Case No: 68835
Event No: 583259
Dec. No: 44/11/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 15 February 2011

on Private Investment Structures

Liechtenstein

The EFTA Surveillance Authority ("the Authority"),

HAVING REGARD to the Agreement on the European Economic Area ("the EEA Agreement"), in particular to Articles 61 (1) and Protocol 26,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("the Surveillance and Court Agreement"), in particular to Article 24,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement ("Protocol 3"), in particular to Article 1(3) of Part I and Article 4(2) of Part II,

Whereas:

I. FACTS

1. Procedure

By letter submitted electronically on 21 September 2010 (Event Nos. 570365, 570367, 570369, 570370, 570371, 570372, 570373 and 570374) Liechtenstein notified, pursuant to Article 1(3) of Part I of Protocol 3, the introduction of a new tax status entitled "*Private Investment Structure*" based on rules laid down in a newly adopted tax Act, entitled "*Gesetz über die Landes-und Gemeindesteuern*" (the "new Tax Act").

By letter submitted electronically on 22 October 2010, the Authority requested additional information from the Liechtenstein authorities (Event No. 573645). By letter submitted electronically on 15 November 2010 the Liechtenstein authorities replied to the information request (Event Nos. 577363 and 577366).

A meeting between representatives from the Competition and State aid Directorate (the "CSA") and the Liechtenstein authorities was held on 11 November 2010. By letter submitted electronically on 29 November 2010 the Liechtenstein authorities provided information to clarify issues discussed in the meeting (Event Nos. 579123 and 579127).

By letter submitted electronically on 3 December 2010, the Authority informed the Liechtenstein authorities that the period of two months within which the Authority is required to adopt a decision, pursuant to Article 4(5) of Part II of Protocol 3, started as of the date of the receipt of the last additional information i.e., on 29 November 2010 (Event No. 579276).

By letter submitted electronically on 22 December 2010, the Liechtenstein authorities provided further information to the Authority (Event Nos. 81806 and 581807).

By letter submitted electronically on 18 January 2011, the Authority informed the Liechtenstein authorities that the period of two months within which the Authority is required to adopt a decision, pursuant to Article 4(5) of Part II of Protocol 3, started as of the date of the receipt of the last additional information i.e., on 22 December 2010 (Event No. 583551).

By letter submitted electronically on 26 January 2011, the Liechtenstein authorities submitted further information (Event Nos. 584556, 584557 and 584677).

2. Description of the proposed measures

2.1. The new Tax Act

On 23 September 2010 the Liechtenstein Parliament adopted a new tax Act entitled "*Gesetz über die Landes- und Gemeindesteuern*" the ("new Tax Act"). With effect from 1 January 2011 the new Tax Act replaces the previous Tax Act adopted on 30 January 1961 and entitled "*Gesetz über die Landes- und Gemeindesteuern*" (the "old Tax Act").

Under the old Tax Act, applicable until the end of 2010, legal persons were subject to a variety of taxes, e.g. corporate income tax, capital tax, capital gains tax on real estate, coupon tax etc.[1] The new Tax Act reforms and simplifies the Liechtenstein tax system.[2] The new Tax Act provides for two taxes only on legal persons: a corporate income tax and a capital gains tax on the sale of real estate.

The corporate income tax ("*Ertragssteuer*") is imposed on (i) net corporate income; and (ii) capital gains (on assets other than real estate). The tax rate is 12.5%.[3] Net corporate income is the difference between revenue and expenditure based on the annual accounts.[4] Capital gains on assets other than real estate, such as bonds, are taxed as part of corporate income.[5]

Since most capital gains are therefore taxed as part of the corporate income, the new Tax Act does not include a general capital gains tax. However, it does include a specific capital gains tax on the sale of real estate ("*Grundstücksgewinnsteuer*") to be paid by the seller of real estate.[6] A change in ownership is considered to be equivalent to a sale. There are no exemptions from the capital gains tax on real estate.

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[1] Certain preferential tax measures are to benefit from a transitional period (Article 158(7) of the new Tax Act). In order to meet the concerns raised by the Authority, the Liechtenstein authorities have committed to propose to Parliament shorten the transitional period from the initially notified five to three years (see the letter from the Liechtenstein authorities submitted 26 January 2011; Event No. 584677).

[2] The new Tax Act is divided into chapters on taxes on natural persons (wealth tax, personal income tax and tax based on expenditure; Articles 6-34); legal persons (Articles 44-65); capital gains on the sale of real estate (Articles 35-43) and the establishment of legal persons and insurance premiums (Articles 66-72).

[3] Articles 47 and 61 of the new Tax Act.

[4] However, according to Article 48 of the new Tax Act certain corporate income is not covered by the tax, such as dividends derived from shares in domestic or foreign legal persons; Article 48(1)(e).

[5] Capital gains are part of the taxable income because Article 47(1) of the new Tax Act provides that taxable income consists of "pure profit" which must be determined on the basis of the annual accounts. However, according to Article 48(1)(f) capital gains on the sale of shares is not considered to be part of the corporate income and hence not subject to tax.

[6] Article 35 of the new Tax Act. The seller may be both a natural and legal person.

2.2. Private Investment Structures

Article 64 of the new Tax Act lays down a special tax regime for certain qualifying legal persons. According to that provision, legal persons may apply to the Liechtenstein authorities for a specific tax status, called Private Investment Structure ("P.I.S."). Once a legal person has been granted P.I.S. status it enjoys a special tax status provided it does not engage in economic activities.[7]

Article 64 lays down the conditions which must be fulfilled in order to be awarded the P.I.S. tax status. The main condition is that the entity may not engage in economic activities in the pursuit of its objectives.

A. *Who can apply for P.I.S. tax status?*

All legal persons can apply for the P.I.S. tax status, provided their shares are not offered or traded publicly on a stock exchange.[8] According to the Liechtenstein Companies Act of 20 January 1926 legal persons are:

- joint stock companies ("*Aktiengesellschaft*")
- limited partnerships with share capital ("*Kommanditaktiengesellschaft*")
- companies with limited liability ("*Gesellschaft mit beschränkter Haftung*")
- establishments ("*Anstalt*")
- foundations ("*Stiftung*")
- trust enterprises ("*Treuunternehmen*")
- associations ("*Verein*")
- cooperative societies ("*Genossenschaft*")

B. *Which assets can be held by an entity with P.I.S. tax status?*

An entity with the P.I.S. tax status may hold any kind of asset. Article 64 of the new Tax Act specifies that assets may include financial instruments (e.g. futures, swaps, negotiable securities), liquid monies, bank account balances, and shares in legal persons. The Liechtenstein authorities have explained that while the listed assets are assumed to cover more than 90% of the assets likely to be held by entities desiring P.I.S. status, other assets could be precious metal and stones, paintings, vintage cars, and stamp collections.

The Liechtenstein authorities have explained that the wording of Article 64 of the new Tax Act was changed after the first reading in Parliament to make clear that an entity with P.I.S. tax status could hold any type of asset. The initial wording of the provision in the Bill provided that entities could only acquire, hold, administer and sell specific types of assets, that is, shares and financial securities.[9] Following criticism in Parliament that such

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[7] Luxembourg introduced a similar tax status entitled "*société de gestion de patrimoine familial*" by law of 11 May 2007.

[8] Article 64(1)(b) of the new Tax Act.

[9] See Government Bill No 48/2010 "*Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend die Totalrevision des Gesetzes über die Landes-und Gemeindesteuern (Steuergesetz; STeG) sowie die Abänderung weitere Gesetze; Nr. 48/2010)*", at page 331, et seq.

a limitation, if adopted, would exclude P.I.S. status if the entity held assets other than those listed in the provision (e.g. gold and paintings), the wording was changed to the current wording to permit the legal person with P.I.S. status to acquire, hold, administer and sell any kind of asset.[10]

C. *Who can be an investor in an entity with P.I.S. tax status?*

Investors in legal persons with P.I.S. tax status are limited to (i) natural persons, acting in the capacity of managing his/her private wealth; (ii) an entity which itself has P.I.S. tax status and acting in the capacity of managing the private wealth of one or more natural persons; and (iii) an intermediary acting on account of one of the former, i.e. a trustee.[11] "*Beneficiaries"* may be either of the first two. Consequently, commercial undertakings are barred from holding any shares, directly or indirectly, in a legal person with P.I.S. tax status.

D. *Which activities can an entity with P.I.S. tax status engage in?*

Article 64 of the new Tax Act provides that an entity with P.I.S. tax status may not engage in economic activities in "*pursuit of its purpose*".[12] The new Tax Act also provides that the condition not to engage in economic activity applies "*in particular"* where the entity "*acquires, holds, administers and sells*" assets. Thus, that provision imposes broad and strict limits on the kind of activities that a legal person with P.I.S status may engage in. The Liechtenstein authorities have explained that Article 64 must be understood as meaning that it prevents an entity with P.I.S. status from engaging in any form of economic activity other than the acquisition, holding, administration and sale of assets.

The Liechtenstein authorities further explained that the permitted activities relating to the acquisition, holding, administration and sale of assets are themselves subject to the further limitation of being for the purposes of passively receiving income derived from the assets and exclude any commercial trading. Accordingly, the new Tax Act contains specific rules which prohibit entities with P.I.S. status from receiving fund management and similar fees. According to those rules entities with P.I.S. status are prohibited from soliciting shareholders and investors as well as from receiving remuneration or cost compensation for their activities from shareholders, investors and third parties.[13]

The Liechtenstein authorities made clear to the Authority that the term "*administration*" limits the activities of entities with the P.I.S. status to accounting processes and other activities necessary for the conservation of the assets. Therefore entities with P.I.S. status cannot engage in activities typical of wealth management companies which seek to exploit the assets commercially.

The Liechtenstein authorities also state that the limitation on the acquisition, holding, administration and sale of assets also means that any activity consisting of commercial rental or leasing (or similar activities) of assets such as cars, paintings, furs etc. is not allowed. Indeed, any economic activity involving the assets while they are held runs counter to the aim of the general prohibition against engaging in economic activities.

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[10] See Government Bill No 83/2010 "*Stellungnahme der Regierung an den Landtag des Fürstentums Liechtenstein zu den anlässlich der ersten Lesung betreffend die Totalrevision des Gesetzes über die Landes-und Gemeindesteuern (Steuergesetz; STeG) sowie die Abänderung weiterer Gesetze aufgeworfenen Fragen; Nr. 83/2010)"*, at page 134, et seq.

[11] Article 64(1)(c) of the new Tax Act.

[12] Article 64(1)(a) of the new Tax Act which states "*… in der Verfolgung ihres Zwecks…*".

[13] Article 64(1)(c) of the new Tax Act.

In sum, entities with P.I.S. status cannot engage in activities beyond the acquisition, holding and sale of assets.

E. *Company statutes of entities with P.I.S. tax status*

The company statutes of the entity with P.I.S. status must provide that the restrictions applicable to P.I.S. status by virtue of Article 64 of the new Tax Act apply to the entity.[14]

F. *Prohibition on involvement in management based on shareholder rights*

While an entity with P.I.S. tax may hold shares in other companies, it (or its shareholders or beneficiaries) is prohibited from actually exercising control by involving itself directly or indirectly in the management of the companies in which the shares are held.[15]

The Liechtenstein authorities have explained that the tax authorities must verify compliance with this condition on the basis of implementing rules to the new Tax Act ('the Tax Ordinance").[16] The Liechtenstein authorities have pointed out that a shareholder may have a controlling shareholding even with a very small shareholding if, for example, it represents the highest holding of a sole owner compared to all other shareholders in the company. Moreover, rules on quorum and the type of stock held (preferred versus common stock) also play a role for determining whether there is a controlling shareholding and whether indirect control is exercised.

In light of this the Liechtenstein tax authorities carefully verify on a case-by-case basis by taking all concrete circumstances into account whether indirect or direct control may be exercised. To this end the tax authorities verify, amongst others, whether the companies (in which the shares are held) are listed at the stock exchange, what the voting rights are, the type of stock held, the voting quorum of the Board of Directors, whether it changes depending on the business issue discussed and which business decisions the management is required to submit to the Board of Directors for prior approval.

The tax authorities proceed according to the size of the shareholding in the following manner:

(i) Shareholding up to 20 percent:

Verification of the fulfilment of the basic conditions for acquiring P.I.S. tax status, (i.e. that the conditions set out in A-E are met); and that the applicant has submitted a written declaration stating that neither the applicant nor its shareholders or beneficiaries exercise control by influencing directly or indirectly the management of the company in question (the "Declaration").

In the absence of the Declaration, P.I.S. tax status is rejected.

(ii) Shareholding between 20 and 50 percent:

Same test as in (i), and:

[14] Article 64(1)(d) of the new Tax Act.
[15] Article 64(2) of the new Tax Act.
[16] *Verordnung über die Landes- und Gemeindesteuern (Steuerverordnung; SteV)* of 21 December 2010.

(a) Inspection of the minutes of the Board of Directors, Board of Trustees or other administrative body of the applicant in order to verify whether control is exercised by influence on the management of the company in question.

(b) Verification of whether the applicant (or its shareholders or beneficiaries) has members on the Board of Directors of the company in question.

If the Declaration is absent or the applicant has a member on the Board of Directors, P.I.S. tax status is rejected.

(iii) Shareholding above 50 percent:

Same test as in (i) and (ii), and:.

Verification that the applicant has submitted written confirmation that the Board of Directors of the company in question decides independently of the applicant (its shareholders or beneficiaries) and that the applicant limits itself to exercising its shareholder rights in the General Assembly.

If the Declaration is absent; or the applicant has a member on the Board of Directors; or there is no confirmation that the Board of Directors is independent in its decision-making, the P.I.S. tax status is rejected.

The above requirements set out the general requirements that the tax authorities apply when assessing whether P.I.S. status should be granted. In exceptional cases, the tax authorities may consider that even if one of the above requirements is not met, the combination of the circumstances are such as to enable the tax authorities to establish that, overall, there is no direct or indirect influence on the management in the company in which the shares are held. In such cases, P.I.S. status may nevertheless be granted.

G. *Tax to be paid by entity with P.I.S. tax status*

An entity which has qualified for P.I.S. tax is no longer subject to corporate income tax but only to a fixed tax of 1200 Swiss Francs.[17] The Liechtenstein authorities have explained that the fixed tax is payable irrespective of whether the net income is zero or if there are losses. The capital gains tax on the sale of real estate remains applicable to entities with P.I.S. tax status.

H. *Verification of the fulfilment of the conditions for P.I.S. tax status*

The applicant for P.I.S status must declare in writing that the conditions listed in A-F are fulfilled at the point in time of the application[18] and subsequently in the event of important changes. That declaration can be issued by auditors if the entity with P.I.S. tax status is subject to statutory requirements[19] of having its annual accounts audited.[20]

The tax authorities must verify whether the conditions for the P.I.S. tax status are met.[21] According to the implementing rules laid down in the Tax Ordinance the tax authorities must verify the company statutes, annual accounts, the type of assets and income as well

[17] Articles 64(8) and 62(1-2) of the new Tax Act.
[18] Article 64(4) states that this applies at the point in time of establishment of the entity. However, during a transitional phase of three years the conditions are verified at the point in time of the application.
[19] According to the rules of the Companies Law („*Vorschriften des Personen- und Gesellschaftsrechts“).*
[20] Article 64(4) of the new Tax Act.
[21] Article 64(6) of the new Tax Act.

as the concrete activities of an applicant.[22] The applicant must declare in writing that no economic activity is carried out. If the assets involve shares the tax authorities proceeds as described above in section F.

The tax authorities have the power to inspect other documents such as minutes of the Board of Directors, Board of Trustees (or other administrative body), as well as extracts of public registers or similar registers concerning the subsidiaries and the shareholders or the beneficiaries if they consider the verification of the documents normally submitted does not enable them to ensure that the conditions for P.I.S. tax status are met.[23]

2.3. National legal basis for the P.I.S. status

The introduction of the P.I.S. tax status is based on Articles 64 and 62 of the new Tax Act as well as Articles 37 and 38 of the Tax Ordinance.

II. ASSESSMENT

1. The presence of state aid

Article 61(1) of the EEA Agreement reads as follows:

"Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement."

To be termed aid, within the meaning of Article 61(1) of the EEA Agreement, a measure must meet the following four cumulative criteria: The measure must (i) confer on recipients an economic advantage which is not received in the normal course of business; (ii) the advantage must be granted by the State or through State resources and must (iii) be selective by favouring certain undertakings or the production of certain goods; and (iv) distort competition and affect trade between Contracting Parties.

1.1. The concepts of "undertaking" and "economic activity"

Prior to examining whether the four conditions are met, it is relevant first to examine whether an entity with P.I.S. tax status qualifies as an "undertaking" within the meaning of Article 61(1) of the EEA Agreement at all. It is therefore necessary to examine whether the activities of an entity with P.I.S. tax status qualify as "economic activity" within the meaning of Article 61(1) EEA. If this is not the case the entities with P.I.S. tax status do not come within the scope of Article 61(1) of the EEA Agreement.

With respect to the meaning of the concepts of an "undertaking" and "economic activity" within the meaning of the competition rules, the European Court of Justice has held that "*the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed,*[24] *and that any activity consisting in offering goods and services on a given market is an economic activity.*"[25]

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[22] Article 37 of the Tax Ordinance.
[23] Article 37(3) of the Tax Ordinance.
[24] Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21; Case C-244/94 *Fédération Française des Sociétés d'Assurances and Others* v *Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, paragraph 14; and Case C-55/96 Job Centre [1997] ECR I-7119, paragraph 21.
[25] Case C-35/96 *Commission of the European Communities* v *Italian Republic* [1998] ECR I-3851, paragraph 36.

While the definition of economic activity is therefore very wide the Court of Justice has also narrowed the scope and explicitly stated that the acquisition, holding and selling of shares or other negotiable securities do not constitute an economic activity.

The European Court of Justice has ruled on the concept of economic activity in the context of the state aid rules. In the *Cassa di Risparmio* case the Court had to consider whether banking foundations by owning a controlling shareholding in banks and other undertakings qualify as economic activity. The Court held that "*the **mere fact of holding shares**, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset*" (emphasis added).[26] The mere holding of shares does not, therefore, constitute economic activity.

In coming to its conclusion in *Cassa di Risparmio*, the Court relied on its rulings in various cases concerning the Sixth VAT Directive, where it has held that in addition to the mere holding of shares, the mere acquisition and sale of shares do not amount to economic activity.[27] For example, in the *BBL* case, the European Court of Justice considered whether the activities of investment companies ('SICAVs" under Belgian law) constitute economic activity within the meaning of Article 4(2) of the Sixth VAT Directive. The Court held that "*the mere acquisition and holding of shares in a company is not to be regarded as an economic activity within the meaning of the Sixth Directive, conferring on the holder the status of a taxable person. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property and is not the product of any economic activity within the meaning of that directive.*"[28] The Court concluded that such activities do not in themselves constitute economic activity and that the same is true of activities consisting of the sale of such holdings.[29]

The European Court of Justice reached a similar conclusion in the *Wellcome Trust* case, where the Court considered whether the purchase and sale of shares and other securities by a trust fund constitute an economic activity within the meaning of Article 4(2) of the Sixth VAT Directive. The Court first held that the "*mere exercise of the right of ownership by its holder cannot, in itself, be regarded as constituting an economic activity.*" and that "*the same must be true of activities consisting in the sale of such holdings.*" [30] With respect to the distinction between the exercise of ownership on the one hand and speculative trading on the other hand, the Court held that "*transactions in shares, interests in companies or associations, debentures and other securities"* which, when "*effected as part of a commercial share dealing activity*" constitute economic activity and should be distinguished from the situation in which an entity "*is forbidden to engage in precisely such activities, being required to make all reasonable efforts to avoid engaging in trade…*".

The Court added that "*neither the scale of share sale, such as the Second Share Sale carried out in this case, nor… can constitute criteria for distinguishing between the*

[26] Case C-222/04 *Cassa di Risparmio di Firenze and others* [2006] ECR I-289, at paragraph 111.
[27] See also paragraph 88 of the Opinion of Advocate Jacobs in Case C-222/04 *Cassa di Risparmio di Firenze and others* of 27 October 2005.
[28] Case C-8/03 *Banque Bruxelles Lambert SA* v *Belgium* [2004] ECR I-10157, at paragraph 38.
[29] Case C-8/03 *Banque Bruxelles Lambert SA* v *Belgium* [2004] ECR I-10157, at paragraph 39.
[30] Case C-155/94 *Wellcome Trust Ltd* v *Commissioners of Customs and Excise* [1996] ECR I-3013, at paragraphs 32 and 33.

activities of a private investor, which falls outside the scope of the Directive, and those of an investor whose transactions constitute an economic activity."[31]

Finally, in *Cassa di Risparmio* the Court held that while controlling shareholdings giving rise only to the exercise of shareholder rights are in and of themselves insufficient to characterise an activity as economic,[32] an entity "*owning controlling shareholdings in a company,*[which] *actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking*",[33] and must therefore be regarded as an undertaking. The Court went on to conclude that the question is therefore whether an entity merely holds a controlling shareholding, or whether, in addition, it actually exercises that control "*by involving itself directly or indirectly in the management*".[34] In the *Cassa di Risparmio* case, the fact that the controlling shareholder was required to appoint members from its management body to the Board of Directors of the subsidiary was one of the elements which led the Court to conclude that the activity went beyond simple administration of capital placed in another company.

1.2. Is an entity with P.I.S. tax status an undertaking?

In the present case, the Authority notes that it is clear from the new Tax Act that an entity can only qualify for the P.I.S. tax status if, in pursuit of its objectives, it does not engage in economic activity. The concept of economic activity must be interpreted in light of relevant EEA case law, as referred to above, and subsequent developments. In addition, the Liechtenstein authorities have made clear to the Authority how strictly they will interpret and apply the provisions of the new Tax Act in this respect.

1.2.1. Scope of activities and assets of an entity with P.I.S tax status

A. Scope of activities

First, under the new Tax Act entities with P.I.S. tax status can only engage in the acquisition, holding, selling and administration of assets. The Liechtenstein authorities have clarified that the wording of the new Tax Act will be interpreted and applied strictly to preclude entities with P.I.S. tax status from engage in any activities considered to be economic so that there will be no ambiguity in that regard.

As is clear from the case law referred to above, the acquisition, holding and sale of assets are considered the mere exercise of a right of ownership and therefore not as economic activity. The reference in the new Tax Act to "administration of assets", which, as already explained, refers to accounting processes, does not change this position.

While entities with P.I.S. tax status may acquire, hold, administer and sell assets, the new Tax Act expressly forbids entities with P.I.S. tax status to engage in economic activity. Hence while being permitted to hold (sell and acquire) shares the prohibition on entities with P.I.S. status to engage in economic activities also prohibits such entities from share transactions which form part of a commercial exploitation (such as commercial share dealings). Moreover, as referred to by the Court in the *Wellcome Trust* case, the scale of the share sale (or acquisition) does not in and of itself turn the activity into economic activity.

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[31] Case C-155/94 *Wellcome Trust Ltd* v *Commissioners of Customs and Excise* [1996] ECR I-3013, at paragraph 37.
[32] Case C-222/04 *Cassa di Risparmio di Firenze and others* [2006] ECR I-289, at paragraph 111.
[33] Case C-222/04 *Cassa di Risparmio di Firenze and others* [2006] ECR I-289, at paragraph 112.
[34] Case C-222/04 *Cassa di Risparmio di Firenze and others* [2006] ECR I-289, at paragraph 118.

In addition, the Authority notes that in order to strengthen the prohibition on economic activity when shares and financial instruments are involved, the new Tax Act contains specific rules aimed at preventing entities with P.I.S. tax status from acting as fund managers or advisors by way of an explicit prohibition against receiving remuneration or cost compensation for their activities.[35]

B. Scope of assets

It is clear from the new Tax Act that no restrictions apply to the kind of assets which may be held by entities with P.I.S. tax status. In this regard, the Authority considers that although the relevant case law – according to which the acquisition, holding and sale of shares and financial securities is not economic activity – only referred to shares and financial securities, that case law must apply also to other assets (for example, precious metal and stones, paintings, antique cars etc.). The Authority therefore considers that the fact that an entity with P.I.S. tax status may hold all kinds of assets does not, in and of itself, bring its activities into the sphere of economic activity. Support for this view can be found in the BBL case, where the Court held that its position in relation to the acquisition and sale of shares must be extended to other negotiable securities.[36]

The Authority also notes that the Liechtenstein authorities have clarified that activities such as rental, leasing (or other similar activities), of assets such as cars, paintings, furs etc are ruled out by the prohibition against engaging in economic activity.

1.2.2. Investors in an entity with P.I.S. tax status

Investors in an entity with P.I.S. tax status are limited to: (i) natural persons; (ii) another entity with P.I.S. tax status; or (iii) an intermediary acting on behalf of (i) or (ii). In other words, commercial companies cannot own an entity with P.I.S. tax status. Therefore, the ownership of an entity with P.I.S. tax status will not be a reason in itself to consider its activities as economic activity. That significantly limits the risk of use of the P.I.S. status as a vehicle for circumventing the EEA state aid rules.

1.2.3. Shareholdings and influence on management

The Authority notes first that the new Tax Act specifically prohibits entities with P.I.S. tax status which hold shares from exercising control over the company in which the shares are held through any direct or indirect influence over the management.[37] The relevant provision has been specifically worded to ensure compliance with the directions given by the Court in the *Cassa di Risparmio* case.

As the Liechtenstein authorities have pointed out, the new Tax Act prohibits entities with P.I.S. tax status which hold shares from exercising control over the company in which the shares are held through any direct or indirect influence over the management. The new Tax Act therefore goes further than simply addressing controlling shareholdings resulting from majority shareholdings, but also deals with controlling shareholdings resulting from other situations (for example, voting or quorum rules).

Secondly, the tax authorities' check as to whether control has been exercised by influencing management becomes progressively stricter the greater the size of the shareholding.

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[35] Article 64(1)(c) of the new Tax Act.

[36] Case C-8/03 *Banque Bruxelles Lambert SA* [2004] ECR I-10157, at paragraph 39. See also Case C-77/01 *Empresa de Desenvolvimento Mineiro SGPS SA* [2004] ECR I-4295, at paragraph 58.

[37] Article 64(2) of the new Tax Act.

(i) Shareholding up to 20%: P.I.S. tax status is rejected if the applicant fails to declare that it (or its shareholders or beneficiaries) does not exercise control by influencing the management (directly or indirectly);

(ii) Shareholding between 20% and 50%: in addition to (i), P.I.S. tax status is also rejected if the applicant has one or more members appointed to the Board of Directors.

(iii) Shareholding greater than 50%: P.I.S tax status is rejected if (i) and/or (ii) are satisfied, and/or the applicant fails to prove that it has no indirect influence on the management by declaring that (a) it is limited to exercising its shareholder rights; and (b) the Board of Directors decides independently of the applicant, its shareholders and beneficiaries.

In other words, the main rule is that a shareholding in excess of 20% prevents an entity with P.I.S. status from appointing members to the Board of Directors; a shareholding in excess of 50% requires the shareholder to prove that it only exercises its shareholder rights without influencing (directly or indirectly) the decision-making of the Board of Directors.[38] Such a system of control is designed to ensure that, in practice, a controlling shareholder with P.I.S. status does not exercise direct control, through management bodies, or indirect control, through exercising rights or influence beyond strict shareholder rights.

In addition, in the *Cassa di Risparmio* case the controlling shareholder was required to appoint members from its management body to the Board of Directors. As already mentioned, this was one element which led the Court to conclude that the activity was economic. In the present case, there is no such requirement: on the contrary, when the shareholding is in excess of 20%, the shareholder is barred from having *any* members on the Board of Directors if it wishes to acquire P.I.S. status.

These rules prevent entities with P.I.S. status from exercising control in companies in which the shares are held, thereby avoiding the pitfall identified by the Court in the *Cassa di Risparmio* case which led the Court to question whether the entity with a controlling shareholding was an undertaking.

On this basis, the Authority considers that the Liechtenstein tax authorities will ensure that entities with a controlling shareholding are granted P.I.S. tax status only in cases where control is not exercised by direct or indirect influence on the management of the company in which the shares are held. Thus, P.I.S tax status will only be granted where it is ensured that a controlling shareholding will not involve economic activity.

1.3. Important changes must be reported

If P.I.S. tax status is granted, the applicant will be required to inform the tax authorities of important subsequent changes.[39] Important changes that are reported trigger a requirement to submit a new declaration that the conditions for P.I.S. tax status are met. In this context, the Liechtenstein authorities have explained that many entities that are expected to apply for P.I.S tax status are already subject to statutory rules requiring annual accounts to be audited by independent auditors. In this context, the auditor will also serve as an

[38] As already stated, exceptionally, the combination of circumstances may allow the tax authorities to establish that overall there is no direct or indirect influence on the management even if the general conditions are not met - see Section 2.2(F) of Part I above.

[39] Article 64(4) of the new Tax Act.

independent third-party who may also inform the tax authorities of important changes to entities with P.I.S. tax status.

1.4. Summary

Based on:

(i) the fact that the investors in an entity with P.I.S. status are limited to natural persons, another entity with P.I.S. status, or an intermediary acting on behalf of either of the former;

(ii) the express provision in the new Tax Act prohibiting an entity with P.I.S. status from engaging in economic activity;

(iii) the rules which limit the scope of the activities of P.I.S. entities to the acquisition, holding, and sale of assets; and

(iv) the control measures aimed at preventing entities with P.I.S. status from exercising effective control over other companies (by being involved in their management),

the Authority considers that P.I.S. tax status will be granted to entities which are not engaged in economic activity within the meaning of the state aid rules. In addition, once P.I.S status has been granted, the tax authorities will be informed of any important changes.

In conclusion, the Authority considers that the P.I.S tax status is awarded to entities which cannot be characterised as "undertakings" within the meaning of Article 61(1) of the EEA Agreement. Hence, advantages which may be involved be way of lower taxation of entities holding P.I.S. status does not constitute state aid within the meaning of Article 61(1).

2. Procedure

The Authority notes that the new Tax Act provides that the provisions on the P.I.S. tax status have been suspended pending a decision by the Authority on compliance of the P.I.S. status with the EEA state aid rules.[40] During the discussions with Liechtenstein the Authority has raised concerns with regard to the length of the transitional period for phasing out the preferential tax measures under the old Tax Act.[41] The Authority therefore welcomes the fact that the Liechtenstein authorities have committed to propose to Parliament to shorten the transitional period from the initially notified five to three years.[42]

3. Conclusion

On the basis of the foregoing assessment, the Authority concludes that an entity with P.I.S. tax status under the new Tax Act will not engage in "economic activity" and will not therefore be characterised as an "undertaking" within the meaning of Article 61(1) of the EEA Agreement. Therefore the P.I.S. tax status in the new Tax Act which the Liechtenstein authorities are planning to implement will not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

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[40] Article 160(3) of the new Tax Act.
[41] See Article 158(7) of the new Tax Act.
[42] Letter from the Liechtenstein authorities submitted 26 January 2011 (Event No. 584677) and Article 158(7) of the new Tax Act.

The Liechtenstein authorities are reminded that all plans to modify this scheme must be notified to the Authority, where any changes would constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The entities with P.I.S. tax status do not constitute undertakings within the meaning of Article 61 of the EEA Agreement. The P.I.S. tax status in the new Tax Act does therefore not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

Article 2

This Decision is addressed to the Principality of Liechtenstein.

Article 3

Only the English language version of this decision is authentic.

Decision made in Brussels, on 15 February 2011.

For the EFTA Surveillance Authority

Per Sanderud (President) Sabine Monauni-Tömördy (College Member)