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Licence box model in Liechtenstein

The concept of the licence box

In the course of the complete overhaul of the Tax Act (Steuergesetz – SteG), which entered into force on 1 January 2011, the preferential taxation of revenues from research and development was introduced for the first time in Liechtenstein. In some EU member states there are already special tax regimes of this kind, known as IP boxes (intellectual property boxes), aiming to promote research and development. In order to keep pace with the European trend, a tax incentive was, therefore, to be introduced by means of a special deduction of 80% of positive patent revenues – i.e. the pure income derived from the use or commercialisation of individual patents – that would present Liechtenstein, an EEA state, as an attractive, competitive location.

Furthermore, the provisions in Art. 55 of the Tax Act specify which intellectual property rights qualify for this deduction.

The following intellectual property rights are eligible:

- Patents, trademarks and designs, provided they are protected by means of entry in a national, foreign or international register
- Software as well as technical and scientific databases

This list is exhaustive. The entry of intellectual property rights in a register is, of course, dependent on the existence of a corresponding register. At the present time, there is however neither a national nor an international register for software, which means that register entry is not a prerequisite here.

An IP box system of this kind offers the advantage that 80% of the sum of the positive income from intellectual property rights is deemed to be a commercially justified expense. This reduces the tax base of this income to 20%, resulting in an effective tax burden of 2.5% (12.5% tax of 20%).

Reconcilability with European aid law

As already mentioned, to waylay any concerns about unwanted state aid (selectivity) the original provisions of Art. 55 of the Tax Act and Art. 33 of the Tax Ordinance (Steuerverordnung – SteV) were submitted to the EFTA Surveillance Authority (ESA) to establish whether they are compatible with the state aid rules within the meaning of Art. 61 of the EEA Agreement. In its decision on 1 June 2011 ESA stated that Art. 55 of the Tax Act and Art. 33 of the Tax Ordinance are EEA-compatible (Official Journal of the European Union C 278/9 of 22 September 2011).

Comparative remarks

In contrast to the licence box models of Belgium, the Netherlands, the United Kingdom and Spain, intellectual property rights are not restricted to patents. The Principality of Liechtenstein does not give a more specific definition of the term intellectual property rights, but does explicitly allow own use for the purposes of deduction. Own use was also included to ensure that the licence box in Switzerland is seen as an alternative to joint ventures (foreign income is taxed at a lower rate). The wording of the definition of income derived from eligible intellectual property rights is the same as in Art. 12(2) of the OECD Model Tax Convention, and the beneficial royalties are to be documented in a licence agreement.

The following example presents the main differences between the licence box model in the Principality of Liechtenstein and the canton of Nidwalden.

	Liechtenstein	*Nidwalden*
Eligible income	OECD Model Tax Convention 12 (limited)	OECD Model Tax Convention 12
Non-eligible income	None	None
Income derived from own use	Possible	Not possible
Applicable to intellectual property rights, acquired from affiliates	Yes	Yes
Limited to self-developed intellectual property rights	No	No
Applicable to capital gains	Yes	Yes
Research and development expenditure deductible	Yes	Yes
Applicable	Intellectual property rights from 1 January 2011	All intellectual property rights
Effective tax rate	2.5 %	8.8 %

Judicial supervision of foundations

The reform of the law on foundations brought with it a revision of the principles governing the supervision of foundations. These principles subject all charitable foundations to foundation supervision by operation of law; private-benefit foundations can elect to subject themselves to foundation supervision (Art. 552 § 29(1) of the Liechtenstein Persons and Companies Act [Personen- und Gesellschaftsrecht – PGR]). The foundation supervisory authority is the Office of Justice, Foundation Supervisory Authority division (formerly the Office of Land and Public Registration) in accordance with Art. 552 § 29(2) of the Persons and Companies Act. Furthermore, under Art. 552 § 29(4) of the Persons and Companies Act, every foundation participant can apply for judicial supervisory measures to be taken against the foundation bodies managing and using the assets in a manner not in line with its designated purpose. Such measures can include obtaining information from the foundation or administrative authorities, inspecting the foundation's accounts and documents, controlling and dismissing the foundation bodies, carrying out special audits or revoking resolutions passed by the foundation bodies.

More than four years have passed since the new foundation law came into effect on 1 April 2009. It is therefore now time to take stock of the extent to which the new judicial supervision has left its mark on foundations.

Application of the new supervisory provisions

It is first important to note that the provisions of the new foundation law on judicial foundation supervision must also be applied to foundations which were established before the law came into effect. In principle, it is true that the new foundation law only applies to «new» foundations, i.e. those established after 1 April 2009, and that the old law must be applied to foundations which were already established at this time. However, in the transitional provisions there is a series of exceptions from this basic rule. In particular, the new law regarding supervision and controlling (information rights of the beneficiaries, foundation supervision, etc.) also applies to foundations which were already established on 1 April 2009. Application of the new judicial foundation supervision to «old» foundations has also already been confirmed in court.[1]

[1] Supreme Court of Liechtenstein 05.02.2010, 10 HG.2008.28 (LES 2010, 218)

The conflict of interest guardian in judicial supervision proceedings

In accordance with current case law – also on the old foundation law – the foundation affected by the supervision proceedings must be involved as a party. This means that the foundation must be involved in the proceedings, either on the side of the applicant or on that of the respondent.[2] In cases of applications for the dismissal of members of the foundation board, the foundation board is – according to the Supreme Court of Liechtenstein – in a clear conflict of interest with respect to the subject of the proceedings. For this reason it held that the applicant must appoint a conflict of interest guardian to be responsible for reviewing the accusations made in an independent manner and detached from the perspective of the partial foundation board members.[3] Critical voices have correctly spoken out against this case law regarding a conflict of interest guardian. One of the main questions is whether it should not be the task of the judge to review the accusations made in an independent manner and detached from the party pleadings.[4] This question can only be answered in the affirmative. What is more, the conflict of interest guardian cannot appraise the accusations in a sensible manner due to his lack of autonomous knowledge about the internal workings of the foundation and the activity of the bodies to be dismissed. The appointment of a conflict of interest guardian should therefore be waived in favour of efficient foundation supervision.

Grounds for dismissing members of foundation bodies

In most cases the dismissal of foundation bodies is the subject of supervisory proceedings. The following case law tendencies have emerged from such proceedings:

- Grounds for dismissal must be so pronounced and serious that they must be regarded as «good cause» which puts the interests of the private-benefit foundation at risk or which make it unreasonable to consider continuing the appointment of the body member. Whether there is good cause must always be considered from the perspective of the functioning of the private-benefit foundation and especially whether pursuing the purpose of the foundation is ensured with a sufficient degree of certainty.
- The details of financial decisions by the asset management are not, however, subject to foundation supervision providing that such individual decisions do not give rise to a risk for the foundation.
- In principle, the court may not act in place of the foundation board. It must refrain from interfering with what are purely discretionary decisions and only take action if the foundation bodies overstep or even abuse the discretionary powers granted to them.[5]
- Dismissing a member of the foundation board owing to incidents which took place in the past can only be based on serious or gross breaches of duty of which a member of the foundation board is guilty on the basis of an ex-ante analysis and which results in his unsuitability for this function or indicates that he is incapable of properly meeting his duties.[6]

Subsidiarity of the judicial supervision proceedings

It is extremely interesting that the competence of the supervisory court to dismiss a member of the foundation board is only intended to be a subsidiary competence. The primary responsibility for dismissing foundation board members lies with the person appointed to do so in the foundation deed. However, the subsidiary competence of the court is mandatory and cannot be waived in the foundation deed. It is for this reason that it is the person or body primarily responsible for dismissal appointed in the statutes who must also be granted party status, especially since this party has a legal interest in the dismissal of members of the foundation board, which is its primary competency, only being carried out where the prerequisites are met.[7] This means that before initiating supervision proceedings in which an application is made to dismiss members of the foundation board, recourse must first be to the person or body assigned the responsibility in the statutes for dismissing members of the foundation board. However, there has not yet been a decision dismissing a supervision proceeding as inadmissible because recourse was not first taken to the body assigned primary responsibility for dismissal in the statutes.

To conclude it can be said that the reformed judicial foundation supervision has proven to be a sensible instrument to ensure proper foundation management which offers the beneficiaries of foundations, in particular, a high degree of control and therefore legal certainty. However, the persons appointed as members of the foundation bodies also benefit from legal certainty because the decisions made in the supervision proceedings provide them with important guidelines which, not as abstract as legal provisions, result from actual cases in practice. This knowledge ensures that the management of Liechtenstein foundations still meets higher quality standards and that as such the Liechtenstein foundation is a valuable and reliable instrument for future founders.

[2] Supreme Court of Liechtenstein 05.02.2004 (LES 2005, 41)
[3] Supreme Court of Liechtenstein 03.04.2008 (LES 2008, 360)
[4] Lorenz, Die Kollisionskuratorrechtsprechung des OGH im Stiftungsaufsichtsverfahren – Eine kritische Auseinandersetzung, LJZ 4/11, p. 156 ff.
[5] Supreme Court of Liechtenstein 05.02.2010, 10 HG.2008.28 (LES 2010, 218)
[6] Supreme Court of Liechtenstein 07.05.2010, 10 HG.2008.5 (LES 2010, 311)
[7] Supreme Court of Liechtenstein 07.05.2010, 10 HG.2008.5 (LES 2010, 311)

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