Tax on Inbound Investment 2022

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Getting The Deal Through

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Tax on Inbound Investment
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Will Smith and Peter North
White & Case LLP

Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Tax on Inbound Investment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Chile and Greece.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Smith and Peter North of White & Case LLP, for their assistance with this volume.

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Austria

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ACQUISITIONS (FROM THE BUYER'S PERSPECTIVE)

Tax treatment of different acquisitions

1 What are the differences in tax treatment between an acquisition of stock in a company and the acquisition of business assets and liabilities?

The acquisition of shares (share deal) in exchange for cash or shares does not generally affect the target company itself (there are certain exceptions, such as net loss carry-forwards, which may cease to exist, or recapture rules under the Austrian group taxation regime). The company continues to record its assets at book values. At the shareholder level, if shares are sold for cash, the selling shareholder realises a capital gain or loss equal to the difference between the sales price and the value of the shares in his or her books. A share-for-share exchange is generally also taxable, but may qualify for rollover treatment under the Austrian Reorganisation Tax Act.

When acquiring shares in an Austrian corporation, the acquirer must capitalise the shares at their acquisition cost. In the case of a future disposal of the shares, a capital gain is subject to corporate income tax at a rate of 25 per cent or at the special income tax rate of 27.5 per cent if the seller is an individual. A capital gain is computed by deducting the book value of the shares at the time of disposal from the proceeds from sale less the costs of disposal.

In the course of the acquisition of business assets and liabilities (asset deal), the price must be attributed to the transferred assets (ie, such a transaction is treated as if the purchaser has bought the various assets separately) according to the going concern values of the individual assets of the business to determine the acquisition costs of the assets (ie, a step-up that allows for depreciation takes place). The remaining acquisition costs that are not allocable to the transferred assets have to be reported as goodwill. The acquiring company is not entitled to utilise any tax losses available to the selling company in respect of the transferred business.

If interests in a partnership are acquired, this is generally treated in the same way as described above for the asset deal; that is, as a pro rata purchase of the assets and liabilities of a partnership. Besides the purchase for a cash consideration, business assets and liabilities (if they constitute a business unit or division of a business unit) or partnership interests can also be contributed against the issuance of shares, and such transactions may also qualify for rollover treatment under the Austrian Reorganisation Tax Act.

Any capital gain resulting from the disposal of assets or a business is subject to corporate income tax at the standard rate of 25 per cent if the seller is a corporation or up to 55 per cent if the seller is an individual. In principle, there is no difference between the taxation of capital gains resulting from the disposal of assets and capital gains resulting from the disposal of a business (some allowances may apply under very narrow circumstances).

The sale of shares in a corporation is VAT-exempt without the right to deduct VAT. The sale of assets is subject to VAT at a rate of 20 per cent. In this case, however, the exemptions set out in the Austrian Value Added Tax Act (eg, for real estate or shares) remain applicable.

Step-up in basis

2 In what circumstances does a purchaser get a step-up in basis in the business assets of the target company? Can goodwill and other intangibles be depreciated for tax purposes in the event of the purchase of those assets, and the purchase of stock in a company owning those assets?

In the course of an asset deal (or purchase of partnership interests), a step-up in basis in the business assets is achievable. Generally, the acquired assets must be reported at their acquisition costs in the book of the acquiring company. Subsequently, the acquired assets may be depreciated over their expected useful lives. The differences between the price actually paid for a business and the acquisition costs of the individual assets must be reported as goodwill. For Austrian tax purposes, the goodwill must be depreciated over a period of 15 years on a straight-line basis.

There is no goodwill deduction in the case of the purchase of stock in a company acquired after 28 February 2014. For shares acquired before that date in an Austrian target that became a member of an Austrian tax group, a goodwill amortisation over a period of 15 years (capped at 50 per cent of the purchase price) was available. Goodwill amortisations from transactions before that date can be continued, to the extent that the goodwill amortisation influenced the purchase price of the shares. In this context it should also be noted that the statutory restriction of this goodwill amortisation to domestic targets violated EU law, according to ECJ case law (C-66/14).

Domicile of acquisition company

3 Is it preferable for an acquisition to be executed by an acquisition company established in or out of your jurisdiction?

In a leveraged transaction, a purchaser will usually seek to implement a tax offset structure that is aimed at offsetting interest expense at the acquisition company (AcquiCo) level with profit generated at the target company level. In principle, there are two methods for achieving this.

The first method is to establish a tax group between the AcquiCo and the target company. In such a tax group, the fiscal result of the AcquiCo and the target company is consolidated at AcquiCo level (ie, a negative fiscal result will be offset against a positive fiscal result). If the aggregated fiscal result of the AcquiCo and the target company is negative, the loss can be carried forward by the AcquiCo to future periods. The formation of a tax group requires a tax allocation agreement and an application to the tax office. The required minimum period of a tax group is fulfilled when three full fiscal years have expired. If the tax

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group is collapsed prior to the lapse of the three-year period, the group members are retroactively taxed on a standalone basis.

A second method, which is sometimes discussed but rarely ever implemented because of the significant implementation risk it involves, is an upstream merger of the target company into the AcquiCo. Based on past decisions of the Austrian Supreme Court, it is pretty clear that where the AcquiCo carries the acquisition debt for the purchase of the shares of the target company, a downstream merger of the AcquiCo into the target company will not be registered. In certain exceptional cases, an upstream merger of the target company into the AcquiCo may, however, be feasible. The result of such an upstream merger would be that the shares in the target company pass to the AcquiCo, interest expense on the acquisition debt can be offset against profit, and guarantees and security interests granted by the merged entity (holding the cash-generating assets) are not subject to the limitations under the Austrian capital maintenance rules and thus will be of greater commercial value to the financing banks. In particular, the last point is often of great interest to the financing banks, which is why this route is sometimes explored when a particular case supports the necessary arguments.

Regarding a future exit, it should be taken into account that double taxation treaties usually assign the right to tax capital gains to the state of residence of the shareholder. For that reason, a foreign seller will usually not be taxed on the capital gains in Austria. If, however, the seller is an Austrian tax resident, capital gains taxation applies (ie, no participation exemption is available for Austrian tax residents in relation to Austrian companies). Avoidance of withholding taxes on dividends is usually less of an issue, since pre-exit distributions are very rare. Still, to address that issue, EU entities are usually preferred over non-EU entities and, among the latter, entities from countries with which Austria has concluded a double taxation treaty are preferred. Accordingly, if a transaction is not leveraged, a foreign AcquiCo will usually be the preferred structure for a foreign purchaser. In the case of a domestic purchaser, the interposition of a foreign AcquiCo would be under high scrutiny by the tax authorities.

Company mergers and share exchanges

4 | Are company mergers or share exchanges common forms of acquisition?

Company mergers or share exchanges as a form of acquisition are not as common between unrelated parties as in other jurisdictions, such as the UK or the United States. Accordingly, the transaction currency will usually be cash. However, when the parties aim to enjoy a rollover treatment, merger or share for share exchanges can be an attractive option.

Under Austrian tax law, mergers within the scope of the Austrian Reorganisation Tax Act are tax-neutral provided that the possibility to tax unrealised gains at the level of the legal successor (receiving company) is not restricted. In the case of a restriction, a merger into a receiving company in the sense of article 3 of the EU Merger Directive in its current version or if the receiving company is resident in an EU member state or an EEA country, is taxable, but the respective tax payment is deferred for up to five annual instalments upon request of the transferring company. If the receiving company does not meet the aforementioned requirements, the merger triggers immediate taxation. Towards EU or EEA entities this is a new and less favourable regime that applies to reorganisations resolved as of 1 January 2016, while reorganisations before that date could apply for a deferral of taxation until capital gains had actually been realised, and such taxation had been time-barred after 10 years. Accordingly, whereas under the past regime an exit taxation had often been avoided, this is no longer possible under the new regime. If capital gains were deferred under the old regime, the tax in such cases is also divided into five instalments if so requested by the taxpayer.

Since 1 January 2020, the regime of share exchanges had been extended to individual persons and to taxpayers, who are subject to limited taxation according to Court of Justice of the European Union case law. Accordingly, a share exchange that leads to a restriction of the right of taxation of Austria will not lead to immediate taxation, but to a deferral of taxation until capital gains have actually been realised or deemed to be realised.

Tax benefits in issuing stock

5 | Is there a tax benefit to the acquirer in issuing stock as consideration rather than cash?

Beside the possibility of tax-neutral reorganisation under the Austrian Reorganisation Tax Act, there are no further tax benefits to the acquirer in issuing stock as consideration rather than cash. However, to benefit from such tax-neutral reorganisation, the stock granted in consideration for the received assets does not necessarily have to be newly issued stock, but may also be existing stock (eg, transferred from other shareholders).

Transaction taxes

6 | Are documentary taxes payable on the acquisition of stock or business assets and, if so, what are the rates and who is accountable? Are any other transaction taxes payable?

There are no transfer taxes as such levied on the sale of shares in a corporation or on the sale of assets in Austria. Note that (minor) court fees for registration in the Commercial Register must be paid.

Additionally, Austria levies stamp duties on a wide range of legal transactions, including:

- lease agreements (exemption for residential lease agreements) (1 per cent);
- assignment agreements (0.8 per cent);
- agreements regarding easements (2 per cent);
- agreements regarding sureties (1 per cent); and
- pledge agreements regarding real estate (1 per cent).

Stamp duties are triggered whenever a written deed evidencing the transaction is signed in Austria or, in cases where the deed is signed outside of Austria, if certain criteria being considered as substitute documentation are fulfilled (it is not the transaction as such that triggers the stamp duty but rather the written deed). Stamp duties can thus be legally avoided if no written deed at all is set up by carefully carried-out strategies. Debtors of the stamp duties are basically all parties of the agreements.

The sale of shares in a corporation is VAT-exempt without the right to deduct VAT. The sale of assets is subject to VAT at a rate of 20 per cent. In this case, however, the exemptions set out in the Austrian Value Added Tax Act (eg, for real estate or shares) remain applicable. The sale of a business as a going concern is treated as the sale of the underlying individual assets (ie, there is no VAT exemption for the sale of a business in its entirety). Therefore, the price of the business has to be divided according to the going concern values of the underlying assets. Tax rates and exemptions are applicable according to regular VAT law.

Real-estate transfer tax (the standard rate is 3.5 per cent) is levied on every acquisition of domestic real estate and in some cases also if shares in corporations or interests in partnerships that directly own Austrian real estate are transferred. In particular, the transfer of buildings and land, building rights and buildings on third-party land falls within the scope of the Austrian real-estate transfer tax; the transfer of machinery and plants is not subject to real-estate transfer tax. The

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tax base of the real-estate transfer tax is the amount of consideration for the transfer (fair market value), which is at least the value of the real estate.

Since 1 January 2016, real-estate transfer tax is triggered if 95 per cent (previously 100 per cent) of the shares of a company that directly holds Austrian real estate are consolidated in the hands of one shareholder or a group of shareholders within the meaning of the Austrian group taxation regime. Furthermore, a new taxable event was added: if within a period of five years 95 per cent or more of the partnership interests of a partnership that directly holds real estate are transferred, this triggers real-estate transfer tax (under the scope of this rule this can include several transactions with different purchasers). In each case, the real-estate transfer tax amounts to 0.5 per cent of the value of the real estate. The law now states that shares held by trustees are to be attributed to the trustor for the purpose of calculating the 95 per cent threshold. If Austrian real estate is transferred in the course of a reorganisation under the Reorganisation Tax Act, the real-estate transfer tax will likewise be 0.5 per cent of the value of the real estate. Taxation based on the value of the real estate – in the absence of a consideration that otherwise would be the tax base – was also introduced. Before that, taxation in such cases was based on an assessed value of real estate for tax purposes that usually was much lower than the fair market value.

In addition to real-estate transfer tax, a registration duty for the land register at a rate of 1.1 per cent, also based on the purchase price or the value of the real estate, is levied if a new owner is registered (ie, not if shares are transferred, as the owner of the real estate does not change in such case).

Net operating losses, other tax attributes and insolvency proceedings

7 Are net operating losses, tax credits or other types of deferred tax asset subject to any limitations after a change of control of the target or in any other circumstances? If not, are there techniques for preserving them? Are acquisitions or reorganisations of bankrupt or insolvent companies subject to any special rules or tax regimes?

Insofar as losses are not deductible in one year they can be carried forward to the next years for corporate income tax purposes. Pursuant to section 8, paragraph 4, No. 2 of the Austrian Corporate Income Tax Act, a deduction of loss carry-forwards up to the amount of 75 per cent (with certain exceptions that allow a deduction of 100 per cent, such as in the course of a liquidation or if a business unit is sold) of operating income is possible.

According to section 8, paragraph 4, No. 2 lit c of the Austrian Corporate Income Tax Act, loss carry-forwards expire if the economic identity of the taxpayer has changed in a significant way. The law stipulates a three-part test to establish if such a change has occurred. There must be:

- a substantial change in the organisational structure;
- a substantial change in the economic structure; and
- a substantial change in the shareholder structure that has been made against consideration.

Generally, all three requirements must be cumulatively met to consider that the economic identity of the taxpayer has changed significantly. Despite the foregoing, some may be less pronounced, as the assessment depends on an overall view of the relevant requirements, taking into account all of the facts and circumstances. While the objective of the shell company acquisition regime is to deny the possibility to buy a company just to benefit from existing tax loss carry-forwards, there is no motive test that would provide for an exemption from the regime if the taxpayer can clearly demonstrate that the transaction was not tax-driven. Even clear business reasons for the transactions do not hinder the application of the regime. In general, the law does not provide for a certain time period in which the three criteria have to be fulfilled cumulatively. The fulfilment of all three criteria within a short time-frame is a strong indication that a shell company acquisition took place. However, the relevant observation period may cover several years as long as the single steps can be considered to be parts of a larger plan to effect the relevant changes leading to the loss of the economic identity.

Even if the conditions are fulfilled, the loss carry-forwards do not expire if the changes are made for purposes of a restructuring of the corporation with the goal of saving a substantial number of existing jobs and its trade or business (that is, an escape clause). A substantial number of jobs is generally given if 25 per cent of the employees are retained. Such exemption will thus usually not be met if a holding entity or a similar vehicle is restructured.

Given that loss carry-forwards do expire as a result of the loss of economic identity, section 8, paragraph 4, No. 2 lit c of the Austrian Corporate Income Tax Act stipulates a very important exemption: any taxable income arising from the substantial economic change (eg, sale of assets or business premises) in the year of loss of the economic identity can be offset with the loss carry-forwards before they expire.

Acquisitions or restructurings of bankrupt or insolvent companies are not subject to any special rules or tax regimes in Austria, although cancellation of debt, which is generally taxable in Austria, may enjoy reduced taxation if certain requirements are met.

Austria has introduced for the first time a tax loss carry-back for losses from the tax assessment year 2020. Under certain conditions, it is possible to use tax losses from the tax assessment year 2020 to offset profits generated in 2019 and 2018. The tax loss carry-back is limited up to an amount of €5 million. If this amount cannot be fully utilised, the remaining losses can be carried back to the tax assessment year 2018 up to a maximum amount of €2 million. Any remaining tax losses can be carried forward. In the case of tax groups, only the group parent company can apply for the tax loss carry-back. The maximum tax loss carry-back amount is capped at €5 million multiplied by the members of the tax group and the group parent.

Interest relief

8 Does an acquisition company get interest relief for borrowings to acquire the target? Are there restrictions on deductibility generally or where the lender is foreign, a related party, or both? In particular, are there capitalisation rules that prevent the pushdown of excessive debt?

Pursuant to section 11 of the Austrian Corporate Income Tax Act, interest – in a narrow sense – on funds used to finance the acquisition of shares is tax-deductible for corporate income tax purposes.

Expenses related to the payment of interest to foreign recipients are in general deductible from the corporate income tax base. However, the deductibility of interest payments is limited in the case of loans between related parties. Accordingly, expenses with interest are not deductible from the tax base of an Austrian corporation as long as, cumulatively:

- the interest is paid to an Austrian company or a foreign company that is comparable to an Austrian company; and
- the interest is paid to a company that is directly or indirectly part of the same group of companies or is influenced directly or indirectly by the same shareholder; and
- the interest payments in the state of residence of the receiving company are:
  - not subject to tax because of a personal or objective exemption; or

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- subject to tax at a rate lower than 10 per cent; or
- subject to an effective tax at a rate lower than 10 per cent due to any available tax reduction.

It is not relevant whether taxation at a rate lower than 10 per cent is based on the domestic law of the state of residence of the receiving company or the applicable double taxation treaty concluded between Austria and the respective state of residence. If the receiving entity is not the beneficial owner, the respective conditions must be investigated at the level of the beneficial owner (eg, in certain back-to-back refinancing scenarios). Additionally, as of 1 January 2021, Austria has introduced an interest barrier rule (section 12a of the Austrian Corporate Income Tax Act), which was outlined by EU legislation (the Anti Tax Avoidance Directive) as a result of the OECD's Base Erosion and Profit Shifting project. As a result, an interest surplus (interest expenses that surpass interest earnings) is only tax deductible up to an amount that equals 30 per cent of the tax EBITDA. However, an exception is made for stand-alone companies, which are not included in a group's consolidated financial statements and have no associated enterprise or foreign permanent establishment (PE). Generally, per assessment period, an interest surplus up to €3 million is always deductible (tax-free amount). If the equity ratio of the company is similar to the average group equity ratio, interest surpluses can be deducted without restriction. Interest surpluses and EBITDA surpluses can be carried forward without time limitation. For tax groups pursuant to section 9 of the Austrian Corporate Income Tax Act, the same principles are applied at a tax group parent level.

Pursuant to section 14 of the Austrian Corporate Income Tax Act, anti-avoidance rules targeting hybrid cross-border structures are regulated. Specific structures leading to a tax deduction in one state without any corresponding taxable income in the other state (Deduction/No Inclusion) as well as structures enabling a double tax deduction in two different states (Double Deduction) shall be prevented. The new provisions apply to specific structures defined by law (eg, hybrid financial instrument, hybrid transfer, hybrid entities, hybrid PE and unconsidered PE) and lead to tax deduction of expenses failed or taxable income in Austria, as well as to tax deduction of expenses failed in Austria. The new rules for hybrid cross-border structures applied as of 1 January 2020.

Despite the fact that there are no Austrian statutory rules on thin capitalisation, as a matter of administrative practice and under case law, loans from related parties to an Austrian company may be considered to be 'hidden' equity and not debt if the Austrian corporation is considered to be thinly capitalised. A shareholder loan may be requalified as deemed equity in the following scenarios:

- lack of sufficient equity in relation to the long-term funding requirements of the business;
- excessive debt financing (debt to equity ratios far below the market standard);
- inability of the borrower to obtain a loan at comparable terms from third parties; or
- the loan agreement grants rights to the lender similar to those of shareholders.

In such a case, the interest is reclassified as dividends for Austrian tax purposes, but these deemed dividends may not, in some cases, benefit from treaty or directive reductions. While there is no official safe harbour rule, the Austrian tax authorities generally accept debt-to-equity ratios of around 4:1 to 3:1. However, this can only serve as guidance and the adequate debt-to-equity ratio must be analysed on a case-by-case basis. Higher debt-to-equity ratios have also been accepted.

In addition, as a general rule the tax authorities may request the disclosure of the eventual recipient (whether related or non-related) of any expenses deducted and that such a rule also applies to interest expenses. In particular, in relation to funds acting as lender, it may be burdensome to comply with such a disclosure rule.

Protections for acquisitions

9 | What forms of protection are generally sought for stock and business asset acquisitions? How are they documented? How are any payments made following a claim under a warranty or indemnity treated from a tax perspective? Are they subject to withholding taxes or taxable in the hands of the recipient? Is tax indemnity insurance common in your jurisdiction?

Tax risks are usually covered by warranties or indemnities. Tax warranties typically foresee a time limitation of around seven years. No liability is usually agreed for mere timing differences (eg, if tax authorities request longer tax depreciation periods) or if the tax risks had already been accounted for (eg, through provisions). Warranties are usually qualified by matters that have been disclosed (in a certain manner) or are deemed disclosed by operation of the provisions of the acquisition agreement or the disclosure letter. Indemnities are generally not qualified by disclosure or knowledge. The tax indemnity is usually only subject to a specific tax conduct provision, a direct loss limitation and the overall cap. In some cases, additional protection is obtained by warranty and indemnity insurance. If a tax warranty or indemnity is triggered, the seller will usually have the right to pursue tax litigation at his or her own risk and expenses to mitigate a potential liability. Payments under tax warranties or indemnities result in a retroactive change as regards the profit or loss generated by the seller and the acquisition costs recorded by the purchaser, and thus have only indirect tax consequences, rather than being taxable as such. If, however, additional payments such as liquidated damages are agreed upon, these would be subject to tax by the recipient. There is generally no withholding tax on such payments. Insurance is less common than in other jurisdictions, such as Germany, but will often include taxes. To conclude, insurance only for taxes is very rare.

POST-ACQUISITION PLANNING

Restructuring

10 | What post-acquisition restructuring, if any, is typically carried out and why?

Typical post-acquisition restructurings are the merger of the acquisition company with the target company or the establishment of an Austrian tax group pursuant to section 9 of the Austrian Corporate Income Tax Act. As a result of an upstream merger of the target company into the acquisition company, interest expense on the acquisition debt can be offset against profit. Owing to corporate limitations, the implementation of such a merger is often not feasible. Accordingly, the following paragraphs focus on the establishment of an Austrian tax group.

Austrian companies have the possibility to establish a tax group with subsidiaries by jointly filing a group taxation application before the Austrian tax authorities. The advantages of a tax group are the offsetting of profits and losses within the group (including the losses of foreign group members) and earlier usage of tax loss carry-forwards and the deduction of interest expenses from operational income.

However, as of 1 January 2021, Austria has introduced an interest barrier rule (section 12a of the Austrian Corporate Income Tax Act). In the case of a tax group, the law stipulates that the interest barrier rule is to applied at the level of the group parent company only. As a result, a group interest surplus (interest expenses that surpass interest earnings), is only tax deductible up to an amount that equals 30 per cent of the tax group EBITDA. Generally, per assessment period and tax group, an interest surplus up to €3 million is always deductible (group tax-free

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amount). If the tax group exists within a larger group (from a corporate law perspective) and the equity ratio of the tax group is similar to the average group equity ratio, interest surpluses can be deducted without restriction. Interest surpluses and EBITDA surpluses can be carried forward without time limitation.

According to the Austrian group taxation regime, a group parent company can form a tax group with a subsidiary if the parent exercises financial control over the subsidiary (ie, the parent owns more than 50 per cent of the capital and voting power in the subsidiary). Group members can include resident companies and non-resident companies if they are resident in an EU member state or in a third state with which Austria has concluded a comprehensive administrative assistance agreement regarding the exchange of information.

With regard to Austrian group members, 100 per cent of the profit or loss of the company is taxed at the level of the parent company (irrespective of the participation held), while losses of non-resident group members are only attributed to the parent to the extent of the direct participation of another national group member or the parent company (profits are not attributed at all). Losses attributed to the Austrian parent company in the past must be recovered in Austria if the non-resident group member offsets the losses with its own income in subsequent years or if the non-resident group member leaves the group. The foreign losses must be calculated based on Austrian tax law, but they can only be offset to the extent that a loss exists according to foreign tax law. Special rules for the recovery of losses apply in the case of liquidation of a non-resident group member. Additionally, foreign losses shall be deductible only to the extent of 75 per cent of the total profit generated by all domestic group members and the parent company.

In general, write-offs with regard to participations in group members are not tax-deductible. For shares acquired in a new Austrian group member, there was an option to record a goodwill element from the acquisition and amortise this asset over 15 years, leading to an additional tax deduction. For shares acquired after 28 February 2014, this option is no longer available. Goodwill amortisations from transactions before that date can be continued, given that the goodwill amortisation influenced the purchase price of the shares.

Other potential post-acquisition reorganisations could be, for example, the change of the legal form (typically a conversion) or the combination of a part of the existing business with the purchased business, which usually would be implemented by a carve-out of the existing one and a combination with the purchased one, which could be implemented either through a straight spin-off by acquisition, or through a spin-off followed by a merger. Sometimes, post-acquisition reorganisations are also aimed at simplifying the structure, for example, if two multinational companies are combined by merging the various local entities. In the cross-border context, another possible post-acquisition reorganisation is the conversion of a local subsidiary into a branch, which is usually implemented by cross-border mergers.

Spin-offs

11 | Can tax-neutral spin-offs of businesses be executed and, if so, can the net operating losses of the spun-off business be preserved? Is it possible to achieve a spin-off without triggering transfer taxes?

Within the scope of article VI of the Austrian Reorganisation Tax Act, a spin-off of companies can be effected as tax-neutral (ie, a rollover treatment is available). The spin-off qualifies only if it relates to:

- a business unit;
- a division of a business unit
- a partnership interest with an active trade or business; or
- a qualifying interest in a corporation (at least 25 per cent of the share capital).

In a spin-off, qualifying assets would be transferred from one company to one or more companies, while the transferring company continues to exist. In a split-off, the transferring company dissolves without formal liquidation and ceases to exist. The property can be transferred to a newly established company (split-off by formation) or to an existing company (split-off by acquisition).

In general, the rules set forth in section 8 paragraph 4 No. 2 lit c of the Austrian Corporate Income Tax Act regarding the limitation of deduction of loss carry-forwards also apply to any changes of the structure of a corporation in the course of a reorganisation, such as spin-offs. However, the Austrian Reorganisation Tax Act contains some special provisions supplementing the general rules. The net operating losses of the spun-off business are transferred to the receiving company as long as the assets that caused the transferred losses are also transferred and the scope of the transferred assets is comparable to the scope of the assets in the point in time when the losses occurred.

Under the provisions of the Austrian Reorganisation Tax Act, an exemption from VAT applies. Stamp duties will usually not be triggered, as the transfer of assets and liabilities is implemented by operation of law according to the principle of universal legal succession. Depending on the assets transferred, real-estate transfer tax and registration duties may be triggered. There is no longer any capital duty in Austria.

Migration of residence

12 | Is it possible to migrate the residence of the acquisition company or target company from your jurisdiction without tax consequences?

There are no explicit statutory taxation rules or administrative guidelines (except one provision in connection with the creation or discontinuation of an international participation in the course of the cross-border migration of an Austrian company) that deal with the migration of an Austrian corporation. At the level of the migrating corporation, the following alternatives have been discussed. Some scholars argued in the older literature that the corporation is treated as if it were liquidated. According to section 19 of the Austrian Corporate Income Tax Act, the liquidation surplus at the level of the company would be calculated as the difference between the net assets at the beginning of the liquidation period and the net assets at the end of the liquidation period according to the normal tax and accounting principles. Losses carried forward can be offset against the liquidation surplus without limitation. The distribution of the liquidation surplus and retained earnings of earlier years constitutes taxable income for the shareholders and is taxed at their level depending upon whether it is a company or an individual, resident in Austria or not. In the meantime, however, the prevailing opinion is of the view that no liquidation taxation is triggered. Based on income taxation rules, it then needs to be analysed whether assets are actually transferred in the course of the migration, in which case exit taxation would be triggered, or whether as a consequence of the migration certain assets are no longer taxable in Austria (eg, goodwill that will usually be attributed to the place of effective management) and likewise would be subject to exit taxation. In the case of migration to an EU or EEA member state, the tax can, upon request of the taxpayer, be paid in five annual instalments (or two annual instalments as regards the current assets).

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Interest and dividend payments

13 Are interest and dividend payments made out of your jurisdiction subject to withholding taxes and, if so, at what rates? Are there domestic exemptions from these withholdings or are they treaty-dependent?

Interest payments to non-Austrian corporations are generally not subject to withholding tax and, therefore, are not subject to limited tax liability in Austria. Interest payments to non-Austrian individuals may be subject to Austrian withholding tax at a rate of 27.5 per cent (or 25 per cent in case of interest payment from bank deposits and certain non-secured receivables against credit institutions) if paid by an Austrian paying agent (eg, an Austrian issuer of securities, Austrian credit institution or Austrian branch of a non-Austrian credit institution). However, if the debtor has neither its seat nor its place of business within Austria, interest payments are exempt from limited tax liability and withholding tax, even if paid by an Austrian paying agent. Relief from withholding tax may be granted under applicable tax treaties.

As of 1 January 2016, dividends paid to a non-resident are subject to a withholding tax of 27.5 per cent (or 25 per cent in the case of corporate entities as recipient). A reduction or relief from withholding tax might be available based on a tax treaty or the EU Parent-Subsidiary Directive. According to the Austrian implementation of the Directive, there is no withholding tax on dividends if:

- the parent company has a form listed in the Directive;
- the parent company owns directly or indirectly at least 10 per cent of the capital in the subsidiary; and
- the shareholding has been held continuously for at least one year.

Given that certain documentation requirements are met, a reduction or relief can be granted at source. There is no relief at source in cases of potential tax avoidance through holding companies (ie, if the recipient is a company that does not have an active trade or business, employees and business premises). Companies can apply for a refund in that case. In the course of the refund procedure, the company must provide evidence that the interposition of the company does not constitute an abusive arrangement. As a further option, a refund of withholding tax on dividends can be claimed by a foreign corporation to the extent that the Austrian payer is not relieved from its withholding obligation, so long as the tax withheld is not creditable in the recipient's home state under a double taxation treaty.

Tax-efficient extraction of profits

14 What other tax-efficient means are adopted for extracting profits from your jurisdiction?

According to Austrian generally accepted accounting principles (GAAP), the balance sheet profit of a company can be sourced by the release of capital reserves paid in by the shareholder or by operating profits obtained by the company itself. Austrian tax law provides a different treatment for distributions of such balance sheet profits, whether they are made in the form of repayment of capital or as dividends. Repayments of capital are tax-neutral and do not trigger withholding tax. At the level of the company, such repayment of capital does not trigger any tax consequences under Austrian tax law. At the level of the shareholder, a repayment of capital is treated as a reduction of the acquisition costs or book value of the participation. Such a reduction leads to a taxable capital gain if the repaid amounts exceed the acquisition costs or book value for tax purposes of the participation.

To document the amount of capital contributions for tax purposes (which can be different from the equity according to Austrian GAAP), taxpayers must record all capital contributions in a special tax account. As long as the contributions recorded in this account cover the amount of a planned profit distribution, the management of a company has the right to decide whether a distribution to all shareholders of the company shall be treated as a taxable dividend or a tax-neutral repayment of capital under certain conditions.

DISPOSALS (FROM THE SELLER'S PERSPECTIVE)

Disposals

15 How are disposals most commonly carried out - a disposal of the business assets, the stock in the local company or stock in the foreign holding company?

The most common form of transaction relating to corporations is the share deal, for reasons that go far beyond the tax implications. In general, a purchaser usually wishes to acquire only the target, rather than the foreign holding entity as well. The purchase of partnership interests is treated as the purchase of the pro rata amount of the assets and liabilities of the partnership (ie, as an asset deal). Either form generally triggers taxation.

Disposals of stock

16 Where the disposal is of stock in the local company by a non-resident company, will gains on disposal be exempt from tax? Are there special rules dealing with the disposal of stock in real-property, energy and natural-resource companies?

The disposal of stock in an Austrian company by a non-resident company is subject to tax if the participation amounts to at least 1 per cent at any time within the preceding five years. Accordingly, such disposals will usually be taxable in Austria (by contrast capital gains realised by Austrian companies arising from the disposal of stock in foreign corporations will usually be exempt from taxation in Austria). Corporate income tax is assessed on such gains at the normal rate of 25 per cent. However, taxation is eliminated in most cases under an applicable double tax treaty. Some of the double tax treaties concluded with Austria include a special provision in connection with companies owning real estate located in Austria and assign Austria the right to tax such capital gains.

Avoiding and deferring tax

17 If a gain is taxable on the disposal either of the shares in the local company or of the business assets by the local company, are there any methods for deferring or avoiding the tax?

It is possible to transfer the shares in an Austrian company or of the business assets by the Austrian company in a tax-neutral way under the Austrian Reorganisation Tax Act. Therefore, if the requirements are met (among others, the consideration that the shares or assets transferred must generally be shares in the acquiring company), rollover treatment is available. If the seller of a local corporation is an Austrian private foundation, taxation of capital gains in a sale transaction can be avoided if, within 12 months, an alternative investment is made and the realised capital gains (hidden reserves) of the sold participation are transferred to this new investment (by reducing the acquisition costs in such new participation) and thereby remain taxable.

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UPDATE AND TRENDS

Key developments of the past year

18 Are there any emerging trends or hot topics in the law of tax on inbound investment?

The Tax Reform Act 2020 foresees anti-avoidance rules targeting hybrid cross-border structures. Accordingly, specific structures leading to a tax deduction in one state without any corresponding taxable income in the other state (Deduction or Non-Inclusion), as well as structures enabling a double tax deduction in two different states (Double Deduction), shall be prevented by these provisions.

The EU Directive DAC 6 as regards the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements provides for a reporting obligation in connection with international tax-planning models and was to be implemented by the EU member states by 31 December 2019. In Austria, the EU Reporting Obligation Act has been in force since 1 July 2020. The EU Reporting Obligation Act takes over from the EU requirements in many areas and requires the reporting of a cross-border arrangement if certain hallmarks are met. Notaries, attorneys-at-law, certified public auditors and certified public tax advisors will be exempt from notification obligations under certain circumstances. Structures in which the first implementation step took place after 25 June 2018 are affected by the obligation to notify. After an extension of that deadline until 31 October 2020 because of the covid-19 pandemic, the obligation to notify is now in force. Additionally, the Austrian Ministry of Finance has published guidelines on the reporting obligations of a cross-border arrangement (eg, information on the taxes covered, the definition of terms, reportable arrangements, hallmarks and main benefit test, deadlines for reporting, etc).

As there was a threat of the EU Commission starting proceedings against Austria owing to the lack of implementation of the interest barrier rule, Austria has introduced such a rule as of 1 January 2021. As a result, if the requirements of the interest barrier rule are met, an interest surplus (interest expenses that surpass interest earnings) is only tax deductible up to a maximum of 30 per cent of the taxable EBITDA of a company. The rule is applicable for the financial year that begins after 31 December 2020. However, interest up to an amount of €3 million per assessment period (tax-free amount) is always deductible. Further specific provisions for tax groups exist as well.

Within the context of the covid-19 pandemic, there has been a wide range of tax measures such as deferments and subsidies.

* *The authors would like to note that prior to Maja Petrovic acting as co-author Martina Gatterer used to co-author this article. The authors are grateful for her previous contribution.*

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