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Direct Taxes

Proposed Amendments to Austrian Corporate Tax Law

A recently proposed tax reform which is likely to be enacted by the end of 2005 provides for various amendments affecting corporate income taxation.

Where an Austrian corporation owns shares in a domestic or foreign subsidiary, a participation qualifying under the Austrian international participation exemption regime may be created, or may cease to exist, if there is a cross-border transfer of the subsidiary's legal seat. In the event of a subsequent disposal of the shares the proposed law stipulates Austria's right to tax with regard to taxable hidden reserves accumulated in Austria prior to the transfer of the seat and vice versa allows for a tax neutral step-up with regard to tax exempt hidden reserves accumulated under the participation exemption regime prior to the transfer of the seat.

Group Taxation

The proposed law introduces a comprehensive set of provisions regulating procedural aspects with regard to the existing group taxation regime. This applies for both the group parent and group members, and provides details of how to determine the group's income and the right to appeal against respective tax assessments.

Reorganisations

The proposed tax reform modifies various provisions with respect to cross-border mergers and significantly reduces the tax planning opportunities for domestic reorganisations. Where an Austrian business or partnership interest is contributed to an Austrian corporation, current law allows a reduction in the value of the contribution of up to 75% of the fair market value by creating an inter-company liability of the receiving company against the contributing company with tax effective interest charges. According to the proposed law this tax planning tool will no longer be available.

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Status quo of transfers of seat and cross border mergers in Austria

Austrian tax law provides for tax neutral cross border mergers and transfers of seat under certain circumstances. The following article outlines the related current tax and company law position.

Such transactions are considered for business reasons as well as for tax planning reasons, predominantly in order to free a company's assets from the taxation right of Austria (outbound mergers or seat transfers) or from another country (inbound mergers or seat transfers). In this regard, Austrian national law complies to a large extent with the merger directive as amended, the regulation on the Societas Europaea (SE) as well as with the recent case law of the ECJ to the freedoms of capital and establishment.

1. Transfers of seat

The possibility of seat transfers from or into other EU countries has been confirmed by decisions of the Austrian High Court. If Austria loses taxation rights in the course of an outbound seat transfer, the respective assets have to be valued at fair market value. However, the taxation of resultant capital gains is deferred where the transfer is to an EU member state (or under certain circumstances to another European Economic Area member state). The deferred tax will be charged upon subsequent actual disposals of the assets, and on any further transfer of such assets to a non-EU country. If the assets are not sold or transferred to a non-EU country within ten years, no tax will fall due.

Assets which become taxable in Austria upon the transfer of seat to Austria are recognized at fair market value, which gives a potential step-up for tax depreciation purposes.

2. Cross border merger

In accordance with the EC-Regulation on the SE, Austrian companies can be merged with other EU-corporations to form an SE. Apart from that, there are no explicit provisions in Austrian company law regulating cross border mergers. Recent court decisions indicate that inbound intra-EU mergers and intra-EU upstream outbound mergers ("merging transformation") are possible if the position of both companies' creditors and minority shareholders is not impaired. Such transactions have already been successfully implemented and registered with the Companies' register. It is currently not clear if the same would apply to other cross border mergers.

Taxwise, cross border mergers are generally covered by Art I or Art II of the Austrian Reorganisation Tax Act. Under this regime, mergers are tax neutral insofar as the hidden reserves in the assets assumed by the surviving company remain taxable in Austria. A tax neutral step up to the fair market value is available for assets, which become taxable in Austria upon the merger. For example. where a foreign company is merged with an Austrian surviving company with the foreign company holding assets which do not form part of a foreign permanent establishment. On the other hand, a taxable event is assumed for assets in respect of which Austria loses its taxation right, e.g. where a domestic company is merged with a foreign surviving company the domestic company owns assets unbound to a domestic permanent establishment. However, if the surviving company is an EU/EEA company, Austrian taxation is deferred until the disposal of the assets.

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Indirect Taxes

Additional Tax Payments without Formal Tax Audit

The Austrian tax authorities use information they obtain during tax audits to review the business partners of the audited company.

All companies subject to Austrian tax will face the same situation at least once: The telephone rings and a tax audit for a period of 3-5 years is announced. During a tax audit a lot of information is gathered by the tax authorities. Key points of examination are, for example, representation charges, valuation of participations and other assets.

In particular, the tax auditors examine payments, such as incentive trips and other benefits in kind, to business partners to reward them for increasing sales or other successful transactions.

These remunerations are in general tax deductible business expenses. But the fact that business expenses of the one company are business income of the other company or person is quite often disregarded, in practice.

This is the reason why the Austrian tax authorities issue so-called notices of inquiry ("Kontrollmitteilungen"). The tax office responsible for the business partner receiving the benefits requests, by written notice, proof that the benefits have been properly taxed. If the business partner fails to provide the respective evidence, additional tax payments (as well as interest of approx. 3-5% p.a.) will be assessed. In addition, proceedings under the Fiscal Penal Code may be initiated.

If the audited company does not name the person or company who received the remunerations or other benefits, it has to bear the tax burden itself. The respective expenses are not allowed tax deductible and thus increase the tax base and the tax payable.

In our experience, it is clear that the Austrian tax authorities are increasingly using notices of inquiry in this way.

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Expatriates

Changes in The Austrian Aliens' Law – Commencement of The New Regulations from January 1, 2006

Foreigners wishing to reside and work in Austria will face a number of new regulations from 1 January 2006. However, the practical implementation of these new regulations has to be awaited.

The most significant changes are:

Adaptations and creations of residence permits:
Residence permits for key employees are initially issued for up to 18 months but can be changed into unlimited ones on satisfaction of certain requirements.

In addition, there will be permits for dependants (limited or unlimited). For example, temporary residence permits will be issued for business delegates, students and rotation managers. An unusual aspect is the concept of a permanent residence permit valid within the EEA. This means that foreigners can reside in any of the EEA member countries as well as have the right to work there, provided that they hold a valid work permit.

Change of competency of authorities:
In Vienna, Aliens' Police will no longer be responsible for applications for residence permits. The so-called MA 20 will now deal with the matter.

Personal applications:
From next year, residence permits will have to be applied for by the applicant in person. It will not be possible any more to send applications by mail or have authorised legal representatives submit the documents.

Registration certificate for EEA citizens:
EEA citizens who want to reside and work in Austria for more than three months have to apply for a registration certificate. They must present a job confirmation by their Austrian employer, evidence of health insurance and proof of sufficient financial means. Administrative fines can be imposed on those who fail to comply with this new regulation.

Visa C/D:
This new visa combines the possibility of residing in any of the Schengen states for a maximum of three months plus the option of working in Austria for up to six months within one calendar year. A valid work permit is still required.

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Austrian Tax Facts & Figures

Taxation of corporations

Corporate income tax rate (Basis – adjusted statutory accounts)	25%	Non-deductible expenses (examples)	
Dividend withholding tax	25%	Long-term accruals	20%
Witholding tax on licences/royalties	20%	Business meals	50%
Interest	0%	Excessive car expenses for luxury cars	
Significant allowances		Tax loss carry forwards	
Research & Development (R&D) (Alternatively premiums in cash: 8%)	up to 35%	Losses may be carried forward for an indefinite period of time	
Learning & Education (L&E) (Alternatively premiums in cash: 6%)	up to 20%	Usage of tax losses: 75% of taxable income	

Double taxation agreements
with 68 countries – mainly exemption method

Group taxation
valid from January 2005

International participation exemption for holding companies		Consolidation of tax losses with taxable profits	
Conditions: Investments >10%, 1 year holding		Conditions: Qualifying participations > 50%	
Dividends	0%	Group agreement and agreement on allocation of cost	
Capital gains	0%		
Thin capitalization rules	None	Losses of foreign participations may be offset against profits of group leader	
CFC rules	None		

Taxation of individuals

Individual income tax rate = Progressive rate		Social security on monthly earnings up to EUR 3,630	
below 10,000	0%	Employer's share	up to 21.9%
from 10,000 to 25,000	23.0%	Employee's share	up to 18.0%
from 25,000 to 51,000	33.5%	Payroll related taxes	approx. 8.0%
over 51,000	50.0%	Income cap for social security contributions, social security totalisation agreements with various states	
after deducting personal expenses (limited)			

Value added tax
in line with the 6th EU directive

Standard rate	20%
Reduced rate (Food, rent, public transportation etc.)	10%
VAT refund for foreign enterprises – available up to June 30 of the following year.	

Other taxes

Real estate transfer tax	3.5%
Capital tax	1.0%
Stamp duties - Loan agreements	0.8%
Rent agreements	1.0%

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We encourage feedback on the newsletter and the content. Equally, we welcome any of your thoughts on topics that you would like to see addressed in future issues.

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