer,* is included in the list of Liechtenstein taxes in all treaties except in the treaty with Austria. The taxable base of Liechtenstein corporate income tax is the income of the legal person irrespective of whether it is distributed to shareholders or beneficiaries or not. The tax rate of the Liechtenstein corporate income tax is 12.5 per cent. All legal persons which have either their legal seat or their effective place of business in Liechtenstein are subject to corporate income tax on their worldwide income.[18] Legal persons which have neither their legal seat nor their effective place of business in Liechtenstein are only taxable on profits from Liechtenstein-situated real estate and permanent establishments.[19]

Since Liechtenstein abolished inheritance and gift tax in 2011, gifts received by legal persons do not trigger a gift tax. However, gratuitous transfers of assets to legal persons, especially donations to (non-charitable) foundations or trusts are regarded as gifts in Liechtenstein tax law. In article 47(4) SteG it is clarified that capital growth due to inheritance, bequest or gift is not part of corporate income. Likewise, donations to foundations, foundation-like shaped establishments or trusts by the settlor or by a third person are not subject to corporate income tax at the level of the receiving entity either.

Contributions to companies, e.g. to private or public limited companies or cooperatives by their shareholders or members are not classified as a gift to the company because the contributor receives additional shares in the company as a consideration or the existing shares increase in value. However, these contributions are also not subject to corporate income tax at the level of the receiving company because these payments have not been earned by the company and are therefore not regarded as income. According to article 47(4)a SteG these contributions are not included in the taxable base of the company.

1.2.4. Real estate capital gains tax

The real estate capital gains tax, in German *Grundstücksgewinnsteuer*, is payable on profits realized at the sale of Liechtenstein real estate. Capital gains from Liechtenstein and foreign real estate are exempt from personal and corporate income tax

18 See Felder and Giezendanner, "Tax Incentives on Research and Development (R&D)", *Studies on International Fiscal Law*, Vol. 100a, p. 426.

19 For personal exemptions from corporate income tax see Canete, "Qualification of taxable entities and treaty protection", *Studies on International Fiscal Law*, Vol. 99b, p. 500.

but capital gains from domestic real estate are subject to a separate real estate capital gains tax. Real estate capital gains tax is applicable for both natural and legal persons, resident or non-resident. Capital gains from real estate are taxed at the same progressive rates as the personal income tax rates applicable to unmarried persons, with a minimum rate of 0 per cent and a maximum rate of 8 per cent with an additional surcharge of 200 per cent resulting in a total tax rate from 0 to 24 per cent. The progressive tax rates are applicable irrespective of the type of seller, even if the seller is a legal person.

Gains from the alienation of immovable property situated in one contracting state may be taxed in that state according to article 13(1) OECD model. This clause is included in all treaties concluded by Liechtenstein. As the Liechtenstein real estate capital gains tax only encompasses domestic real estate, Liechtenstein is entitled to levy this tax also on capital gains derived by residents from partner states without any treaty limitations. Vice versa, gains from the sale of foreign real estate must not be taxed in Liechtenstein according to the tax treaties. Capital gains from foreign real estate are also not taxable according to Liechtenstein domestic law, which is especially relevant when the foreign real estate is located in a non-treaty state.

1.2.5. Corporation taxes

Furthermore, in all Liechtenstein tax treaties except in those with Austria and Switzerland "corporation taxes" are enumerated among the applicable Liechtenstein taxes in addition to corporate income tax. In brackets they are translated into German as *Gesellschaftssteuern* using a plural word. Corporation taxes in Liechtenstein tax law included corporate income tax but also used to be understood as a special taxation in the past for certain kinds of companies, foundations and other entities. Before 2011, Liechtenstein holding companies and domiciliary companies were exempt from corporate income tax and only subject to a tax of 0.1 per cent of the paid-up capital or assets invested in the company or CHF 1,000 annually, whichever was the higher. This special taxation was in principle abolished by the tax reform of 2011 and is not applicable for entities founded in 2011 or at a later date but could be maintained for pre-existing entities until the end of 2013. Therefore, in the most recent Liechtenstein tax treaties like those with the Czech Republic and Switzerland corporation taxes are no longer listed.

1.2.6. Coupon tax

Coupon tax is included in the list of Liechtenstein taxes in almost all tax treaties. When investigating whether the tax subject is relevant for the application of the distributive articles in Liechtenstein one has to take a closer look at this tax. Coupon tax originally amounted to 4 per cent and has been levied on every distribution from available profit or reserves from companies with subdivided capital, especially from public limited companies and private limited companies. The taxable person is the debtor of the coupon or of the taxable performance according to article 88e SteG. The shareholder receives the dividend minus the coupon tax.

The 2011 comprehensive revision of the Liechtenstein Tax Law included the abolition of the coupon tax, with the exception of old reserves. "Old reserves" are profits earned up to the end of 2010 which still had to be taxed because they had not been distributed until then. If dividend payments are made after 2010, old reserves are deemed to be distributed first ("first in–first out" principle). During the years 2011 and 2012 it was possible to tax these old reserves at a reduced rate of 2 per cent. At the taxpayer's request, the coupon tax could be levied on the old reserves, even if no distribution was made. The portfolio of existing old reserves must be carried forward, minus the amount of tax levied by request. If this option was not chosen, any subsequent distribution of old reserves in the year 2013 was subject to a tax rate of 4 per cent as in the previous tax law. Until the end of the year 2015, the remaining old reserves were subject to coupon tax, even if they were not distributed as dividends. The coupon tax rate for the tax years 2014 and 2015 was reduced to 2.5 per cent according to article 158(4) SteG. By the end of the year 2015 all old reserves had been taxed and the era of coupon tax in Liechtenstein was finally over.

For tax treaty purposes, coupon tax is regarded as a withholding tax on dividends in Liechtenstein[20] even though the distributing company and not the shareholder is liable to coupon tax. The coupon tax is not qualified as an add-on to the Liechtenstein corporate income tax upon distribution. In conformity with this view, losses of companies which were incurred after 1 January 2011 cannot be set off against "old" reserves.

2. Relevance of the notion of tax in the elimination of international double taxation

2.1. Tax treaty resident concept

2.1.1. General remarks

The Liechtenstein tax treaties basically follow article 4(1) of the OECD model and grant treaty benefits only to persons that are, under the laws of a contracting state, "liable to tax" therein by reason of their domicile, residence, place of management or any other criterion of a similar nature. The treaties do not specify what "tax" means in this context. Natural persons with their domicile or residence in Liechtenstein are subject to unlimited personal income tax and wealth tax and therefore can claim treaty benefits. Legal persons having their legal seat or their effective place of business in Liechtenstein are subject to unlimited corporate income tax liability.

Entities with legal personality which are subject to corporate income tax in Liechtenstein are, in general, entitled to treaty benefits. A taxable entity which is exempt from tax is also considered to be a resident of Liechtenstein if it is subject to tax law but is exempt from tax because it meets all the requirements for exemption specified in the Liechtenstein tax laws, e.g. entities that pursue common-benefit purposes such as charitable organizations.[21]

[20] See Marxer and Partners, *Companies and taxes in Liechtenstein*, 8th edn, p. 174.
[21] See Canete, *op. cit.*, p. 504.

Liechtenstein corporate income tax accounts for 12.5 per cent of the taxable income of a legal person. Besides, for all resident legal persons a minimum corporate income tax applies that amounts to CHF 1,200 per year. Exempt from minimum corporate income tax are legal persons whose exclusive purpose is to operate a commercially conducted business unless their average balance sheet total over the last three business years exceeds CHF 500,000. Non-resident legal persons have to pay the minimum corporate income tax also if they have domestic sources of income, e.g. from a permanent establishment in Liechtenstein. The minimum corporate income tax also has to be paid in a year with taxable losses. It is fully allowable against the "regular" corporate income tax, e.g. if the corporate income tax burden equals or is higher than CHF 1,200 there is no additional minimum tax due.

2.1.2. Partnerships

General and limited partnerships are transparent for tax purposes in Liechtenstein and are not subject to corporate income tax. The partners are taxed individually on their share of the profit according to article 14(4) SteG. Capital assets of the partnership are treated as owned by the partners. If the partners are natural persons, they are liable to personal income and wealth tax; if the partners are legal persons, they are liable to corporate income tax. As a consequence, treaty benefits are basically not available to partnerships themselves. However, according to the tax treaties with Austria and San Marino partnerships shall be treated as residents of the contracting state in which they are established insofar as the partners themselves are residents according to the treaty.[22] According to the treaty with Uruguay, partnerships are generally deemed as resident in Liechtenstein if they are constituted under the laws of and established in Liechtenstein or if constituted and established outside Liechtenstein, are managed or controlled in Liechtenstein.[23] In a similar provision in the treaty with Hong Kong partnerships are regarded as resident in Liechtenstein for treaty purposes if they are incorporated in Liechtenstein or if incorporated outside Liechtenstein, are managed or controlled in Liechtenstein.[24]

2.1.3. Private asset structures (PAS)

Private asset structures (PAS) are subject only to the minimum corporate income tax of CHF 1,200 and do not have to file a tax return. The minimum corporate income tax is payable in advance. Basically, every legal person, e.g. private and public limited companies, foundations, establishments, trusts with legal personality, etc., can apply for the status of PAS if the legal requirements are met. The legal person must not conduct commercial activities in order to qualify as a PAS.[25] A

[22] See art. 4 para. 4 tax treaty Liechtenstein–Austria; protocol no. 4 tax treaty Liechtenstein–San Marino.

[23] Protocol no. 1 on art. 4 of tax treaty Liechtenstein–Uruguay.

[24] Art. 4 para. 1 of the tax treaty Liechtenstein–Hong Kong.

[25] See Wanger, "Liechtenstein's New Tax Law – The End of Offshore Companies?", *Tax Notes International* 2011, p. 635.

PAS may acquire, hold, manage and sell only financial instruments, holdings in legal persons, liquid assets and bank account balances. This restriction rules out the acquisition and management of art, real estate and precious metals, among other things, as well as direct investments in, for example, limited partnerships. In principle, holdings in legal persons are permissible for a PAS, but the legislative text provides that the domain of asset management is overstepped if the PAS itself, its shareholders or beneficiaries in any way influence the management of the company beyond pure shareholder rights.

According to the protocols of the tax treaties with Austria, the Czech Republic, Germany, Switzerland and the United Kingdom legal persons which are subject exclusively to the minimum corporate income tax in Liechtenstein such as a PAS under article 64 SteG shall not be considered residents of Liechtenstein.[26] The reason for these limitation-on-benefits clauses is that a PAS generally does not need treaty protection from double taxation as it is only subject to the minimum corporate income tax in Liechtenstein.

2.1.4. Foundations and establishments

Foundations (*Stiftungen*) and establishments (*Anstalten*) are subject to ordinary corporate income taxation in Liechtenstein according to article 44 SteG. Establishments are subject to corporate income tax even if they do not have a legal personality.[27] If the foundation or the establishment is not treated as a PAS and has either its seat or its effective place of business in Liechtenstein it is ordinarily taxed on its worldwide income. As a consequence, foundations and establishments qualify for treaty benefits as Liechtenstein resident companies according to article 4 OECD model.

In some tax treaties foundations and establishments which are fully liable to corporate income tax in Liechtenstein are explicitly mentioned as being resident in the treaty protocol.[28] The revised treaty with Switzerland contains a special LOB clause for Liechtenstein foundations, foundation-like structured establishments and registered trusts which have a Swiss-resident founder or settlor or Swiss-resident beneficiaries. Ordinary taxed Liechtenstein foundations, foundation-like establishments or registered trusts are only resident if neither the founder nor settlor, nor a beneficiary or a closely related person is entitled to dispose of the foundation's assets and income.[29]

[26] Protocol no. 1 of tax treaty Liechtenstein–Austria; protocol no. 1(c) of tax treaty Liechtenstein–Czech Republic; protocol no. 2(c) of tax treaty Liechtenstein–Germany; protocol no. 2(b) of revised tax treaty Liechtenstein–Switzerland; protocol no. 2(c) of tax treaty Liechtenstein–United Kingdom.

[27] See Gierhake and Peter, "Einsatzszenarien von liechtensteinischen Stiftungen und stiftungsähnlichen Zweckvermögen unter dem neuen DBA Schweiz – Liechtenstein", *Steuer Revue* 70/2015, p. 643.

[28] Protocol no. 1(a) of tax treaty Liechtenstein–Czech Republic; protocol no. 1 of tax treaty Liechtenstein–Georgia; protocol no. 1(a) of tax treaty Liechtenstein–Guernsey; protocol no. 2 of tax treaty Liechtenstein–Malta; protocol no. 4(b) of tax treaty Liechtenstein–United Kingdom.

[29] For further details see protocol no. 2(a) (iii) of revised tax treaty Liechtenstein–Switzerland.

2.1.5. Trusts

Trusts which are established in Liechtenstein law have a legal personality if they are registered trusts ("trust reg.", also called "trust enterprise"), but most trusts are not legal persons. Trusts and registered trusts are both subject to the minimum corporate income tax of CHF 1,200. If the registered trust is constituted under the trust law of Liechtenstein or has its effective place of business in Liechtenstein, its worldwide income is subject to corporate income tax in Liechtenstein unless the registered trust opts for taxation as a PAS. In contrast to registered trusts, trusts without legal personality only have to pay the minimum corporate income tax unless they achieve income from Liechtenstein-situated real estate or a permanent establishment. Trusts without legal personality cannot acquire the tax status of a PAS.

In tax treaty law registered trusts which have their legal seat or their effective place of business in Liechtenstein are qualified as resident persons because they are fully subject to corporate income tax. So they are treated the same way as foundations or other entities with legal personality. Registered trusts meet the definition of article 4(1) OECD model as a person who, under the laws of Liechtenstein, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. In the treaties with the Czech Republic[30] and Malta[31] registered trusts are explicitly stated to be resident persons.

Trusts without legal personality are subject to corporate income tax in Liechtenstein, but only on income from certain domestic sources as pointed out above. This special method of taxation applies for both Liechtenstein and foreign-law trusts regardless of their effective place of business. As trusts without legal personality are not treated as bodies corporate for tax purposes in Liechtenstein and are only taxable on income from domestic sources, they are not qualified as resident companies following the last sentence of article 4(1) OECD model which is included in most Liechtenstein tax treaties. Nevertheless, the special taxation of trusts in Liechtenstein can lead to international double taxation in some constellations in which treaty relief for trusts would be needed.

In a couple of tax treaties the residence of trusts is stated differently. In the treaties with Hong Kong[32] and Uruguay[33] the treatment of trusts is explicitly clarified. Any person other than an individual constituted under the laws of and established in Liechtenstein or, if constituted and established outside Liechtenstein, being managed or controlled in Liechtenstein, is considered to be a resident of Liechtenstein. This extended residence concept also encompasses Liechtenstein trusts without legal personality.[34]

Under the tax treaty with San Marino trusts established under Liechtenstein law are treated as residents of Liechtenstein and beneficial owners of the income insofar as individuals and bodies corporate are subject to tax on that income in

30 Protocol no. 1(a) of tax treaty Liechtenstein–Czech Republic.
31 Protocol no. 2 of tax treaty Liechtenstein–Malta.
32 Art. 3(1)(k) and art. 4(1)(b) (iii) of tax treaty Liechtenstein–Hong Kong.
33 Protocol no. 1 subpara. b of tax treaty Liechtenstein–Uruguay.
34 Liechtenstein Government, Report and Application (BuA) on Liechtenstein–Hong Kong treaty, no. 99/2010, p. 8.

Liechtenstein. Moreover, trusts can also claim treaty benefits from treaties between San Marino and third states insofar as the trust income is attributable to residents in the respective third state.[35]

According to the protocol of the Malta–Liechtenstein treaty a trust is considered to be a resident of Liechtenstein, if one trustee is resident in Liechtenstein and none of the trustees is resident in Malta and vice versa. If trustees are resident in both states Liechtenstein and Malta then the trust is considered to be a resident in the state where the decisions concerning the administration of the trust are taken. If such decisions are taken in both or in neither of the contracting states then the competent authorities of the contracting states will settle the residence of the trust by mutual agreement.[36]

2.1.6. Investment funds

Liechtenstein investment funds which are formed under the EU/EEA Directive for Undertakings for Collective Investment in Transferable Securities (UCITS), the Alternative Investment Fund Managers Directive (AIFM) or under the Liechtenstein Investment Undertakings Act are personally liable to corporate income tax in Liechtenstein provided that the funds have a legal personality. However, the corporate income from the managed assets of the fund is exempt from corporate income tax under article 48(1)g SteG because this income is taxable at the level of the shareholders of the fund.

The treaty application on investment funds is quite heterogeneous and depends very much on the respective partner state. Liechtenstein tries to pursue the policy that investment funds are treated as resident persons for treaty purposes. Consequently, in the tax treaties or treaty protocols with the Czech Republic, Georgia, Germany, Guernsey, Malta, Singapore, the United Kingdom and Uruguay investment funds are explicitly mentioned as being resident in their domicile state.[37] Under the treaties with Singapore and the Czech Republic resident persons include collective investment vehicles, which are established in one contracting state according to its laws even in the case where their income is taxed at a zero rate in that state or is exempt from tax there.[38] As a consequence, Liechtenstein domiciled investment funds are entitled to claim the benefits from these treaties, especially a reduction of foreign withholding taxes, even though the income of the fund is exempt from corporate income tax at fund level but taxable at the level of the investor in Liechtenstein. A special provision is included in the Liechtenstein–Germany treaty: Liechtenstein investment funds can claim a reduction of withholding tax under the tax treaties concluded by Germany with the respective resident state

35 Protocol no. 1 of tax treaty Liechtenstein–San Marino.

36 Protocol no. 3 of tax treaty Liechtenstein–Malta.

37 Protocol no. 1(b) of tax treaty Liechtenstein–Czech Republic; protocol no. 1 of tax treaty Liechtenstein–Georgia; protocol no. 1 of tax treaty Liechtenstein–Germany; art. 4 para. 1 of tax treaty Liechtenstein–Guernsey; protocol no. 3 of tax treaty Liechtenstein–Malta; Governmental Report 25/2014 on tax treaty Liechtenstein–Singapore, p. 15; protocol no. III of tax treaty Liechtenstein–United Kingdom; protocol no. 2 of tax treaty Liechtenstein–Uruguay.

38 Protocol no. 1 of tax treaty Liechtenstein–Czech Republic and Liechtenstein Government, Report and Application (BuA) no. 25/2014.

of the investor.[39] A similar rule is applicable according to the treaty protocol with San Marino.[40]

If a Liechtenstein-domiciled investment fund is shaped as a partnership without legal personality, it is taxed like a "normal" partnership in the Liechtenstein domestic tax law. As a consequence, the income of this kind of investment fund is attributed to its shareholders. On the treaty level these funds are not regarded as being resident under most treaties. Under the treaties with Austria, San Marino, Hong Kong and Uruguay one could advocate the residence of investment funds under the same conditions as the residence of a partnership.

2.1.7. Dual-resident persons

Most tax treaties concluded by Liechtenstein follow the OECD concept of residence, including the tie-breaker rules. As a special provision, the treaty between Liechtenstein and Austria does not contain a tie-breaker rule for persons other than individuals equivalent to article 4(3) OECD model and excludes dual-resident legal persons from treaty benefits totally.[41] As a consequence, dual-resident companies are not entitled to apply the treaty Liechtenstein–Austria even though they are subject to ordinary corporate income tax in Liechtenstein.

Legal persons which opt for group taxation according to article 58 SteG in Liechtenstein continue to be liable for corporate income tax. Their corporate income may be reduced by the losses of other group members which are ascribed to them but a consolidation for tax purposes does not take place within a group. So dividends between a group member and the group parent are possible and dealings between group companies are taxed in conformity with the arm's length principle. As group members still have to pay income tax on their corporate income they keep their tax residence with regard to tax treaties.

2.2. Methods for the elimination of international double taxation

2.2.1. The exemption system

2.2.1.1. Unilateral exemption

Resident individuals are generally subject to unlimited wealth and personal income tax liability on their worldwide wealth and their worldwide income. However, immovable property located abroad and any property attributable to a foreign permanent establishment are exempt from wealth tax according to article 10e and 10f SteG. Likewise, foreign-source income from foreign permanent establishments and from foreign real estate used for agriculture and forestry are exempt from personal income tax in Liechtenstein according to article 15(2)a and b SteG. These foreign-related exemptions from Liechtenstein taxation are granted under progression according to article 21 SteG.

39 For details see art. 31 para. 3 tax treaty Liechtenstein–Germany.
40 Protocol no. 1 of tax treaty Liechtenstein–San Marino.
41 For details see Wenz, Linn, Brielmaier, Busch and Langer, "Liechtenstein" in Lang *et al.* (eds.), *The impact of the OECD and UN Model Conventions on Bilateral Tax Treaties*, p. 650 *et seq.*

For resident legal persons, all foreign income is included in their taxable corporate income, basically. However, income attributable to a foreign permanent establishment or foreign immovable property is exempt according to article 48(1)a, b and c SteG. Capital gains from the sale of foreign real estate are also exempt after article 48(1)d SteG.

To use this exemption from Liechtenstein taxation, foreign profits have to be recalculated according to Liechtenstein tax law as if the income from the foreign real estate or permanent establishment were taxable in Liechtenstein. In particular, the Liechtenstein allowance for corporate equity (ACE) must be applied on the foreign profit. If the foreign profit decreases in the course of recalculating, which often happens, only the smaller amount can be exempted from the Liechtenstein taxable base. The exemptions from personal income and wealth tax and from corporate income tax are granted on a unilateral basis in Liechtenstein without any preconditions, especially without reciprocity from the foreign state.

2.2.1.2. Treaty exemption

For the further elimination of international double taxation article 22 SteG makes reference to the applicable tax treaty. The treaty also determines which method is used in Liechtenstein to avoid double taxation. If the treaty provides for a tax exemption with respect to foreign-related wealth, that wealth shall be exempt from domestic wealth tax. Likewise, if income has been generated in a foreign state with which a tax treaty stipulates an exemption for that income, that income is exempt from domestic personal or corporate income tax. The exemption from the Liechtenstein personal income tax is granted under progression according to article 22(2) SteG if the applicable tax treaty contains a progressivity clause.

Within the Liechtenstein tax treaty network the exemption method is widely used for resident taxpayers and is supplemented by a progressivity provision. For Liechtenstein residents with capital in the sense of article 22 OECD model that may be taxed in the foreign state all Liechtenstein tax treaties stipulate the exemption method.

2.2.1.3. Exemption based on reciprocity

If neither an exemption based on domestic law nor an exemption based on a tax treaty can be claimed, the taxpayer can profit from an exemption from taxation in Liechtenstein under the reciprocity concept according to article 22(1) SteG. Liechtenstein grants an exemption from personal income or wealth tax in international cases provided that the foreign state would also offer an exemption in a vice versa situation.

The scope of this reciprocity exemption is not entirely clear, as the wording of the law does not indicate whether the exemption can be claimed by residents only or also by non-residents. As the text of the law requires wealth, which is situated in a foreign state, or income, which has been generated in a foreign state, the reciprocity/exemption seems to be only applicable for residents. Unfortunately, there have not been any legal procedings on this matter up to now.

2.2.2. The credit system

2.2.2.1. Treaty credit

Liechtenstein does not offer a unilateral credit for foreign taxes in its domestic tax law. In contrast to a tax exemption, a tax credit can only be claimed under a tax treaty or under the reciprocity requirement.

Where a tax treaty exists which stipulates the credit method, the treaty relief applies. For resident individuals the credit method is mainly used for certain sorts of income defined by the respective treaty such as foreign dividends, interest and royalties paid to a Liechtenstein resident if a limited withholding tax is defined by the treaty or for income of employees, artists and sportspersons working in a foreign state.

2.2.2.2. Credit based on reciprocity

Where no tax treaty is applicable, a tax credit in Liechtenstein is possible based on reciprocity. The legal requirements are basically the same as for a tax exemption due to reciprocal treatment. If the foreign state is ready to credit Liechtenstein taxes in a vice versa situation the foreign taxes can be credited against the Liechtenstein tax liability. In relation to those foreign states which are not willing to credit Liechtenstein taxes a tax credit is not granted. In this way an incentive to those states which currently refuse to credit Liechtenstein taxes is offered by the legislator to change their practice.

2.2.3. The deduction system

The deduction method is not used for granting relief from double taxation in Liechtenstein either on a treaty basis or unilaterally. Costs from taxes, especially from corporate income tax and real estate capital gains tax, are generally not deductible from the taxable base according to article 47(3)f SteG;[42] this provision also applies to foreign taxes. Since the profit from a foreign permanent establishment or foreign real estate has to be calculated in accordance with the Liechtenstein tax laws in order to be exempt from income tax in Liechtenstein, foreign income taxes or foreign corporate income taxes are not deductible from the Liechtenstein tax base.

2.3. Non-discrimination

According to article 24(6) OECD model the non-discrimination provisions of article 24 OECD model shall, notwithstanding the provisions of article 2, apply to taxes of every kind and description. Most tax treaties concluded by Liechtenstein encompass this clause but there are also a few deviations from the OECD model within the Liechtenstein treaty network. For instance, the treaty Liechtenstein–Singapore limits the application of the non-discrimination clauses to those taxes which are the subject of the treaty. The treaty Liechtenstein–United Kingdom does

[42] Liechtenstein Government, Report and Application (BuA) no. 48/2010, art. 47, p. 121.

not include an extension of the non-discrimination provisions to taxes of every kind and description in the sense of article 24(6) OECD model. This fact seems to be in line with the reservation that the United Kingdom has made to article 24(6) OECD model in order to restrict the application of this article to the taxes covered by the OECD model. The treaty Liechtenstein–Austria also does not contain a provision identical to article 24(6) OECD model, but this fact can very probably be explained by its early signing date in the year 1969. Until now, the provision of article 24(6) has not been the subject of any court decision or decree by the tax administration in Liechtenstein. As Liechtenstein is an EEA (but not an EU) Member State, the non-discrimination articles of the Treaty of the Functioning of the European Union (TFEU) have to be taken into consideration in a tax context, as well. Therefore, non-discrimination clauses in tax treaties with EU countries or other EEA countries have a more limited area of application than in treaties with other states.[43]

3. Relevance of the notion of tax in the elimination of double non-taxation situations

3.1. Tax treaty subject-to-tax clauses

Within the Liechtenstein tax treaty network only two subject-to-tax clauses exist. According to the protocol of the tax treaty Liechtenstein–Germany payments upon the termination of employment contracts can be taxed in the resident state of the recipient if they are not taxed in the source state.[44] This treaty clause does not specify which kind of taxation in the source state is necessary for the residence state not to retain the right to tax the payment. In most cases it seems to be obvious that the taxation of the payment as income is required but there is no explicit testimony which would confirm this fact.

A second subject-to-tax clause can be found in the revised Liechtenstein–Switzerland tax treaty[45] and concerns capital gains from the alienation of shares in real estate companies except for stock-exchange listed companies and companies using their real estate for commercial activities. Such capital gains can be taxed in the resident state of the alienator if they are not taxed in the source state where the real estate is situated.

3.2. Domestic law anti-avoidance provisions

3.2.1. General anti-avoidance rules

Liechtenstein tax law includes one general anti-avoidance rule (GAAR) and several special anti-avoidance rules (SAARs). The GAAR is stipulated in article 3 of

43 Liechtenstein Government, Report and Application (BuA) no. 59/2010 on the non-discrimination clause of the tax treaty Liechtenstein–Luxembourg, p. 29.
44 Protocol no. 5(b) to art. 14 and 17 of tax treaty Liechtenstein–Germany.
45 Art. 13(4) and art. 23 para. 1(a) and para. 2(a) last sentence of the revised tax treaty Liechtenstein–Switzerland.

the Liechtenstein Tax Act and covers legal or actual structures that appear inappropriate to the economic circumstances and whose sole economic purpose consists in attaining tax advantages. Although the wording of the GAAR only refers to "tax advantages" in general a further requirement for application is that the granting of this tax advantage would violate the object and purpose of "this Act". Consequently, the GAAR in article 3 of the Liechtenstein Tax Act is applicable to all taxes which are settled in this Act. These taxes encompass wealth tax and personal income tax, the tax based on expenditure, the real estate capital gains tax, the corporate income tax, the formation tax and the tax on insurance premiums. For other taxes levied in Liechtenstein such as stamp duty and value added tax there are separate anti-avoidance provisions laid down in the relevant tax Acts.[46] As a consequence, the GAAR cannot be utilized for the avoidance of foreign taxes, either. However, there has not been any jurisdiction on this matter.

3.2.2. SAARs

The Liechtenstein tax laws do not contain any CFC regime or thin capitalization provisions or subject-to-tax clauses concerning cross-border situations. Currently there are only four provisions in the Liechtenstein tax law which can be regarded as SAARs. All SAARs are codified in the Liechtenstein Tax Act among the personal income and wealth tax or corporate income tax provisions. Therefore it is evident that these SAARs are directed to fighting the avoidance of personal income and wealth tax and corporate income tax. The issue of what kinds of taxes are meant has to be examined in detail for each SAAR separately.

One of the SAARs emphasizes the arm's length principle between managing shareholders and the company. It states that if the owner of a legal person works for that legal person, the owner must declare an appropriate salary[47] which is then subject to personal income tax. This rule also applies to persons working for businesses which participate substantially in the capital of the legal person and thus are able to exercise a controlling influence on the management of the legal person. According to the SAAR the legal person has to be resident in Liechtenstein or if it is not resident in Liechtenstein, it must have domestic income from Liechtenstein-situated real estate or from a Liechtenstein permanent establishments. The appropriate salary does not necessarily have to be taxed with domestic income tax. The SAAR is also applicable if the work of the shareholder is done abroad and therefore may be taxed abroad in accordance with a tax treaty. As a result, the SAAR stipulates only that an adequate salary has to be paid. The salary does not necessarily need to be taxed in Liechtenstein to apply this SAAR.

A second SAAR deals with restructuring. After the contribution of an enterprise into a company the existing hidden reserves can be transferred at book value. Afterwards, the shares of the acquiring company can be sold tax exempt. For this reason, this SAAR provides for the fact that the hidden reserves, which were present at the time of incorporation, can be taxed later if the shares are sold within the next five years. One-fifth of the transferred hidden reserves are considered to become tax neutral each year after incorporation. As this rule is only relevant

[46] Art. 39 para. 4(b) Liechtenstein VAT Act.
[47] Art. 14 para. 2 subpara. d SteG.

for Liechtenstein corporate income tax, foreign taxes do not play any role in the application of this SAAR.

The third SAAR concerns write-downs and value adjustments in the case of permanent value decreases of participations with possible tax evasion effects. If a participation is acquired by a person with a close relationship to the seller (for example, by group companies), the depreciation basis of the person with a close relationship must be assumed, to the extent that it does not exceed the acquisition costs.[48] In effect, a tax neutral step-up will not be granted in such cases.

A fourth SAAR concerns low-interest loans granted by a legal person to affiliated persons, such as shareholders, settlors or – in the case of a foundation or a trust – beneficiaries. If the interest rate of a loan granted by a legal person to its shareholder falls below the rate for the ACE[49] of 4 per cent, the company has to pay tax on the (low) interest income generated by the loan on the one hand but may deduct 4 per cent of its equity on the other hand. In effect, the corporate income of a company can be reduced by giving low-interest-loans to affiliated persons. In order to avoid this tax-reducing effect, the ACE is reduced by the difference of the lower interest rate of the loan and 4 per cent unless the allocation of loans is part of the principal activity of the legal person,[50] e.g. of a bank. As the ACE is only relevant for determining the Liechtenstein tax base, this SAAR is limited to domestic corporate income tax.

Generally, Liechtenstein SAARs are separate provisions that want to fend off the loss of tax substance and the avoidance of taxation. They do not make any reference to foreign taxes and do not require certain – domestic or foreign – taxes to be levied in order not to apply.

3.3. Administrative assistance

All Liechtenstein tax treaties follow the OECD standard including article 26(1) OECD model and extend the scope of administrative assistance in tax matters to “taxes of every kind and description” and not only the taxes covered by article 2 of the treaty. There is no further explanation in a treaty as to which levies are encompassed by this provision. However, some of the Liechtenstein tax information exchange agreements (TIEA) give a closer definition of the taxes covered by administrative assistance. The TIEA provisions may give an indication of how the notion of tax under article 26 of the Liechtenstein income tax treaties could be seen. For instance, the Liechtenstein TIEA with the United Kingdom is applicable on all taxes imposed by the contracting parties on a national or countrywide level but not including customs duties.[51] Most TIEAs concluded by Liechtenstein even provide a list of domestic taxes and taxes of the partner state which are covered by the TIEA. These TIEAs enumerate all Liechtenstein taxes referred to in article 2 of the Liechtenstein income tax treaties and in addition mention estate, inheritance and gift tax and value added tax.

48 Art. 53 para. 4 SteG.

49 For details about the equity deduction in Liechtenstein see Wenz and Wünsche, “The Debt–Equity Conundrum”, *Studies on International Fiscal Law*, Vol. 97b, p. 435 *et seq*.

50 See art. 54 para. 3 SteG.

51 See art. 3 para. 1 and art. 4 para. 1 subpara. q of the tax treaty Liechtenstein–United Kingdom.

Currently, only some of Liechtenstein's tax treaties contain clauses on the assistance of the collection of taxes in conformity with article 27 OECD model such as the revised tax treaty with Austria[52] and the treaties with the Czech Republic, Germany and the United Kingdom.[53] The definition of the "revenue claim" in those treaties is completely in conformity with the OECD model. Until now, the scope of a revenue claim in this sense has not been subject to discussion in Liechtenstein either before the courts or in academic publications.

52 See art. 25(b) of the tax treaty Liechtenstein–Austria.

53 See art. 26 of tax treaty Liechtenstein–Czech Republic, art. 28 of the tax treaty Liechtenstein–Germany, art. 26 of tax treaty Liechtenstein–United Kingdom.

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