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Expert Analysis Chapter

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1 Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in your jurisdiction?

Austria has an extensive network of income tax treaties (*Doppelbesteuerungsabkommen*) with 90 treaties currently in force (as of 1 January 2021). In addition, Austria has concluded seven tax information exchange agreements with Andorra, Gibraltar, Guernsey, Jersey, Mauritius, Monaco and St. Vincent & the Grenadines. Furthermore, the Convention on Mutual Administrative Assistance in Tax Matters and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting are applicable.

1.2 Do they generally follow the OECD Model Convention or another model?

Austrian tax treaties generally follow the OECD Model Convention, with certain minor modifications. Double taxation of dividends, interest and royalties is mostly eliminated by the credit method (*Anrechnungsmethode*) under Austrian tax treaties, while double taxation of other income is avoided by the exemption method (*Freistellungsmethode*). Some of the tax treaties contain tax-sparing provisions for different types of income, such as royalties and interest.

1.3 Has your jurisdiction signed the tax treaty MLI and deposited its instrument of ratification with the OECD?

Austria signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting in June 2017 and deposited its instrument of ratification with the OECD in September 2017. The MLI entered into force in Austria as of 1 July 2018.

1.4 Do they generally incorporate anti-abuse rules?

Austria has no general policy to include anti-abuse rules in tax treaties that go beyond the rules in the OECD Model Convention, but Austrian courts rely on the general anti-abuse rules (see question 9.1 for further details). On the request of the tax treaty partner, a few treaties incorporate such rules. For example, the tax treaty concluded with the United States includes a limitation-on-benefits clause.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

In general, the tax treaty provisions prevail over domestic law as "*lex specialis*". Technically, a provision introduced subsequently could override treaty law as "*lex posterior*", but Austria has not enacted any tax treaty override legislation so far. However, Austrian tax authorities take the view that tax treaty law does not limit the application of domestic anti-abuse provisions. For example, the Annual Tax Act 2018 introduced controlled foreign company (CFC) rules (see question 7.3) for permanent establishments (applicable for business years starting 1 January 2019), overriding the rules of treaties for permanent establishments.

1.6 What is the test in domestic law for determining the residence of a company? Has the application of the test been modified in response to COVID-19?

A corporation will be deemed tax resident in Austria if either its legal seat (place which is designated as such in its articles of association) or its place of management is situated in Austria. The place of management is defined as the centre from which the activities of the company are effectively directed from a management perspective; whereas in the past the focus was mainly on where the relevant decisions are taken (usually proven by board meeting minutes), the tax authorities now increasingly also taking into account where such decisions are communicated and implemented by the management. Resident companies are subject to unlimited taxation in Austria on their worldwide income.

Based on the tax treaties concluded by Austria, a company is considered to be resident in the state in which the place of its effective management is located. In practice, the domestic term "place of management" is understood in the same way as "place of effective management".

There have been no modifications with regard to the determination of residence of a company in response to COVID-19. However, the Austrian Ministry of Finance has issued a letter of information which can serve as a guideline regarding the question of whether a permanent establishment is created in Austria in case employees perform their work from their Austrian home-office due to COVID-19. According to the Austrian Ministry of Finance, this should rarely be the case.

1.7 Is your jurisdiction's tax authority expected to revisit the status of dual resident companies in cases where the MLI changes the treaty "tiebreaker"?

According to the reservations and notifications of the Republic of Austria to the MLI, the Republic of Austria has reserved the right

for the entirety of Article 4 – Dual Resident Entities – not to apply to its covered tax agreements. Since the introduction of the Tax Reform Act 2020 (*Steuerreformgesetz 2020*), the attribution of specific non-distributed income (*Hinzurechnungsbesteuerung*) also applies to dual resident entities (Section 10a para. 6 no. 1 Austrian Corporate Income Tax Act (*Körperschaftsteuergesetz*)) and certain deductions are now excluded in case of dual resident entities in connection with hybrid structures (Section 14 para. 7 no. 3 Austrian Corporate Income Tax Act). Whether Austria's tax authorities will further revisit the status of dual resident companies is unclear.

2 Transaction Taxes

2.1 Are there any documentary taxes in your jurisdiction?

The Austrian Stamp Duty Act (*Gebührengesetz* – GebG) contains an exhaustive list of legal transactions that are subject to Austrian stamp duty provided that a signed written deed is executed and a nexus to Austria exists. Legal transactions such as, *inter alia*, lease agreements (exemption for residential lease agreements), assignments, suretyships and mortgages are covered by the stamp duty provisions at rates of between 0.8% and 1% of the contract value. No stamp duty is levied on share transfer agreements, or furthermore on loan and credit agreements signed after 31 December 2010.

Signing a written deed on a stamp-dutiable transaction in Austria will trigger stamp duty. Due to a broad interpretation of the term "signed written deed", even if the contract is not signed in Austria, bringing a written deed originally signed outside Austria into Austria may result in the necessary nexus to Austria for a transaction subject to stamp duty. In addition, any written reference to the contract/transaction that is signed by only one of the parties to the transaction but is then handed over (sent) to another party or (in certain circumstances) to a third party, could provide sufficient evidence of the transaction to give rise to stamp duty. The term "written deed" comprises even email communication carrying an electronic or digital signature (details are disputed), which gives evidence of a stamp-dutiable transaction (e.g., mentioning of a lease or assignment agreement by a party thereto).

2.2 Do you have Value Added Tax (VAT), or a similar tax? If so, at what rate or rates? Please note any rate reduction in response to COVID-19.

VAT is levied at all levels of the supply of goods and services with the right to deduct input VAT to the extent the recipient thereof qualifies as an entrepreneur. Austria's VAT Act is based on the EU Council Directive on the common system of VAT.

The standard rate is 20%. A reduced rate of 10% applies, *inter alia*, to food, books, newspapers and periodicals, passenger transport, accommodation in hotels and renting of residential immovable property. A further reduced rate of 13% applies for various recreational and cultural services.

In response to COVID-19, a temporary reduced tax rate of 5% has been introduced to support the F&B, hotel, cultural and publication sectors. The reduced tax rate was foreseen for accommodation and camping sites, for the supply of all food and beverages in the gastronomy sector, and with regard to the already favoured services of the cultural sector and supplies in the publication sector. The measure is still in force for accommodation and camping sites, the supply of all food and beverages in the gastronomy sector, and services of the cultural sector until 31 December 2021. The measure regarding the publication sector expired on 31 December 2020.

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

There are two types of exemption from VAT: an exemption under which credit for input VAT is not possible; and an exemption which entitles the taxpayer to credit for input VAT.

The first type of exemption includes banking, finance and insurance-related transactions, the disposal of shares, the leasing or letting of immovable property for commercial purposes, the supply of land and buildings, health and welfare services, and supplies by charitable organisations. For most of these transactions, there is an option for standard VAT treatment (i.e., VAT has to be charged, but with the benefit that credit for input VAT may be claimed). For the rental of land and buildings for commercial purposes, the option to charge VAT is only applicable if the tenant uses the object to render services that are subject to VAT.

The second type of exemption includes exports, intra-community supplies, the supply of services consisting of work on movable property acquired or imported for the purpose of undergoing such work, and the supply of services when these are directly linked to the transit or the export of goods.

The supply of services and the delivery of goods of an entrepreneur, who operates his business domestically and whose turnover does not exceed the amount of EUR 35,000 p.a. (since 1 January 2020; before that, the amount was EUR 30,000 p.a.) (regime for small entrepreneurs – *Kleinunternehmerregelung*), are exempt from VAT without credit for input VAT.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

A deduction or refund for input VAT is available to both resident and non-resident entrepreneurs if the respective supplies are used to render supplies that are not VAT-exempt under the first type (without the entitlement to claim credit for input VAT), with financial institutions being the most relevant example. An entrepreneur is any person (individual or legal entity) conducting a business independently in order to realise earnings (though not necessarily profits), regardless of nationality or residence.

If an entrepreneur renders both VATable and VAT-exempt supplies, only the input VAT attributable to the VATable supplies can be recovered. Input VAT deduction is only allowed if an invoice that fulfils certain formal requirements has been provided by the supplier.

It should be noted that holding companies (including acquisition vehicles) are usually not entitled to claim credit for input VAT, unless they also provide VATable services, in which case input VAT may be claimed for the related expenses. Accordingly, holding entities often provide such VATable services (e.g., accounting, procurement or IT services) to other (group) entities, to recover some input VAT.

2.5 Does your jurisdiction permit VAT grouping? If so, how does this apply where a company in one jurisdiction has an establishment in another?

The Austrian Value Added Tax Act provides that the effects of a VAT tax group are limited to the Austrian parts of the company. Therefore, it is possible, under current legislation, to include an Austrian permanent establishment of a foreign company (but not the entire company) in an Austrian VAT tax group. Services between the foreign head office and the domestic permanent establishment are thus taxable. The Austrian tax authorities interpret the provisions in place in line with the *Skandia* case.

2.6 Are there any other noteworthy transaction taxes or indirect taxes that are payable by companies?

Real estate transfer tax 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 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, whereas the transfer of machinery and plants is not subject to real estate transfer tax.

In short, the real estate transfer tax is 3.5% (reduced rates apply between specific family members and in the case of a transfer of shares in corporations or interests in partnerships or reorganisations) and it is irrelevant whether it is acquired by an Austrian or a foreign citizen or resident. Further, an additional 1.1% registration fee becomes due upon incorporation of the ownership change in the land register.

2.7 Are there any other indirect taxes of which we should be aware?

Austrian Insurance Tax applies on the payment of insurance premiums for several types of insurance contracts.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

Dividends paid to a non-resident are subject to a withholding tax of 27.5%.

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 rules implementing the EU Parent-Subsidiary Directive, there is no withholding tax on dividends if (i) the parent company has a form listed in the EU Parent-Subsidiary Directive, (ii) the parent company owns (directly or indirectly) at least 10% of the capital in the subsidiary, and (iii) the shareholding has been held continuously for at least one year.

Provided that certain documentation requirements (including a tax residence confirmation for the foreign recipient, which needs to be issued by the foreign tax authorities on a special tax form) are met, a reduction or relief can be granted at source. No relief at source is granted in cases of potential tax avoidance, e.g., in case of holding companies with little or no substance in the state of residence (i.e., if the recipient is a company that does not have an active trade or business, employees and business premises). If no reduction or relief was granted at source, companies can apply for a refund. In the course of the refund procedure, the company has to provide evidence that the interposition of the foreign company does not constitute an abusive arrangement. If such refund procedure was successful, a simplified procedure is applied in the following three years.

As a further option, a refund of withholding tax on dividends can also be claimed by a foreign corporation resident in the EU to the extent that the Austrian company 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.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Royalties paid to a non-resident are subject to a withholding tax of 20%.

A reduction or relief from withholding tax might be available based on a tax treaty or the EU Interest and Royalties Directive. According to the Austrian rules implementing the EU Interest and Royalties Directive, there is no withholding tax on royalties if (i) the parent company has a form listed in the EU Interest and Royalties Directive, (ii) the parent company owns directly at least 25% of the capital in the subsidiary, and (iii) the capital holding has been held continuously for at least one year.

The procedures for the application of reduction or relief, as well as for a refund, are the same as for dividends.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Interest paid to non-resident corporations is generally not subject to withholding tax.

3.4 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

Despite the fact that there are no Austrian statutory rules on thin capitalisation, as a matter of administrative practice and case law, loans provided by related parties to an Austrian company may be considered "hidden" equity and thus not be treated as debt if the Austrian corporation is too thinly capitalised (taking into account debt provided by unrelated parties). In such case, interest payments are reclassified as dividends for Austrian tax purposes, and accordingly are not deductible and are subject to withholding tax. As part of the new COVID-19 Tax Measures Act, an interest limitation rule has been implemented in Austrian law by the new Section 12a of the Austrian Corporate Income Tax Act in order to comply with the EU Anti-Tax-Avoidance Directive (ATAD). The purpose of the interest limitation rule is to limit the deductibility of loan costs depending on the company's earnings before interest, tax, depreciation and amortisation (EBITDA), if the debt leverage is higher in Austria than the average of the whole group. The deductibility of interest surplus (*Zinsüberhang*) is in principle limited to 30% of the tax EBITDA of the respective year. There are four significant exceptions to the interest limitation rule:

- Up to EUR 3 million of interest surplus is fully deductible. The amount exceeding this sum is subject to the interest limitation rule. In case of a tax group, the allowance applies for the entire group, not per group member.
- The interest limitation rule does not apply on standalone entities. A standalone entity is considered an entity, which is not (fully) included in consolidated financial statements, has no affiliated companies and has no foreign permanent establishments.
- The interest surplus can be fully deducted if the company can prove that the ratio of its equity over its total assets is equal to or higher than the equivalent ratio of the corporate group it belongs to (equity-escape clause). A two-percentage-point tolerance exists.
- For contracts concluded before 17 June 2016, the interest limitation rule is not applicable until 2025.

3.5 If so, is there a "safe harbour" by reference to which tax relief is assured?

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 has to be analysed on a case-by-case basis. Having said that, higher debt-to-equity ratios have also been accepted.

3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

No. However, debt provided by unrelated parties is to be taken into account when determining the debt-to-equity ratio.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

Austria has introduced the interest barrier rule, which also applies for payments made to third parties. For further details on the interest barrier rule, please see question 3.4.

3.8 Is there any withholding tax on property rental payments made to non-residents?

Such payments would not be subject to withholding tax, but the rental payments that relate to domestic real estate would be subject to limited taxation and the non-residents would be obliged to file a tax return for the rental payments.

3.9 Does your jurisdiction have transfer pricing rules?

Austria has generally adopted the OECD Transfer Pricing Guidelines. The Austrian Ministry of Finance has issued transfer pricing guidelines as well, which are based on the OECD Guidelines.

Therefore, transactions between related corporations, as well as profit attributions to permanent establishments, must be at arm's length. There is also an obligation to prepare documentation for transfer prices in inter-group transactions.

Under Austrian procedural law, a formalised advance ruling procedure can be filed to determine the applicable transfer prices.

Furthermore, there are provisions about documentation obligations (as mentioned below at question 10.3).

3.10 Can companies in your jurisdiction obtain unilateral, bilateral or multilateral advance pricing agreements?

In Austria, it is possible to apply for the issuance of an information notice (*Auskunftsbescheid*) pursuant to Section 118 Austrian Federal Fiscal Code (*Bundesabgabenordnung* – BAO) to obtain a unilateral advance pricing agreement (APA). Additionally, bilateral or multilateral APAs may be obtained through advance ruling procedures (*Vorabverständigungsverfahren*). The Austrian Ministry of Finance has issued a letter of information which can serve as a guideline in that regard.

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

Generally, Austrian corporations are subject to the corporate income tax levied over their profits, at a rate of 25%.

There is an annual minimum corporate income tax (i.e., which applies irrespective of the actual income and thus also in a loss situation) of EUR 500 p.a. for a limited liability company in the first five years after incorporation and EUR 1,000 p.a. during the next five years. Thereafter, the minimum corporate income tax is raised to EUR 1,750 p.a. The minimum corporate income tax for a stock corporation amounts to EUR 3,500 p.a.

4.2 Is the tax base accounting profit subject to adjustments, or something else?

Companies are obliged to keep books according to the commercial law rules. The accounting profits based on Austrian generally accepted accounting principles (GAAP) then serve as the basis for determining the tax base. The accounting profits are, however, adjusted for certain positions as described in the answers below.

4.3 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

The main adjustments include:

- tax-exempt income (e.g., income from dividends and capital gains subject to the participation exemption);
- non-deductible expenses (e.g., profit distributions, certain expenses in relation to company cars, certain representation expenses, directors' fees exceeding EUR 500,000, expenses in connection with tax-free income, interest or royalties paid to related parties in low-tax jurisdictions); and
- differences in the calculation of provisions, in depreciation rates and regarding valuation (impairment) rules for other assets and liabilities.

4.4 Are there any tax grouping rules? Do these allow for relief in your jurisdiction for losses of overseas subsidiaries?

According to the Austrian group taxation regime, a group parent company can form a tax group with a subsidiary if the parent company exercises financial control over the subsidiary (i.e., the parent owns more than 50% of the capital and voting power in the subsidiary).

Eligible group members include both resident companies and non-resident companies; in the case of the latter, however, this is only 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% of the profit/loss of the company is attributed to and taxed at the level of the parent company (i.e., irrespective of the participation held), while losses of non-resident group members are attributed to the group member or to the group parent to the extent of the direct participations of all group members (profits are not attributed at all). Losses attributed to the Austrian parent company in the past have to be recaptured in Austria if the non-resident group member offsets the losses with its own income in subsequent years (or fails to do so despite being entitled to), or if the non-resident group member exits the Austrian tax group. The foreign losses have to be calculated on the basis of Austrian tax law, but they can only be offset to the extent a loss also exists according to foreign tax law. Special rules for the recovery of losses apply in case of the liquidation of a non-resident group member. Additionally, foreign losses shall be deductible only to the extent of 75% of the total profit generated by all domestic group members and the parent company.

In general, write-offs on participations in group members are not tax-deductible (the rationale is that losses can be offset from other profits anyway). For shares acquired in an Austrian target that became a group member, a goodwill amortisation over a period of 15 years (capped at 50% of the purchase price) was applied, 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 if the goodwill amortisation influenced the purchase price of the shares. In this context, it should also be noted that the restriction of this goodwill amortisation to domestic targets violated EC law, according to case law.

4.5 Do tax losses survive a change of ownership?

The tax loss carry-forwards of a corporation are, in general, not affected by a change of ownership. However, there are two exemptions.

Loss carry-forwards can expire if the "economic identity" of the company is no longer given in connection with an acquisition of the shares for consideration (*Mantelkauf*). The law specifies that the "economic identity" is lost if there is a significant change of the shareholder structure, the organisational structure and the business structure of the company. Generally, all three criteria have to be met cumulatively in order to apply, taking into account not only the time of the acquisition, but also the following months (up to approximately one year).

Furthermore, loss carry-forwards can expire in a reorganisation if the business unit that caused the losses does not exist anymore or is reduced in such a way that it cannot be considered comparable to the business unit in which the losses occurred.

It is worth noting that a loss carry-back has been introduced due to COVID-19. Accordingly, losses from 2020 could be offset against the profits from the years 2019 and 2018. The maximum amount that could be carried back is EUR 5 million. Such loss carry-back was also available in the tax group regime. This provision is still relevant for fiscal years differing from the calendar year; consequently, the taxpayer may carry back a tax loss from 2020/2021 to the previous two years. Combining losses from two years is not possible.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

No. Both retained and distributed profits are taxed at the same rate at the corporate level (i.e., only corporate income tax), but additional taxes may apply at the shareholder level when the profits are then distributed. By comparison, in the case of a partnership, the profits are immediately taxed at the progressive income tax rate if the partner is an individual or at the rate of 25% corporate income tax if the partner is a corporation, irrespective of whether or not they are distributed, so that no further tax is triggered upon distribution to the partners.

4.7 Are companies subject to any significant taxes not covered elsewhere in this chapter – e.g. tax on the occupation of property?

An annual real estate tax on all domestic immovable properties is levied at a basic federal rate, multiplied by a municipal coefficient on assessed value of real estate for tax purposes (*Einheitswert*). The basic federal rate is usually 0.2% and the municipal coefficient ranges up to 500%.

5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

Capital gains and losses derived from the sale or other disposal of business property are taxed as ordinary business income of a company at normal rates (in the case of individuals, reduced rates apply to certain capital gains).

5.2 Is there a participation exemption for capital gains?

Capital gains derived from the sale of shares in a foreign corporation may be exempt under the International Participation Exemption (see question 7.2). By comparison, there is no exemption for capital gains derived from the sale of shares in a domestic corporation.

5.3 Is there any special relief for reinvestment?

No, there is no rollover relief available for companies in relation to capital gains. It should, however, be noted that the regime applicable to Austrian private foundations, which often are the shareholders of Austrian companies, provides for such relief if the private foundation reinvests within a period of 12 months.

5.4 Does your jurisdiction impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

There is a withholding tax of 27.5% on proceeds from shares sold over a securities account at an Austrian credit institution. This does not apply to the sale of limited liability companies.

For the sale of Austrian real estate, a withholding tax of 30% is levied.

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

On 1 January 2016, the former capital duty of 1% levied on equity contributions was abolished, and therefore no taxes are due upon formation.

6.2 Is there a difference between the taxation of a local subsidiary and a local branch of a non-resident company (for example, a branch profits tax)?

A branch will be taxed as a permanent establishment of the foreign head office, while a subsidiary is a separate taxable entity. The profits (subject to corporate income tax) of a permanent establishment can be remitted to the head office without any tax consequences. In contrast, the taxed profits of a subsidiary have to be distributed as a dividend (subject to withholding tax). Besides that, there are no further differences between the taxation of a local subsidiary and a local branch of a non-resident company. In particular, there is no branch profit tax in Austria.

Transactions between the subsidiary and the foreign parent have to comply with the "arm's length" principle. On the other hand, a permanent establishment cannot conclude contracts with the head office, as both are considered to be one legal entity. Therefore, it can be more burdensome in practice to determine and allocate an appropriate profit to the permanent establishment, as compared to a subsidiary.

6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

For the calculation of the taxable profit, a permanent establishment will be treated as a notional "independent enterprise".

A functional analysis has to be conducted, which is based on "significant people functions". Functions, risks and assets, as well as an appropriate amount of capital, have to be allocated to the permanent establishment to determine the arm's-length profit of the permanent establishment. Besides a transfer pricing concept, there is also a requirement to have separate tax accounts for the permanent establishment (while, according to the prevailing view in legal writing, there is generally no such obligation under commercial law).

6.4 Would a branch benefit from double tax relief in its jurisdiction?

The branch as such would not be entitled to tax treaty benefits, as it is not a legal person. Only the head office would be able to claim treaty protection. However, the branch can, in fact, in many cases benefit from treaty relief as a consequence of the anti-discrimination clauses contained in most Austrian tax treaties or on the basis of EC law.

6.5 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

There is no such taxation in Austria.

7 Overseas Profits

7.1 Does your jurisdiction tax profits earned in overseas branches?

Austrian companies are taxed on their worldwide income, including income from overseas branches. In most cases, such income will be exempt in Austria based on an applicable double tax treaty (only very few Austrian treaties foresee the credit method for business profits). If there is no treaty in place with the respective country, relief from double taxation is granted via unilateral measures under certain circumstances. It is worth noting that the CFC rules (see question 7.3) for permanent establishments foresee taxation of profits earned in overseas branches in Austria under certain circumstances.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

Austrian legislation grants a participation exemption for the dividends received from a domestic corporation.

An exemption also applies to dividends received from a foreign corporation, as well as to capital gains thereof, which are also exempt from taxation (unless the parent company opts for taxation) if the following conditions are fulfilled (international participation exemption):

- the participation amounts to at least 10%;
- the participation is held uninterruptedly for at least one year;
- the foreign corporation is comparable to an Austrian corporation (or an entity enumerated in the Annex to the EU Parent-Subsidiary Directive, in which case this is met in almost all cases); and
- the "switch-over" provision is not applicable.

Furthermore, portfolio dividends (i.e., dividends from a participation under 10%; no minimum percentage or holding period is required) received from either a foreign corporation listed in the Annex to the EU Parent-Subsidiary Directive, or from a foreign corporation, which is comparable to an Austrian corporation, either resident in an EU Member State or resident in a jurisdiction which has a broad exchange of information clause in its double tax treaty with Austria, will be exempt from Austrian income tax as well as long as the "switch-over" provision is not applicable. It should be noted that this exemption only applies to dividends, thus capital gains from a participation under 10% are always taxable.

The participation exemption will not apply if the dividend distributed to the Austrian company is tax-deductible by the foreign corporation in its home jurisdiction. This is now also the standard under the EU Parent-Subsidiary Directive.

The "switch-over" provision, i.e., that the income is taxable with a tax credit for the foreign corporate tax paid by the subsidiary, applies to low-taxed passive income of qualified international participations and qualified portfolio investments of at least 5%. Following this, the switchover to the credit-method will be triggered if (i) the foreign subsidiary predominantly achieves low-taxed passive income, and if (ii) the CFC legislation (see question 7.3) is not applicable.

The "switch-over" provision, as implemented by the Annual Tax Act 2018, is applicable if the following two conditions are cumulatively fulfilled:

- the foreign subsidiary generates predominantly interest income or other income from financial assets, royalties or other intellectual property income, dividends and income from the sale of shares, financial leasing income, income from activities of insurance companies and banks and other financial activities as well as income from settlement companies (sources of income referred to as "passive income"); and
- the income of the foreign subsidiary is subject to an effective corporate income tax not higher than 12.5% considering the foreign income calculated based on Austrian tax law and the factual paid foreign tax ("low taxation").

Further details regarding the two conditions – passive income and low taxation – are stipulated in a decree published by the Ministry of Finance. The mentioned switchover mechanism for international participations and portfolio investments applies for business years starting 1 January 2019.

It is worth noting that interest expenses directly related to the debt financing of the acquisition of a participation are deductible even if the income is exempt under the participation exemption, if applicable.

7.3 Does your jurisdiction have "controlled foreign company" rules and, if so, when do these apply?

The Annual Tax Act 2018 implemented the standards set by the EC Anti-Tax Avoidance Directive and introduced CFC rules for "controlled foreign companies" and permanent establishments. According to these provisions, specific non-distributed passive income (e.g., interest income or other income from financial assets, royalties or other intellectual property income, taxable dividends and income from the sale of shares, financial leasing income, income from activities of insurance companies and banks and other financial activities as well as income from settlement companies) of a controlled foreign subsidiary is included in the corporate tax base of the Austrian parent company by applying the CFC rules.

The preconditions for such attribution of income of the foreign company are that the subsidiary:

- is directly or indirectly controlled (50% of voting rights or capital or rights to profit);
- is situated in a low-tax country (meaning that the effective corporate income tax paid by the subsidiary is not higher than 12.5% considering the foreign income calculated based on Austrian tax law and the factual paid foreign tax); and
- does not carry out any significant economic activity in terms of personnel, equipment, assets and premises.

Low-taxed passive income shall only be attributed to the Austrian parent company if it amounts to more than one third of the income of the foreign company. To avoid any potential double taxation triggered by the CFC rules, a tax credit for actually paid foreign taxes and a reduction of taxable capital gains by the amount of profits (forming part of such capital gain) which have already been subject to the Austrian tax pursuant to the CFC rules is provided. Further details regarding the two conditions – passive income and low taxation – are stipulated in a decree published by the Ministry of Finance. The new CFC rules apply for business years starting from 1 January 2019.

8 Taxation of Commercial Real Estate

8.1 Are non-residents taxed on the disposal of commercial real estate in your jurisdiction?

A non-resident company is taxed on the disposal of real estate located in Austria at a corporate income tax rate of 25%. A non-resident individual is taxed on the disposal of real estate located in Austria at a special tax rate of 30%.

8.2 Does your jurisdiction impose tax on the transfer of an indirect interest in commercial real estate in your jurisdiction?

The transfer of an indirect interest in real estate does not trigger (corporate) income tax, but could trigger real estate transfer tax. However, real estate transfer tax is triggered if 95% of the shares of a company that directly holds Austrian real estate are consolidated in the hands of one shareholder (*Anteilsvereinigung*) or a group of shareholders within the meaning of the Austrian group taxation regime. Furthermore, if within a period of five years 95% 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% of the fair market value of the real estate. Shares held by trustees are to be attributed to the trustor for the purposes of calculating the 95% threshold. If Austrian real estate is transferred in the course of a reorganisation (*Umgründung*) under the *Umgründungssteuergesetz* (UmgrStG), the real estate transfer tax will likewise be 0.5% of the fair market value of the real estate.

8.3 Does your jurisdiction have a special tax regime for Real Estate Investment Trusts (REITs) or their equivalent?

A REIT that is established based on the Austrian Real Estate Investment Fund Act (*Immobilien-Investmentfondsgesetz*) is subject to a special tax regime. Such special tax regime may also be applicable to REITs established under foreign law (Section 42 Austrian Real Estate Investment Fund Act). The REIT itself is not treated as a taxable entity. Rather, it is treated as a transparent entity where the income earned is attributed to the unit owner, regardless of whether it is distributed or not (comparable to a partnership). Besides income from the renting of property, interest on liquid reserves and profit distributions from Austrian real estate companies, the profit of an Austrian REIT also includes valuation gains from the annual revaluation of the real estate properties of the funds, regardless of whether they are realised or not. Profits from a REIT or from the sale of the REIT certificates are generally subject to withholding tax at a rate of 27.5% as of 1 January 2016. Please note that several major Austrian real estate companies are not established as fund-type vehicles based on the Austrian Real Estate Investment Fund Act, but rather as non-transparent corporations subject to the ordinary tax regime.

9 Anti-avoidance and Compliance

9.1 Does your jurisdiction have a general anti-avoidance or anti-abuse rule?

Section 22 BAO provides that tax liability cannot be avoided by an abuse of legal forms or methods offered by civil law ("abuse of law"). This is assumed in cases where transactions are entered into, or entities are established, solely for the purpose of obtaining special tax advantages. If such an abuse has been established, the tax authorities may compute the tax as if such abuse had not occurred. Generally, tax abuse is only assumed in a multi-step situation (i.e., the taxpayer takes more than one step to avoid or reduce the tax). Furthermore, if a taxpayer can demonstrate substantial business reasons for a chosen structure, tax abuse may be rebutted.

The Annual Tax Act 2018 introduced a legal definition of "misuse/abuse" in Section 22 BAO based on EC Anti-Tax Avoidance Directive. Following this, abuse shall exist "when a legal arrangement, which may include one or more steps, or a sequence of legal arrangements, is inappropriate in terms of economic purpose. Inappropriate are those arrangements that, disregarding the associated tax savings, no longer make sense, because the essential purpose or one of the essential purposes is to obtain a tax advantage, which is contrary to the aim or purpose of the applicable tax law. There is no abuse, if there are valid economic reasons that reflect the economic reality".

The new definition of "misuse/abuse" applies to circumstances that are implemented after 1 January 2019.

Additionally, Section 23 BAO provides that an act or transaction not seriously intended by the parties ("sham transaction") but performed only to cover up facts that are relevant for tax purposes will be disregarded, and that taxation will be based on the facts the taxpayer sought to conceal.

Furthermore, Section 24 BAO provides specific provisions in connection with the attribution of business assets, in particular with regard to security ownership, trusteeship, beneficial ownership and joint ownership. This provision says that, in general, assets are to be attributed to their beneficial owner. Here, the "substance over form" principle applies. This is the case if a person is in a position to exercise those rights which are distinctive for ownership such as the use, consumption, amendment, pledge and sale of the assets, and if such person is simultaneously entitled to exclude any third party on a permanent basis from having an impact on the assets.

9.2 Is there a requirement to make special disclosure of avoidance schemes or transactions that meet hallmarks associated with cross-border tax planning?

The EU Directive DAC 6 as regards 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 had to be implemented by the EU Member States by 31 December 2019.

In Austria, the EU Reporting Obligation Act (*EU-Meldepflichtgesetz*) has been in force since 1 July 2020. The EU Reporting Obligation Act takes over from the EU requirements in many areas. A cross-border arrangement is subject to reporting if it

involves a potential risk of tax avoidance or of circumvention of the reporting obligation under the Common Reporting Standard or of preventing the identification of the beneficial owner and (i) its first step was implemented between 25 June 2018 and 30 June 2020, or (ii) its first step is implemented from 1 July 2020 or it is designed, marketed, organised, made available for implementation, or managed from 1 July 2020. During the COVID-19 pandemic, there has been an extension of the deadline for the obligation to report until 31 October 2020. The Austrian Ministry of Finance has issued a letter of information which can serve as a guideline for the application of the reporting obligations.

The obligation to report a cross-border tax arrangement is generally imposed on the so-called intermediary. An intermediary is any person who designs, markets, organises, makes available for implementation, or manages the implementation of an arrangement subject to reporting requirements. It is worth noting that notaries, attorneys-at-law, certified public auditors and certified public tax advisors are exempt from notification obligations under certain circumstances.

A distinction is made between arrangements that are subject to mandatory reporting and those that are subject to conditional reporting. In any case, arrangements that are subject to a mandatory reporting obligation must be reported, regardless of whether a potential tax advantage has been obtained. Conditionally, reportable arrangements need only be reported if the main benefit or one of the main benefits of the cross-border arrangement is the obtainment of a tax advantage. In the future, therefore, each individual case of a cross-border arrangement must be subjected to a detailed analysis and assessment with regard to the reporting obligation.

9.3 Does your jurisdiction have rules which target not only taxpayers engaging in tax avoidance but also anyone who promotes, enables or facilitates the tax avoidance?

No, there are no special rules with regard to anyone who promotes, enables or facilitates tax avoidance. However, tax evasion (*Abgabenhinterziehung*) and tax fraud (*Abgabenbetrug*) are subject to criminal prosecution pursuant to the Austrian Fiscal Criminal Act (*Finanzstrafgesetz*). In the course of such criminal proceedings, persons who assist tax evasion and tax fraud are also considered offenders and are, thus, subject to penalties.

9.4 Does your jurisdiction encourage "co-operative compliance" and, if so, does this provide procedural benefits only or result in a reduction of tax?

As an alternative to tax audits, Austria has introduced the possibility of accompanying control (*begleitende Kontrolle*) for companies with a turnover above EUR 40 million (Section 153a *et seq.* BAO). An application can be submitted for the company and for some or all of its affiliated companies resident in Austria. The main advantage of accompanying control is the regular and timely communication with the tax authorities on current tax issues, which can significantly increase legal certainty and planning security. From a procedural standpoint, during accompanying control, the competent tax office is subject to an extended duty to provide information, which is a benefit compared to advance rulings which are subject to a fee and limited in scope. Likewise, the companies under accompanying control are subject to increased disclosure requirements. However, there are no tax benefits for companies under accompanying control.

9.5 Are there rules requiring special disclosure where a company is taking a position on a tax issue that is uncertain (open to dispute from a technical perspective)?

There is no rule that explicitly requires a company to make special disclosures solely based on the fact that it takes a certain legal position on a tax issue.

However, companies which are under accompanying control pursuant to Section 153a *et seq.* BAO are required to disclose circumstances which are likely to be assessed differently by the competent tax office and may have a not insignificant impact on the tax base. These disclosures must be made without prior request and before filing the tax return. Additionally, there is in general an increased duty to cooperate in certain matters as those involving other countries.

In case of requests for information, a company may only rely on the principle of good faith when acting on the basis of the given information, when it included a comprehensive statement of facts in the information request, which can be considered as a special disclosure requirement. Several regulations issued by the Austrian Minister of Finance allow for such information requests (e.g., withholding tax in case of the applicability of the EU Parent-Subsidiary Directive).

Additionally, on specific topics it is possible to request a legally binding advance ruling (*Auskunftsbescheid*) pursuant to Section 118 BAO, which requires comprehensive disclosures as well.

10 BEPS, Tax Competition and the Digital Economy

10.1 Has your jurisdiction implemented the OECD's recommendations that came out of the BEPS project?

As a reaction to the BEPS project, a provision was introduced by the Austrian Tax Amendment Act 2014, stating that interest expenses or royalties are no longer deductible from the tax base of an Austrian corporation in the case that, cumulatively:

- the interests or royalties are paid to an Austrian company or a foreign company that is comparable to an Austrian company;
- the interests or royalties are paid to a company which is directly or indirectly part of the same group of companies or is influenced directly or indirectly by the same shareholder; and
- the interest or royalty payments in the state of residence of the receiving company are: (i) not subject to tax because of a personal or objective exemption; (ii) subject to tax at a rate lower than 10%; or (iii) subject to an effective tax at a rate lower than 10% due to any available tax reduction.

It is not relevant whether the tax at a rate lower than 10% 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 have to be investigated at the level of the beneficial owner (e.g., in certain back-to-back refinancing scenarios).

That regulation is effective for all payments carried out since 28 February 2014, irrespective of when the corresponding contract was concluded.

Furthermore, hybrid structures have been substantially limited: the participation exemption will not apply if the dividend distributed to the Austrian company is tax-deductible by the foreign corporation in its home jurisdiction. This is now also the standard under the EU Parent-Subsidiary Directive.

In addition, with the Tax Reform Act 2020, anti-avoidance rules targeting hybrid cross-border structures have been implemented. 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 (e.g., hybrid financial instrument, hybrid transfer, hybrid entities, hybrid PE and unconsidered PE) and lead to tax deduction of expenses failed and/or taxable income in Austria as well as to tax deduction of expenses failed in Austria. The new rules for hybrid cross-border structures apply as of 1 January 2020.

Please refer to questions 3.7 and 3.4 for an update in connection with the deductibility of interest payments and the proposed interest barrier rule.

10.2 Has your jurisdiction adopted any legislation to tackle BEPS which goes beyond the OECD's recommendations?

No. Currently, there are no legislative plans which go beyond what is recommended in the OECD's BEPS reports besides the regulations implemented by the Annual Tax Act 2018 (see questions 7.2, 7.3 and 9.1), the regulations regarding hybrid cross-border structures foreseen in the Tax Reform Act 2020 (see question 10.1) and the introduction of a digital corporate tax on online advertising (see question 11.1).

10.3 Does your jurisdiction support information obtained under Country-by-Country Reporting (CBCR) being made available to the public?

The Austrian legislator adopted the Transfer Pricing Documentation Act, which includes documentation and reporting obligations for a multinational group of companies (CBCR). These obligations essentially apply for business years starting from 1 January 2016. The received documentation is not made available to the public, but forwarded to the competent tax authorities of the EU Member States where companies of the multinational group are resident.

10.4 Does your jurisdiction maintain any preferential tax regimes such as a patent box?

No, there is no preferential tax regime such as a patent box. In this context, however, it should be noted that there are various tax incentives for research and development activities.

10.5 Has your jurisdiction taken any unilateral action to tax digital activities or to expand the tax base to capture digital presence?

According to the Digital Tax Act 2020 (effective as of 1 January 2020), a digital corporate tax on online advertising is levied. Such digital corporate tax applies to digital groups of entities with a worldwide turnover of EUR 750 million and an Austria-wide turnover of EUR 25 million. The assessment base is the remuneration received by the online advertising agent reduced by expenses for advance services of other unrelated online advertising providers and the tax rate is 5% of the assessment base. Furthermore, taxation and stronger reporting requirements for online brokerage platforms like Airbnb have been implemented.

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