Effects of Global Minimum Taxation on Liechtenstein Double Taxation Treaties?
- GloBE-Subject to Tax Rule (STTR) -

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From a Liechtenstein perspective, it should be noted that the STTR, independent of the

- **turnover threshold of EUR 750 million,**

may have effects in the amount of a maximum additional tax burden of 9% for a variety of incomes. This applies to both Liechtenstein legal entities and, in particular, to their foreign subsidiaries, even if they will not be subject to the national GloBE laws of the respective countries.

However, the resulting practical effects for Liechtenstein entities are likely to be manageable since the regulation is to be limited exclusively to Double Taxation Agreements (DTAs) with developing countries. For foreign subsidiaries of Liechtenstein entities, the specific situation must be analyzed in more detail.

Contextualization

On 17 July 2023, the OECD published guidelines for a further instrument to implement global minimum taxation, a GloBE-specific Subject to Tax Rule (STTR), which is to accompany the instruments already being implemented nationally (IIR and UTPR top-up tax) in the future.

The STTR has its own, much broader personal scope of application and its effect extends significantly to existing DTAs.

It was originally a concern of the developing countries and was already included in the OECD Blueprint on GloBE from October 2020. Detailed information on its final design had already been announced for mid-2022 and has now been followed up by the publication of the STTR Model Rules and the STTR Commentary of 17.07.2023.

In the current Liechtenstein legislative procedure on GloBE (Report and Motion [BuA] 65/2023), the STTR could therefore not be considered and would also have had to be separated from it in terms of content, mainly due to its exclusively treaty-law effect.

Objective

The STTR is based on the understanding that a source state that has ceded its taxing rights for certain intra-group payments abroad under a DTA should nevertheless be able to recover part of these rights if the income is taxed at a rate below 9% in the state of the payee.

Specifically, it is intended to entitle the respective source state to impose a withholding tax on certain cross-border payments between associated enterprises, in particular, interest and royalty payments, which are not subject to at least a nominal minimum tax rate of 9% in the other state, in the amount of the difference between the actual nominal tax rate and the nominal minimum tax rate (max. 9%).

The STTR thus aims to revise the current division of the rights of taxation between source and domicile states within its scope.

Implementation

Due to its independent personal scope of application, which is detached from the IIR and the UTPR, and its legal consequences, which are limited to treaty law, the STTR is to be integrated into the DTAs by way of a new Multilateral Instrument (MLI), provided that a DTA partner state so requests. However, this should only be possible for partner states that are considered developing countries according to the World Bank's definition. In relation to Liechtenstein, this concerns, for example, the DTA with Georgia.

This new MLI is available for signature as of 05.10.2023. For Liechtenstein as a member of the Inclusive Framework, there are two options for implementing the STTR, which are either to sign the new MLI (as a multilateral agreement) or to amend the treaties (DTAs) bilaterally. However, the prerequisite for a need for adaptation is always the request of the DTA partner state.

Scope of application

The scope of application of the STTR extends to all existing DTAs for which adjustment is requested. Entities personally covered are associated enterprises, but not natural persons, non-profit organizations, certain investment funds and, among others, recognized pension funds.

The definition of an associated enterprise is based on Art. 5 (8) of the OECD Model Tax Convention 2017 (OECD-MA) and generally requires a control relationship (> 50%).

Further exceptions to the scope of application exist in the form of a relative return threshold and an absolute materiality threshold (see below).

Covered Income

The following income is covered by the STTR within the meaning of the OECD-MA 2017:

a) interest pursuant to Art. 11 (3),
b) licence fees pursuant to Art. 12 (2),

and also in relation to

c) payments made in return for the use or right to use distribution rights for a product or service,
d) insurance and reinsurance premiums,
e) fees for the provision of a financial guarantee or other financing fees,
f) rentals or other charges for the use of, or the right to use, industrial, commercial, or scientific equipment; or
g) **all income received in return for the provision of services**,

permanent establishment income (Art. 7) as well as other income according to Art. 21. Certain income from the shipping industry is not covered.

In addition, the STTR is not to apply if the gross amount of the covered income other than interest or royalties (letters c-g) does not exceed the cost of remuneration of the recipient for the service giving rise to such income by 8.5% (relative return threshold), as these are deemed to represent a lower profit shifting risk. In addition, each tax jurisdiction may set an absolute threshold below which the STTR does not apply in the respective tax year (absolute materiality threshold).

Determination of the applicable tax rate

The decisive factor is the nominal tax rate after a correction for certain preferential adjustments. These adjustments must lead to a permanent reduction of the taxable income because of

a) a full or partial exemption or exclusion from income,
b) a deduction from the tax base calculated based on the amount of income and without taking into account a corresponding payment or payment obligation, or
c) a tax credit, other than a credit for foreign tax paid on the income, calculated based on the amount of the income or the tax on that income (tax credit),

which are **directly related to the income covered** or incurred under a scheme that provides tax relief for income from geographically mobile activities.

Legal consequences

If the conditions are met, the source state may levy a withholding tax on the recognized income at a maximum rate of 9%, which always limits the additional withholding tax to the difference between the actual nominal tax burden on the recognized income in the recipient's state of domicile and the maximum withholding tax rate of 9%. For example, if the nominal tax burden in the recipient's country of domicile is 5%, the source state has a maximum right of taxation of 4%.

Implications for Liechtenstein

Since the nominal tax rate in Liechtenstein is significantly higher than 9% and Liechtenstein does not have a mechanism that provides for tax concessionary adjustments in direct relation to certain income (e.g., IP box regime), there should likely be no application of the STTR in the affected DTAs regarding the payments concerned. Nevertheless, further developments will have to be observed.

In cases where STTR-related withholding tax is deducted, it is generally possible to credit the foreign withholding tax against a domestic tax liability, although the maximum credit amount and the "per-item limitation" (Art. 18b of the Tax Act [SteG]) may impose restrictions on the amount of the credit.

Recommendation for action

It is not yet possible to foresee when the STTR will enter into force for the respective Liechtenstein DTAs. Nevertheless, it is important to analyze the potentially "covered payments" - also outside the scope of application of GloBE - and to keep an eye on the development, especially **for foreign subsidiaries that use, for example, IP box regimes.**

In affected cases, the STTR is also likely to require annual ongoing monitoring of the respective service relationships due to the relative and absolute scope exceptions.

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