Austrian Tax News

pwc

Season's Greetings
and a Happy New Year!

In this issue

Issue 55, December 2016

CbCR – upfront notification to the tax office

Austria introduced a new law on mandatory transfer pricing documentation requirements such as the preparation of a Country-by-Country (CbC) Report, which is mandatory in case the consolidated group revenue of a multinational enterprise (MNE) group amounted to EUR 750m or more in the preceding fiscal year (qualifying MNE). Furthermore, specific notification obligations already due by 31 December 2016 apply with respect to the CbC Report, if the fiscal year corresponds with the calendar year.

Filing of the CbCR Report

Ultimate parent entities resident in Austria are obliged to file a CbC Report for the reporting year 2016 with the Austrian tax authorities until 31 December 2017. The duty to report may be taken over by a subordinate Austrian business unit (i.e. basically legal entities or permanent establishments preparing financial statements) of a qualifying foreign MNE in case one of the following criteria is fulfilled

- the ultimate parent entity is not obliged to file a CbC Report in its jurisdiction of tax residence
- no (functioning) qualifying competent authority agreement which provides a basis for the exchange of the CbC Report is in place with the tax jurisdiction of the ultimate parent entity.

The Austrian tax authorities shall transmit the CbC Report to all tax jurisdictions where a business unit of the group resides and which have signed an agreement on the exchange of CbC Reports.

Notification obligation

In order to comply with Austrian documentation requirements, each Austrian business unit that is part of a qualifying MNE has to inform its competent Austrian tax office as to which business unit of the group will file the CbC Report. The notification is to be made by the end of the relevant fiscal year. Thus, if the fiscal year corresponds with the calendar year, the notification for the reporting period 2016 is already due as of December 31, 2016.

In this regard the Austrian tax authorities have published a specific notification form on their website, which requires the declaration of the following information:

- Indication whether the Austrian business units are the ultimate parent entity (item 1),
- Surrogate parent entity (item 2) or,
- If neither 1 or 2 applies, indication of the business unit of the MNE group responsible for CbC reporting. In this regard the following information must be provided: company name, legal form, address, tax number, tax residency and UID number. In case the reporting business unit is not the ultimate parent, details on the ultimate parent also have to be given (item 3).

Tax authorities are currently working on a guidance concerning the notification procedure. It is hard to predict whether a module in "FinanzOnline" will already be available by the end of 2016. Currently, a notification via "sonstige Anbringen" in "FinanzOnline" or by post seems to be available.

In view of the newly introduced fiscal penalties for willful or gross negligent failure to properly provide the CbC Report, it is highly recommendable to comply with these notification requirements.

In case of any uncertainties with respect to the reporting business unit within the MNE group, we recommend to disclose these uncertainties on a voluntary basis. Such uncertainties may exist for example if the ultimate parent is residing in a country, which has not yet implemented any legal provisions on CbC reporting, such as Russia or the US.

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Update on Double Tax Treaties
Double Tax Treaty between Austria and Iceland

Austrian Government has submitted a new Double Tax Treaty between Austria and Iceland to Austrian parliament. The legal procedures to bring this treaty into force are now being followed. In case the Double Tax Treaty comes into force in the course of next year, its provisions will be effective from 1 January 2018 onwards. The Double Tax Treaty basically follows the OECD model convention. The key provisions are:

- A building site or installation project shall constitute a permanent establishment if it lasts more than twelve months. The tax treaty does not contain a provision for services-based permanent establishments.
- A 5% withholding tax rate applies to dividend payments, if the beneficial owner of the dividends (not a partnership) holds a qualifying participation of at least 10%; a 15% rate applies in all other cases. The term “dividend payments” shall also include payments from Austrian private foundations (and comparable foreign entities).
- No withholding tax is foreseen on interest payments. Interest payments may therefore only be taxed in the state of residence.
- The source state shall have a taxation right of 5% on royalty payments. Payments for the rental of equipment are not treated as royalties.
- Capital gains from the alienation of shares shall only be taxable in the state where the alienator is resident.

Austria applies the credit method in case of dividends and royalties. In all other cases Austria uses the exemption method. Iceland applies the credit method.

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Austrian Supreme Administrative Court: Cash contributions and write-downs in Austrian tax groups

Facts

In the case at hand, A Co (AT) as a tax group parent holds 100% in B Co (AT) as a group member. B Co holds 100% of the shares in C Co (AT), which does not participate in the tax group. A Co made a non-repayable equity contribution in cash to its sub-subsidiary C Co. After this contribution, B Co made a capital loss when selling its shares in C Co. A Co wrote down its shares in B Co. For tax purposes, B Co spread the capital loss over seven years, and the write-down at the level of A Co was not tax effective. The tax authorities did not allow tax deduction of the capital loss at the level of B Co; in addition, the write-down at the level of A Co was not tax effective. Thus, the capital loss has not been utilised at all.

Background

For tax purposes, losses (among others capital losses or write-downs) are in general tax deductible, however, with regard to such shareholdings losses are to be spread over seven years. Furthermore, in the following situations such losses are not tax-deductible at all:

- Losses in shareholdings in Austrian tax group members. This restriction aims to avoid double utilisation of losses within the tax group (losses of the group members are transferred to the group parent).
- If a grandparent makes a contribution in cash (e.g. capital injection) to its sub-subsidiary whose value after the contribution does not recover, the write-down to fair value is disallowed at the level of the intermediate subsidiary B Co. This restriction aims at preventing multiple deductions of write-down at various shareholder levels.

Due to the coincidence of these two restrictions the Austrian tax authorities denied the deduction of write-downs at either level.

Decisions of the Court

The Court of first instance (BFG) ruled that write-downs should be deductible for tax purposes once. Therefore, it held that the restriction on the deduction of write-downs should not apply at the level of the intermediate subsidiary B Co.

The Austrian Supreme Administrative Court (VwGH) did not fully confirm the view of the court of first instance. It held that the write-down should be tax-deductible at the level of A Co. Furthermore, for tax deductibility at the level of A Co it is necessary that B Co's loss causes the loss at the level of A Co and is reflected in the depreciation of the value of the shareholding in B Co.

Implications

The Austrian Supreme Administrative Court is stricter in its decision. While after the decision of the Court of first instance such a write -down would have been tax-deductible at the level of the intermediate subsidiary B Co, according to the Supreme Court's decision the write-down is only tax-deductible at the level of the grand-parent A Co and not at the level of B Co. Thus, in case such a capital loss is fully or partially covered by other hidden reserves, a write-down at the level of A Co would not be possible. In the future it should be documented that the write-down in the shareholding of B Co results from the loss in value of its shareholding or capital loss in C Co.

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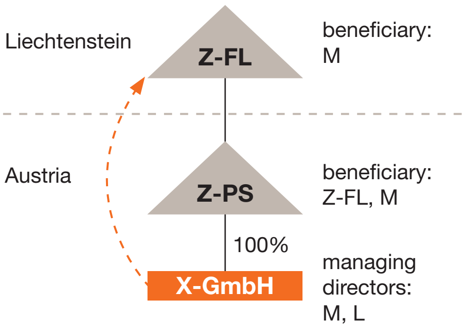
Recent decisions of the Austrian Supreme Administrative Court (VwGH) on the tax treatment of jouissance rights

In 2016, the VwGH rendered two decisions (2012/13/0061, 2013/13/0036) regarding the tax treatment of debt-like and equity-like jouissance rights.

VwGH 2012/13/0061 (11 February 2016)

Facts



In 2004, a profitable Austrian company (X-GmbH) issued a debt-like jouissance right with a nominal value of € 185k to the Liechtenstein private foundation Z-FL (a related party of X-GmbH). Pursuant to the underlying agreement, the profit participation was based on the relation of the nominal value of the jouissance right to the nominal share capital of X-GmbH (€ 35k), which corresponds to a participation of about 85%. Since such an agreement does not meet arm's length conditions and non-tax reasons could not be demonstrated, the Austrian tax authorities deemed the profit participation to be a pass-through hidden distribution to M as the only beneficiary of Z-FL (i.e. hidden distribution from X-GmbH to Z-PS and hidden contribution from Z-PS to Z-FL) and denied the deductibility of interest expenses relating to the jouissance right on the level of X-GmbH.

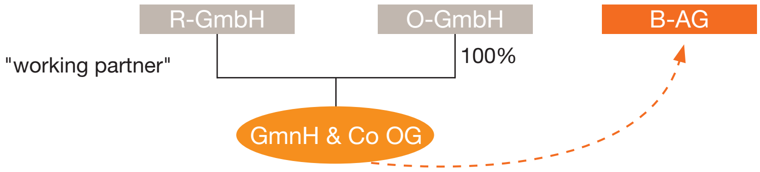
Decision of the VwGH

Despite the fact that the underlying agreement was adequately documented, the VwGH affirmed a pass-through hidden distribution to M as the only beneficiary of Z-FL and entirely denied the deductibility of interest expenses, since under arm's length conditions the jouissance right would never have been issued. The VwGH based its decision on the following arguments:

- The jouissance right was issued to cover start-up costs of X-GmbH. However, at the time of the issuance (only three months after incorporation), X-GmbH had already generated commission revenues of € 500k (€ 1.88m until the end of 2004) and had no expenses worth mentioning. Therefore, there never was a financing need.
- The VwGH followed the arguments of the Austrian tax authorities that other financing instruments would have been more favorable for X-GmbH, e.g. the Austrian private foundation Z-PS would have been able to provide X-GmbH with capital. While the foundation board of Z-PS refused to provide X-GmbH with capital, the foundation board of Z-FL (consisting of the identical persons) was willing to provide capital (in form of the jouissance right) to X-GmbH.

VwGH 2013/13/0036 (30 March 2016)

Facts



In 2005, GmbH & Co OG (an Austrian partnership) issued an equity-like jouissance right to B-AG. B-AG treated the profit distributions relating to the jouissance right as tax-exempt income from participations pursuant to § 10 para. 1 n. 3 CITA. However, the tax authorities denied tax exemption of the profit distributions with the argument that § 10 para. 1 n. 3 CITA is not applicable for partnerships.

Decision of the VwGH

Jouissance rights are financing instruments which are independent from the company's legal structure. Nevertheless, the VwGH followed the decision of the tax authorities that due to the legal form of the issuing company, § 10 para. 1 n. 3 CITA and thus tax exemption for the profit distributions is not applicable. Further, the only purpose of tax exemption is the avoidance of double or multiple taxation of income from participations, and in the case at hand no double or multiple taxation occurred.

B-AG argued, that GmbH & Co OG as a partnership is not subject to tax and following the transparency principle, the participation right should be treated as if it was issued by the shareholders of GmbH & Co OG, and therefore tax exemption pursuant to § 10 para. 1 n. 3 CITA would be applicable.

The VwGH did not follow the arguments of B-AG and decided that tax exemption is not applicable in this case.

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Austrian Supreme Administrative Court: Up-stream merger of the head of an Austrian tax group into a non-group company terminates the tax group

On 28 June 2016 the Austrian Supreme Administrative Court decided that an up-stream merger of the head of an Austrian tax group terminates the tax group. This judgment is in line with the opinion of the Austrian tax authority, but contrary to a former decision of the Austrian Independent Fiscal Senate ("UFS").

Decision of the UFS in 2013

The UFS ruled in 2013 that a merger of the head of a tax group into a non-group company neither terminates the tax group nor does it lead to a reversal of the tax effects of the group, even if the tax group existed for less than three years. According to the UFS, the merger is carried out under universal legal succession, which is also effective for Austrian tax law. Therefore, the "group parent attribute" of the merging company is transferred to the absorbing non-group company. The "group parent attribute" does not constitute a personal right which cannot be transferred to another legal entity.

The Supreme Administrative Court decision in 2016

According to the Supreme Administrative Court, the up-stream merger into a non-group company terminates the tax group. The Court argued that only restructurings within a tax group are harmless for the tax existence of the tax group. Since in the underlying case the absorbing company is not a member of the tax group, the tax group collapses. Therefore the effects of the tax group have to be reversed, if the minimum commitment period of three years is not fulfilled at the mergerdate.

Prospect

The Supreme Administrative Court confirmed the opinion of the Austrian tax authority that tax groups cannot be extended through an up-stream merger by the head of the tax group. However, down-stream mergers of the head of the tax group into a group member should not terminate the tax group, since such a merger is carried out within the tax group.

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Austrian company cars – VAT burden for Austrian employees of foreign taxable persons

Recently, the Austrian tax authorities started to investigate in more detail in cases where Austrian employees of foreign employers (e.g. with their seats in Switzerland or Germany) use company cars in Austria for private purposes (e.g. for travel between the employer's premises and their home). In such a scenario Austrian VAT may become due. This is due to the fact that providing vehicles to employees for private purposes is regarded as long term hiring of vehicles to non-taxable persons in exchange for work. The place of supply is deemed to be the place where the recipient (i.e. employee) is resident (i.e. Austria). VAT on the private use of company cars by employees becomes due under the following circumstances:

- The employee is resident in Austria.
- The employee uses the company car for private purposes on a regular basis.
- The employer has claimed input VAT (regardless whether Austrian or foreign input VAT) in connection with the company car.
- This applies irrespective of whether the employer has a seat or is already registered for VAT purposes in Austria.

In this case, Austrian VAT becomes due and the employer has to be registered for VAT purposes in Austria and pay VAT to the Austrian tax authorities.

The private use of a company car is recognised as income in kind at the level of the employee per month (so-called "Sachbezug"). The income in kind is calculated at 2% of the actual acquisition cost of the company car (max. EUR 960 per month). This income in kind is the amount including VAT, i.e. VAT of 20% has to be calculated out of the income in kind.

In case the private use of a company car does not exceed 500 kilometres per year, only half of the amount is considered as income in kind.

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Update: PoS systems in Austria: New decrees by the Austrian Ministry of Finance

On 3 August 2016 the Austrian Ministry of Finance published a decree regarding the bonus calculation in connection with investing in a new PoS system or software. Bonuses for investing in a new system or for changing an existing system are generally EUR 200 per system or a maximum of EUR 30 per PoS. It is worth mentioning that a taxable person cannot only get a bonus for new PoS systems.

In case a so-called “closed overall system” is implemented, a bonus application for all PoS within that closed overall system can also be filed with the Austrian tax authorities (again EUR 30 per PoS).

As already mentioned, if you carry out your business in Austria and you receive payments e.g. in cash or by credit card, please consider the new obligations regarding cash registers and the issue of receipts with mandatory content (as of 1 April 2017 with a specific QR code).

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Austrian Supreme Administrative Court on chain supplies

In a recent decision by the Austrian Supreme Administrative Court, the prevalent Austrian view on the treatment of chain supplies of goods and the allocation of the "moved supply" was confirmed.

In the case at hand, three parties (first supplier, established in Germany – "A", second supplier, established in Austria – "B", recipient, established in Austria – "C") were involved in a cross-border chain supply involving Germany and Austria. The transport of goods was organised by C, however, this fact was not communicated between A and B. On the contrary, B approached A, using his Austrian VAT ID, leading A to think that this would be a standard intra-EU supply, not a chain supply with another party (C) involved. A provided B with all documents necessary to pick up the goods and treated the supply as an intra-EU supply of goods (i.e. issued an invoice without German VAT). Instead of picking up the goods himself, he provided C with these documents. C picked up the goods and transported them to Austria. B issued an invoice with 20% Austrian VAT and C deducted this VAT as input VAT. Based on the incorrect VAT treatment of the chain supply, this input VAT deduction was denied by the Austrian tax authorities. Therefore, B corrected the invoice in order to be able to reclaim the VAT paid. B became insolvent before C could reclaim the VAT amount paid to him.

Based on the above, the Austrian Supreme Administrative Court again elaborated the rules on the treatment of chain supplies from an Austrian VAT point of view. The "moved supply" has to be allocated to the supply between the party organising the transport and his supplier (i.e. from B to C in the case at hand). All supplies effected before this "moved supply" are deemed to be effected in the country of dispatch (i.e. the supply from A to B in the case at hand), all supplies effected after the moved supply are deemed to be effected in the country of destination. The Court did not consider the remarks of the European Court of Justice in cases in which other conditions for determining the "moved supply" were mentioned (e.g. VSTR).

In this decision, the Court made it very clear that the good faith on the part of the first supplier (A) cannot change the VAT treatment of chain supplies. As the recipient (C) organised the transport, the "moved supply" has to be allocated to the supply between the second supplier (B) and the recipient (C). Therefore, as the corresponding invoice would have to be issued without Austrian VAT, the recipient (C) is not entitled to deduct the VAT shown on the invoice issued by the second supplier (B) as input VAT. Furthermore, the court elaborated that the good-faith-rule according to Art. 7 Abs. 4 UStG does not relate to the right to deduct input VAT, but merely to the right to treat a supply as zero-rated intra-EU supply. Hence, the recipient (C) is not entitled to input VAT deduction in connection with the supply from the second supplier (B) to him.

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Evidence requirements for triangulation supplies: update

In our last issue, we informed on a further notification of the Austrian Federal Ministry of Finance on evidence requirements for triangulation supplies not qualifying for the simplification rule. The Ministry pointed out that an abstract confirmation indicating that the triangulation simplification is applicable in the member state of destination is regarded to be sufficient.

Recently, the Federal Ministry of Finance issued another notification where it specified these requirements. Hence, when the respective (incorrect) invoice or EU Sales Listing are amended correspondingly and no reference of fraud is given, no abstract confirmation of the member state of destination is necessary.

This affects the following member states:

Belgium	Bulgaria	Germany
Estonia	Finland	France
Greece	Ireland*	Italy
Croatia	Latvia**	Lithuania
Luxemburg	Netherlands	Poland
Portugal	Romania	Sweden
Slovenia	Slovakia	Spain
Hungary	Great Britain	Cyprus

* if the correction of the EU Sales Listing is made within 5 days

** if the EU Sales Listing is valid and there is a note on the invoice that VAT liability is shifted to the recipient

In case of an audit, the taxable person has to be granted reasonable time by the authorities to correct the invoice or the EU Sales Listing or to provide the above mentioned abstract confirmation.

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Austrian Tax Facts and Figures

Taxation of corporations

Corporate income tax rate (Basis – adjusted statutory accounts)	25%
Dividend withholding tax	27.5/ 25%
Witholding tax on licences/royalties	20%
Interest witholding tax	0%
Significant allowances	
Research & Development (R&D) (premium in cash)	12%

Non-deductible expenses (examples)	
Long-term accruals	3.5% per year
Interest and royalties paid to lowtaxed group companies	
Interest of debt-push down	
Tax loss carry forwards	
Losses may be carried forward for an indefinite period of time	
Usage of tax losses: 75% of taxable income	

Double taxation agreements
with 89 countries – mainly exemption method

International participation exemption for holding companies	
Conditions: Investments 10%, 1 year holding	
Dividends and Capital gains	0%
Dividend EC portfolio (shares) < 10%	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 tax cost
Foreign participations if EU-resident or third countries with comprehensive assistance agreement
Losses of foreign participations may be offset against profits of group leader up to 75%

Income in EUR	in 2015	from 2016 onwards
0 to 11,000	0%	0%
11,001 to 18,000	36.5%	25%
18,001 to 25,000		35%
25,001 to 31,000	43.21%	35%
31,001 to 60,000		42%
60,001 to 90,000	50%	48%
90,001 to 1,000,000		50%
above 1,000,000		55%

Social security on monthly earnings up to € 4,860			
Employer's share	up to 21.48%	Payroll related taxes	approx. 8.0%
Employee's share	up to 18.12%		
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 (Accommodation, art, cinema etc.)	13%
Reduced rate (Food, rent, public transportation etc.)	10%
VAT refund for foreign enterprises – available up to June 30 of the following year and for EU enterprises up to September 30 of the following year.	

Other taxes

Real estate transfer tax	0.5 – 3.5%
Stamp duties - Assignment agreements - Rent agreements - Suretyship agreements	 0.8% 1.0% 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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