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Tax

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In this issue

Direct Taxes
1 Austrian withholding tax on certain services of foreign suppliers by Angelika Plassak

2 New Double Tax Treaty Austria – Czech Republic by Sybille Pitzer

3 Swiss finance branch and taxation in Austria by Michael Lubenik

Indirect Taxes
4 VAT treatment of intercompany charges in Austria by Gerald Dipplinger

4 Overlooked Taxes by Carina Buerger, Johannes Geier

Expatriates
6 Amendments to the Austrian Aliens' Employment Law by Sabine Gassner

8 Austrian Tax Facts & Figures

Direct Taxes

Austrian withholding tax on certain services of foreign suppliers

Foreign suppliers could be subject to a special Austrian withholding tax on their services rendered in Austria. The calculation of the withholding tax generally is based on the gross income. Since 24 May 2007 the withholding tax may be optionally calculated on the net income by deducting operating expenses. The following article gives an overview of the most important aspects and compares both calculation methods.

Taxpayers without residence, registered office, place of business or permanent establishment in Austria are basically subject to limited tax liability.

Generally the non-resident taxpayer with limited taxation in Austria has to file a tax return.

In some specific cases the tax is withheld at source by the recipient of the services. This is applicable for services of highly mobile foreign suppliers, for example writers, lecturers, artists, architects, sportsmen, entertainers and non-executive directors. The Austrian recipient of the services is responsible for the calculation of the withholding tax on behalf of the non-resident supplier, the deduction of the tax at source and the payment of the withheld tax to the appropriate Austrian tax office.

The withholding tax generally amounts to 20% of the gross income of the supplier. Gross income also includes travelling expenses or costs of accommodation paid by the Austrian recipient of the services to the foreign supplier but not the Austrian VAT.
As a consequence of the decision of the European Court of Justice in the Scorpio case, the Austrian Income Tax Act was amended. Since 24 May 2007 operating expenses of the supplier may be deducted from the gross income before calculating the withholding tax, as an optional alternative treatment to the gross basis. The treatment can be used in the following circumstances only:

- The foreign supplier has his residence, registered office or place of business in a member state of the European Union or the European Economic Area,
- the expenses are directly linked to the income subject to limited tax liability (e.g. travelling expenses or cost of accommodation),
- the foreign supplier gives written notice about the expenses to the Austrian recipient and

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- if these expenses exceed 2,000 EUR and the beneficiary of these expenses is subject to limited tax liability in Austria, the taxation in Austria has to be sufficiently secured.

If the tax is calculated on the net income, the applicable withholding tax rate will rise to 35% for individual foreign suppliers and to 25%, if the foreign supplier is a legal entity.

Although the assessment basis for the tax calculation decreases by deducting expenses the tax burden may rise, due to the increased tax rates of 25% and 35%. Generally the calculation of the withholding tax on the net income should be more favourable for individuals whose expenses amount to more than 42.86% of the total income. The most favourable way to calculate the withholding tax has to be examined case by case.

Due to liability reasons the recipient of the services is not obliged to calculate the tax on the net income of the foreign supplier.

Where the option to deduct expenses from the gross income is not exercised, or for foreign suppliers not resident in the European Union or the European Economic Area, it is possible to take account of expenses by filing a tax return in Austria.
A (German) brochure of the Austrian withholding tax on certain services of foreign suppliers is now available.

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New Double Tax Treaty Austria - Czech Republic

A new Double Tax Treaty between Austria and the Czech Republic has come into force, with its provisions effective from 1 January 2008. Prior to then the old double tax treaty with the Czechoslovak Republic is applicable.

The main changes incorporated in the new treaty include the following:

1. Dividends are taxable in the country of residence of the beneficial owner, provided that the recipient is a company that owns at least 10% of the payer. In other cases, a ten percent withholding tax applies.

2. Interest are taxable only in the country of residence of the beneficial owner.

3. Royalties are taxable in the country of residence of the beneficial owner. However, certain kinds of royalties, e.g. patents, brands, software, prototypes, are subject to a five percent withholding tax.

4. The definition of a service permanent establishment has been introduced, which creates a taxable presence of an Austrian service provider if services are provided in the Czech Republic for more than six months in a 12-months-period. Services are not only consulting services but also services within the function as Managing Director.

5. The 183-days-rule refers to an employment within a 12-months-period (up to now 183 days within the calendar year). Weekends, national holidays, business trips, home leaves and vacations spent abroad have to be included when calculating the presence of an individual in the other state to determine taxation rights.

6. In the Czech Republic double taxation is eliminated by the credit method which replaces the exemption-method under the old double tax treaty, Austria maintains the exemption method.

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Swiss finance branch and taxation in Austria

The Austrian Ministry of Finance reconsiders its view on Swiss finance branches of Austrian companies.

In the past, the Austrian Federal Ministry of Finance has confirmed in various letter rulings that income allocated to a Swiss financing branch of an Austrian company shall be exempt from Austrian income taxation following the double tax treaty between Austria and Switzerland. In the Ministry's view, a management fee at arm's length for the Austrian head office to be taxed in Austria was deemed sufficient. Even if part of the income of the Swiss branch was not taxed in Switzerland, Austria should have no right to tax this income in Austria.

However, this view was not shared unanimously within the Ministry. As a result of internal debates, the approach has become more restrictive.

As set out in the letter ruling dated 17 September 2007, the Ministry holds the view that the Austrian tax exemption on the income attributed to the Swiss permanent establishment shall be subject to the following tests:

First, it has to be checked whether the business activities of the Swiss permanent establishment exceed mere asset management (i. e. whether operating business activities are performed through the Swiss fixed establishment). In the absence of any operating business, even an existing office space would not constitute a permanent establishment for the purposes of the double tax treaty. Consequently, the Double Tax Treaty would not prevent Austria from taxing that income. This statement is in line with earlier statements of the Ministry. Second, the arm's length capitalization of the Swiss permanent establishment is tested. In Switzerland, tax authorities grant a lump-sum deduction of ten elevenths (approx. 91%) of the interest income as deemed refinancing expenses. The Austrian Ministry interprets this as a declaration by the Swiss authorities that an equity ratio of one eleventh (approx. 9%) is adequate for the performance of the permanent establishment's functions.

With reference to the Thin Capitalisation Approach mentioned in the OECD report on the Attribution of Profits to Permanent Establishments, the Austrian Federal Ministry of Finance holds that the state of residence (i.e. Austria) is allowed to adjust the capitalization where the permanent establishment is furnished with equity above the arm's length level. Following the Swiss treatment whereby ten elevenths of the interest income qualifies as deemed refinancing expenses. Austrian tax authorities may take the view that the deemed refinancing expenses shall be treated as corresponding interest income of the Austrian head office.

Finally, the Austrian Ministry refers to the possibility of a mutual agreement procedure according to Art. 25 of the Double Tax Treaty. This however would represent a time consuming process with an uncertain outcome.

The new approach of the Austrian tax administration has met heavy criticism, especially as intra-company interest-bearing loans may, according to the usual view, only be assumed under very restrictive circumstances (i.e. as a compensation for functions effectively fulfilled by the Austrian head office).

The new statement of the Ministry explicitly aims at Austrian multinationals shifting taxable profits out of Austria. Letter rulings are not binding for tax offices and tax inspectors. Foreign multinationals structuring via Austria might still be able to obtain a binding ruling from the competent tax office approving the benefits of a Swiss finance branch.

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VAT treatment of intercompany charges in Austria

In a group it is quite common that group companies provide services to each other. Charges for various services are often regrouped in a single intercompany charge or management fee. In practice, these intercompany charges are charged without VAT to group companies abroad. However, Austrian tax inspectors currently challenge this "simplified" VAT Treatment of services and seek to identify services for which Austrian VAT should have been charged.

Place of supply

Services charged between group companies in a single intercompany charge or management fee regularly include a number of different services such as marketing, consulting, general administrative services or provision of staff. The place of supply and thus the VAT treatment (with or without VAT) of such services is determined

- on the one hand by the nature of services rendered, e.g. marketing or consulting services, which are taxable at the place of recipient (services according to Art. 56 EC VAT Directive) or general administrative services which are taxable where the supplier is established (services according to Art. 43 EC VAT Directive);
- on the other hand from an economic point of view following the rules for single/bundled supplies of services:

Single vs. bundled supply of services

Under the Austrian VAT Law one single ("bundled") supply is assumed if several supplies are of equal economic importance and are regarded as a unity from an economic point of view. According to the Austrian Supreme Court this is the case if the supplies are closely linked and appear as part of one supply. In addition, according to the ECJ decision dated 11 June 1998, C-349/96, Card Protection Plan, a supply of services should not be artificially divided up into individual components which are not economically independent. As a consequence, if the services charged are regarded as bundled supply of services, the place of supply is determined by the main/predominant service rendered.

Therefore, if the main service rendered is qualified as Art. 56 service (e.g. consulting services), the total intercompany charge is deemed to be rendered at the place of the recipient and consequently charged without VAT to group companies abroad. However, if the main service rendered is qualified as Art. 43 service, the total intercompany charge has to be charged with local VAT as the place of supply of the bundled services is in Austria.

Not all intercompany services are bundled

Although the principles of the bundled supply are accepted in the Austrian legislation, the regrouping of different services in one single intercompany charge does not automatically lead to a bundled supply. On the contrary, as different supplies which are not closely linked or ancillary to each other (e.g. marketing and general administration services) have to be treated independently from a VAT point of view – even if they are charged together – Austrian tax inspectors recently started to review intercompany charges charged without VAT more closely. The tax inspectors try to identify Art. 43 services such as general administrative services rendered by an Austrian company to a group company abroad for which Austrian VAT should have been charged.

Therefore, intercompany charges charged without VAT should be carefully reviewed to whether they really consist only of Art. 56 services or to whether the services covered by the intercompany charge can be seen as a bundled supply of services with a predominant Art. 56 services element. Otherwise local Austrian VAT and penalties for late payment could be levied on the Art. 43 services in the course of a tax audit.

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Overlooked Taxes

The following article discusses specific taxes which are – based on our own experience – very often unknown in companies and all too frequently disregarded. Some typical examples which will be investigated are contributions to the Chamber of Commerce, capital transfer tax, stamp duty and the subway tax.

1. Contribution to the Chamber of Commerce

The contribution to the Chamber of Commerce consists of three components:

- Contribution to the Chamber of

Commerce 1 (KU1)
- Contribution to the Chamber of Commerce 2 (KU2) = DZ
- Fixed amount allocation

The contributions to the Chamber of Commerce (KU1 and KU2) are channelled towards the general funding of the federal and province based Chambers of Commerce. The fixed amount allocation serves to finance the different groups and professional associations represented within the Chamber of Commerce.

Contribution to the Chamber of Commerce 1 (KU1)

KU1 is governed by the Austrian Chamber of Commerce Act. In general, KU1 applies to all members of the Chamber of Commerce.

KU1 does not apply in instances where sales taxable under Austrian VAT law do not exceed 150,000 EUR per calendar year. This relates to net sales which members generate in the course of their business related activities.
The KU1 rate is set at a uniform rate of 0.3% for all provinces. This rate is made up of a province chamber rate of 0.18% and a federal chamber rate of 0.12%.

The KU1 rate is a self-assessment based charge (calculated by the member of the Chamber itself and not determined by the tax office on the basis of a filed tax return). Every member of the Chamber has to pay KU1 to the local tax office by the 15th of the second month following the end of the respective quarter.
The basis of assessment takes into account the following:
- the invoiced amount of input valued added tax (input VAT) with the exception of any amount arising from the sale of a business;
- the import VAT owed by the member of the Chamber;
- the intra-community acquisition tax owed by the member of the Chamber;
- the VAT obligation arising from a reverse charge system;
- reduced by the VAT burden resulting from self-supply.

There are several special regulations in place for the purpose of determining the basis of assessment for certain industries. These industries/businesses are: banks, leasing companies, forwarding agents, independently run petrol stations, travel agencies, industrial building promoters, the oil industry, affiliated trading companies, insurance companies, small insurance associations, Austrian lottery companies, pension funds and advertising agencies.

Contribution to the Chamber of Commerce 2 (KU2)

The contribution to the Chamber of Commerce 2 is a surcharge (DZ) which applies to contributions made to the Family Burden Equalisation Fund (FLAF). The basis of assessment for the DZ is the employer's contribution to Family Burden Equalisation Fund (referred to as DB). There is the same tax exempt threshold throughout.

The KU2 rate is made up of a federal chamber rate of 0.15% and a provincial chamber rate which differs according to each province.

The KU2 rate is also a self-assessment based charge like KU1. KU2 has to be calculated on a monthly basis and to be paid to the local tax office not later than the 15th of the month following the month concerned.

Fixed amount allocation

The fixed amount allocations applying to all members form the very financial basis for the work of the trade associations and the trade groups. In accordance with the Austrian Chamber of Commerce Act all members which are affiliated with trade associations or trade groups must submit the fixed amount allocation. The rate of the fixed amount allocation is adjusted every year by each trade association on an autonomous basis. The level of the rate will be set either at a fixed amount (e.g. 70 EUR) or upon an assessment basis (e.g. payroll).
The fixed amount allocation falls due within one month after the receipt of the annual assessment notice.

2. Capital Transfer Tax

The Capital Transfer Tax Act stipulates that capital transfer tax should be imposed on capital contributions made to Austrian corporations. In particular, the following transactions are subject to capital transfer tax:
- apital contribution in exchange for shares
- other equity contributions in cash or in kind
- redomiciliation of foreign companies to Austria except for EC companies
- equity contributions to Austrian branches except for branches of EC companies

Capital transfer tax falls due where the equity contributions are made by a direct shareholder or a sister company.

Legal entities which fall within the Austrian Capital Transfer Tax Act include public limited companies, private limited companies as well as limited partnerships, provided that a company is a general partner (e.g. GmbH & Co KG).

Regarding equity contributions there are exemptions and mitigation techniques available to optimize the tax burden. Capital contributions made by grand parent companies to Austrian companies are, as the fiscal authorities confirmed, not subject to capital transfer tax.

This tax is levied at a rate amounting to 1% of the value of consideration. The taxpayer (i.e. the company) has to submit the declaration to the local tax office by the 15th of the second month following the month the transaction was made.

3. Transaction fees under the Austrian Stamp Duty Act

Transaction fees are generally incurred for certain documentation and transactions for which a contract or notary deed has been signed.

The most important taxable transactions are the following:

- 1/8% for bill of exchange
- 0.8% for assignments
- 0.8% for loan agreements (1.5% for revolving loan agreements with a duration of more than five years)
- 1% for lease contracts
- 1 or 2% for amicable arrangement
- 2% for valuable easements

Transaction fees are incurred either as a result of an assessment notice or through self assessment. The taxpayer has to file the respective announcement with the local tax office by the 15th of the second month following the month the transaction fee liability arises.

4. Subway tax

The subway tax is used as a form of financing the Vienna subway network. Employers located in Vienna must pay the tax for all employees. The subway tax is currently set at a weekly amount of 0.72 EUR for each individual employee. Exceptions are made for employees who are more than 55 years of age, apprentices or employees who work fewer than ten hours per week. The tax is calculated on a monthly basis and must be paid to the municipal treasury department (Magistratsabteilung) by the 15th of the month following the month concerned.

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Expatriates

Amendments to the Austrian Aliens' Employment Law

The Austrian Government has introduced amendments to the Immigration Laws and to the Aliens' Employment Law which have come into effect on 1 January 2008.

With a view to increasing the attractiveness of Austria as the science location, the regulations of specialists (non EU/EEA nationals) engaged in science and research has been extended to researchers working in any public or private entity. This implies that now all researchers plus their spouses and children are exempt from the Aliens´ Employment Law and hence do not need a work permit. They merely have to apply for the respective residence permit.

Work permits for seasonal workers in the area of agriculture and forestry can now be issued for a maximum period of nine months (instead of a maximum period of six months). This applies to „new“ EU citizen only (such as Czech, Hungarians, Polish, Estonian, Romanian, Bulgarian, etc.) who have already worked as seasonal workers in that field in the past three years. For citizens from non-EU/EEA states such work permits can only be issued for up to six moths since the respective visa can only be issued for a maximum period of 180 days.

One important change of the existing Austrian laws is that the requirements and procedures concerning temporary business assignments within the EU/EEA have been simplified. These changes were required to avoid breaching EU constitutional law with regards to the freedom of services within the European Union. The changes refer to the temporary seconding of non-EU/EEA nationals or “new” EU citizens who are employed with a company located in the EU. Firstly, the requirement that the seconded employee must have entered an employment relationship for an indefinite period of time or has already been employed with the home employer for one year has been removed. From 2008 the assigned individual merely has to prove being (legally) permitted to work for his/her home employer also beyond the assignment to Austria. In addition, one has to comply with the Austrian work conditions and regulations on minimum salaries as well as rules on social security. Furthermore, the notification procedure has changed. Previously, the Austrian employer (or Austrian contracting entity) had to notify the responsible labour authority and the competent authority that controls illegal work of the planned assignment. From January 2008 the Austrian entity only has to notify the latter authority which in

turn informs the labour authority. Upon having checked that all requirements are met, the labour authority issues an EU-assignment permit within two weeks. The individual, however, can commence work in Austria prior to the issue of that permit but has to cease to work without undue delay should the labour authority decline the application. On the other hand, the penalty fees for not complying with the legal obligations (lack of notification, failure to comply with the regulations on Austrian wages and work conditions, etc.) have been increased.

Other changes include the abolishment of notifications of the competent labour authority on commencement and termination date of the foreign employee (The dates for seasonal workers, however, still have to be reported to the labour authority).
In addition to these reforms, the following changes recently became effective or will enter into force in the near future:

The Schengen Area has changed from 21 December 2007. Austria's internal frontiers towards the Czech and Slovak Republics, Hungary and Slovenia are not subject to controls anymore. This will facilitate travel within the new boundaries. Airports, however, will adopt the Schengen area changes as at 30 March 2008. Switzerland is expected to become member of the Schengen Area in autumn 2008.

Each year the Austrian government decides on annual quotas per Federal State for foreigners (for instance for key employees, their accompanying family members, seasonal workers, etc.). Whilst during the past two years the allocated quota for qualified personnel was too low (especially for key employees in Vienna), the quota for key employees for the year 2008 has been considerably increased (for Vienna even by more than 50%).

For the new EU member states Bulgaria and Romania that joined effective from 1 January 2007 the same transition rules as for those countries that joined the EU on 1 May 2004 (e.g. Poland, Slovak Republic, Hungary, etc.) apply. The transition period is set out for a maximum of seven years (2+3+2 years). While for the countries having joined in 2004 the transition period is likely to end on 30 April 2009 (2+3+2), it can be expected for the recent joiners that the Austrian government, in order to protect the Austrian labour market, will decide on sticking to the transition rules for a further three years (2+3+2). During the transition period "new" EU citizens still need a work permit (linked to one specific employer) when wanting to take up work in Austria. After one year of continuously having worked in Austria they can apply for a free movement certificate which enables them to work for any employer within the Austrian territory for an unlimited period of time.

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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

International participation exemption for holding companies	
Conditions: Investments >10%, 1 year holding	
Dividends	0%
Capital gains	0%
Thin capitalization rules	None
CFC rules	None

Group taxation

valid from January 2005

Consolidation of tax losses with taxable profits
Conditions: Qualifying participations > 50%
Group agreement and agreement on allocation of cost
Losses of foreign participations may be offset against profits of group leader

Annual taxable		Income Tax		Effective Tax Rate	Marginal Tax Rate
to	€ 10,000	€ 0		0%	0%
over to	€ 10,000 € 25,000	$\frac{(EK - 10,000) \times 5,750}{15,000}$		0 - 23%	38.333%
over to	€ 25,000 € 51,000	$\frac{(EK - 25,000) \times 11,335}{26,000}$	+ 5,750	23 - 33.5%	43.596%
over	€ 51,000	(EK - 51,000) x 50%	+ 17,085	> 33.5%	50%

Social security on monthly earnings up to EUR 3,930			
Employer's share	up to 21.9%	Payroll related taxes	approx. 8.0%
Employee's share	up to 18.1%		
Income cap for social security contributions, social security totalisation agreements with various states			

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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