Austrian Tax News

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Coming into force of Part II of the 2015 Tax Amendment Act

The Tax Amendment Act ("AbgÄG 2015") has been passed by parliament and was announced on 28 December 2015. The amendments included in the AbgÄG 2015 are generally applicable as from 29 December 2015 onwards. However, due to special coming into force rules, most rules are applicable from 1 January 2016 onwards.

Only slight amendments have been made compared to the draft bill of the AbgÄG 2015 (see our recent newsletter from December 2015). The two most important changes are as follows:

- An as yet unpublished decree from the Ministry of Finance is to detail all impacts of reorganisations on the internal financing accounts which determine the equity or current profit nature of dividends
- Profits resulting from exit taxation may be fully offset against tax loss carry forwards (in general a 75% rate applies under Austrian tax law)

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Update on Double Tax Treaties

Double Tax Treaty between Austria and Belarus

The Protocol amending the Double Tax Treaty between Austria and Belarus came into force in September 2015. The Double Tax Treaty now includes a provision reflecting the OECD standard for the exchange of tax information. The amendments will have effect for periods beginning on or after 1 January 2016.

Double Tax Treaty between Austria and Chile

The Double Tax Treaty between Austria and Chile – signed in December 2012 – was finally ratified by the parliament of Chile. The Treaty will be effective for taxable periods starting on or after 1 January 2016. The Double Tax Treaty is basically in line with the OECD model convention. The main differences are as follows:

- Construction sites constitute a permanent establishment after 6 months.
- If employees work for more than 183 days during a period of 12 months in the source state, this constitutes a permanent establishment.
- The source state has a taxation right of 15% on dividend payments, with no reduced rate being foreseen for substantial shareholdings.
- Interest may be taxed at 15% in the source state. A reduced tax rate of 5% is applicable in specific cases (i.e. interest derived from loans granted by banks and insurance companies; bonds or securities which are regularly traded on a recognised market).
- The source state has a taxation right of 5% on royalties that refer to the use of, or the right to use industrial, commercial or scientific equipment. A 10% rate applies in all other cases.
- Capital gains arising from the sale of shares in a company may be taxed in the source state. Where the seller has owned shares (directly or indirectly) at any time during the twelve months preceding such sale, representing less than 20% of the capital, the capital gains tax is not to exceed 17% of the capital gain.

Austria applies the credit method in case of dividends, interest, royalties and capital gains from the alienation of shares. In all other cases Austria uses the exemption method. Chile applies the credit method.

Double Tax Treaty between Austria and Turkmenistan

A new Double Tax Treaty between Austria and Turkmenistan has been ratified by the Austrian parliament. The legal procedures to bring this Treaty into force are now being followed. In case the Double Tax Treaty comes into force during this year, its provisions will be effective from 1 January 2017 onwards. The Double Tax Treaty basically follows the OECD model convention. The key provisions are:

- A building site or installation project constitutes a permanent establishment if it lasts more than twelve months. The Treaty does not contain a provision for service based establishments.
- Dividend payments may be taxed at 15% by the source state. The tax rate is reduced to nil for substantial shareholdings.
- Withholding tax on interest and royalties is not to exceed 10%. Exemptions are available in specific cases (e.g. for interest payments for loans owed to the contracting state, a political subdivision or export financing agency thereof).
- Capital gains on the alienation of shares are to be taxable only in the state where the alienator is a tax resident.

Austria and Turkmenistan apply the credit method to eliminate double taxation.

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Affiliated companies are not allowed to set up provisions for letters of comfort issued to other group companies

The Austrian Administrative Supreme Court recently published a decision with regard to the possibility of setting up provisions based on issued letters of comfort. The court held that an injection of funds through a mediate or immediate shareholder does not lead to operating costs, but rather to capital contributions in accordance with § 6(14) Austrian Income Tax Act and that, as a consequence, the setup of provisions based on letters of comfort issued to direct/indirect subsidiaries is not allowed.

An Austrian corporation (the "group parent") issued letters of comfort to its direct and indirect subsidiaries. In FY09 the group parent set up a provision based on the issued letters of credit as the respective subsidiaries showed negative equity and huge amounts of bank liabilities. During a tax audit of the group parent it turned out that in December 2009 the group parent had received a sales offer regarding its direct and indirect subsidiaries. In the course of the tax audit they argued that it was crucial for the success of the planned share deal that the subsidiaries showed positive equity. As a consequence it seemed clear to the parent company at the end of 2009 that its obligation laid down in the letters of credit would fall due, which is why the respective provision was set up in its FY09 financial statements.

The setup of the respective provision in its FY09 financial statements was challenged by the tax inspectors.

Judgment of the Austrian Administrative Supreme Court

The Austrian Administrative Supreme Court (decision no. 2014/15/0049) ruled that an injection of funds through a mediate or immediate shareholder does not lead to operating costs, but rather to capital contributions. As a consequence, the setup of provisions based on letters of comfort issued to subsidiaries is not allowed.

The above mentioned view applies to direct and indirect subsidiaries. In its decision the court did not deal with the setup of provisions for letters of comfort issued to other affiliates (e.g. sister companies).

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Update: Comprehensive administrative assistance arrangements regarding income tax law

The Austrian Ministry of Finance has recently published a document entitled "Comprehensive administrative assistance arrangements regarding taxes on income". This document includes a list of those countries with which "comprehensive assistance arrangements" have been in place since 1 January 2016. It constitutes an update of the last list published by the Austrian Ministry of Finance on 27 January 2015.

The existence of comprehensive assistance arrangements is particularly relevant when it comes to recapture taxation of foreign permanent establishment losses in Austria pursuant to § 2(8) Austrian Income Tax Act, tax exemption of dividends from third country portfolio investments as well as the incorporation of foreign group members into tax groups pursuant to § 9(2) Austrian Corporation Tax Act (see also our Newsletters dated 9 April 2014, 1 October 2014 and 5 February 2015).

The list of countries most recently published by the Austrian Ministry of Finance now also includes Belarus, Cameroon, Chile, Kazakhstan, Mauritius, Montenegro, Nigeria, Russia and the Seychelles as those countries with which comprehensive assistance arrangements are in place.

As from 1 January 2016, "comprehensive assistance arrangements" have been agreed upon with the following countries and territories:
Albania, Algeria, Andorra, Anguilla, Argentina, Armenia, Aruba, Australia, Azerbaijan, Bahrain, Barbados, Belarus, Belgium, Belize, Bermuda, Bosnia-Herzegovina, Brazil, British Virgin Islands, Bulgaria, Cameroon, Canada, Cayman Islands, Chile, Colombia, Costa Rica, Croatia, Curaçao, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Faroe Islands, Finland, France, Georgia, Germany, Ghana, Gibraltar, Great Britain, Greece, Greenland, Guernsey, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Japan, Jersey, Kazakhstan, Korea (Republic), Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Mauritius, Mexico, Moldavia, Monaco, Montserrat, Montenegro, Morocco, Netherlands, New Zealand, Nigeria, Norway, Philippines, Poland, Portugal, Qatar, Romania, Russia, St. Vincent and the Grenadines, San Marino, Saudi Arabia, Serbia, Seychelles, Singapore, Sint Maarten, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Taipei, Tajikistan, Thailand, Tunisia, Turkey, Turks and Caicos Islands, Ukraine, United States of America, Venezuela and Vietnam.

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Due diligence costs: Immediate deduction as operating expenses or capitalisation as acquisition costs?

In its decision dated 3 June 2015, the Austrian Fiscal Court specified in detail which consulting expenses associated with acquisition processes are to be capitalised as incidental acquisition costs or which are to be deducted immediately as operating expenses. When it comes to a due diligence made prior to the purchase of a share, the Austrian Fiscal Court did not see a particularly close connection to the subsequent share purchase, which is why the associated costs of the due diligence were qualified as immediately deductible expenses.

Facts of the case: Purchase of a share
- 4 December 2009: Supervisory Board resolution on the preparation of a market study and due diligence
- 2 February 2010: Letter of Intent on the further course of action between buyer and seller
- 9 February 2010: Commissioning of due diligence
- 17 February to 15 March 2010: Performance of due diligence
- 21 May 2010: Conclusion of purchase agreement
- 25 May 2010: Supervisory board approval of share purchase agreement

Definition of acquisition costs
Acquisition costs are not defined under Austrian tax law. Under the prevailing opinion, the Austrian Commercial Code (UGB) definition is therefore deemed to generally apply to tax law unless there are specific mandatory tax provisions to the contrary. When it comes to consulting services rendered prior to and in association with the acquisition of goods, the general definition as set out in § 203(2) UGB continues, in our opinion, to apply to tax law as well: "Acquisition costs are any expenses incurred in order to purchase an asset and render it operational…"

The acquisition as such can be subdivided into two phases: the purchasing phase and the phase of rendering the asset. With respect to the acquisition of capital shares, the interesting phase is that of the purchasing process.

Purchasing phase
The purchasing phase ends with the transfer of the power of control to the acquiring party. The end of the purchasing phase thus defines the acquisition date and the date the asset is recorded in the books of the purchaser. But it is the beginning of the purchasing phase which decides whether consulting expenses are to be capitalised prior to the transfer of the power of control. Under the prevailing opinion, the purchasing phase begins after a decision in favour of the purchase has been taken and with the first definite action designed to obtain power of control. In practice this has led to pre-decision costs being deductible immediately as operating expenses and post-decision costs having to be capitalised as (incidental) acquisition costs. This fundamental differentiation between consulting expenses before and after the decision to purchase a share has, in our opinion, been confirmed by the Austrian Fiscal Court: Accordin-

gly, such expenses only qualify as acquisition costs if it has already been determined that a purchase will subsequently be made.

However, it is not easy to determine the exact point in time when the decision to make the purchase has been made: The German Supreme Fiscal Court considers the "fundamental decision in favour of the purchase" to be the relevant point in time. The Austrian Fiscal Court does not seem to agree. Rather, it deems the "final decision in favour of the purchase" to be relevant and even goes one step further: For the case in question, the Austrian Fiscal Court rules that the final decision in favour of the purchase – which was ultimately made upon conclusion of the purchase agreement, which in turn became effective by subsequent Supervisory Board approval – was the relevant point in time. By contrast, the tax authority was of the opinion that the decision in favour of the purchase was already taken upon conclusion of the Letter of Intent.

The result
In the opinion of the Austrian Fiscal Court, the due diligence costs incurred prior to the purchase of the share were immediately deductible operating expenses. However, an official revision appeal has already been lodged.

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Salzburg Tax Dialogue 2015 – VAT

In late 2015, the Austrian tax authorities dealt with various VAT topics recently discussed and summarised their opinions in the "Salzburg Tax Dialogue".

Chain supplies in VAT groups
Based on a fictional background with three parties involved in a chain supply, with the first two parties (supplier – first recipient) being part of a VAT group in the country of dispatch, the Austrian tax authorities argue that, depending on whether the VAT group is based in Austria or another Member State, the VAT treatment is different.

In case the VAT group (and, therefore, the first two parties of the chain supply) is based in a Member State other than Austria, the VAT group is not recognised in the view of the Austrian tax authorities, meaning that the chain supply needs to be treated as a standard chain supply between three independent parties. In case the VAT group is based in Austria, the VAT group is, in the view of the Austrian tax authorities, recognised as such and the supply between the first to parties is treated as a non-taxable transaction. Hence, the supply between the first recipient (established in Austria) and the second recipient (established or registered for VAT purposes in another Member State) has to be treated as intra-EU supply.

Retroactive application of the triangulation simplification
The triangulation simplification cannot be applied retroactively. If the first recipient does not initially issue a correct invoice based on which the second recipient is able to perceive that this simplification is being applied and does not report the supply correctly in the European Sales Listing, the application of the simplification rule is therefore prohibited.

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Annual update of the 2015 VAT guidelines

Recently, the Austrian tax authorities have updated the Austrian VAT guidelines, incorporating the latest legal changes and jurisdiction.

Self-supply in connection with cars with zero CO2 emissions
Under the general Austrian VAT rules, input VAT incurred in connection with cars cannot be deducted. Hence, in the case of own consumption (e.g. if the acquisition costs of cars exceed EUR 40,000), the exceeding costs are not deductible from an income tax perspective and therefore trigger a self-supply for the exceeding part.

VAT changes in the tourism sector
The VAT rate for accommodation services is being raised from 10% to 13%. As food is still subject to a VAT rate of 10%, package deals (i.e. accommodation services including breakfast, half-board or full-board) need to be examined closely (see our article in issue no. 50 of September 2015).

In case it is possible to separate the accommodation services from the additional services (i.e. provision of food and drinks), the services need to be invoiced using the individual prices as well as the corresponding VAT rate (10% VAT for food, 13% VAT for accommodation services, 20% for drinks).

In case it is not possible to clearly separate the accommodation services from the additional services, the Austrian VAT guidelines now offer flat rates that can be used to determine the share that is subject to 10% VAT (food) and 13% VAT (accommodation services). Depending on the arrangement (breakfast, half-board or full-board) and the price per person per night, the flat rates are different (see margin no. 1369 of the Austrian VAT guidelines). The provision of a standard local breakfast is, if provided together with accommodation services, still subject to a VAT rate of 10%.

Change of VAT rates and the effect on down payments

In case down payments are received and the applicable VAT rate changes by the time the supply is actually effected, the taxation of the down payment as well as any down payment invoices need to be amended to reflect the new VAT rate (e.g. 13% VAT instead of 10% VAT). This adjustment must be shown on the first VAT return after the change came into effect. Alternatively, if it is foreseeable that the VAT rate will already have changed when the supply is effected, the down payment invoices can already be issued using the VAT rate that will be in effect at the time of supply. The excess VAT amount paid (i.e. 3% if a VAT rate of 13% instead of 10% is applied) is owed as VAT due to invoicing until the new VAT rate is in effect and needs to be declared as such on the VAT return for the period in which this down payment invoice is issued. According to the Austrian VAT guidelines, the recipient of this invoice can already deduct the full input VAT amount as shown on the down payment invoice.

Application of the triangulation simplification

The updated Austrian VAT guidelines state that the triangulation simplification can, from an Austrian VAT point of view, also be applied if the first recipient (middleman) is registered for VAT purposes in the Member State of dispatch. However, it has to be ensured that the first recipient uses a VAT ID issued by a Member State other than the Member State of dispatch.

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Austrian Tax Amendment Act 2015 – Customs-related innovations

When issuing the Austrian Tax Amendment Act 2015 (Abgabenänderungsgesetz 2015 – AbgÄG 2015), the legislator took the chance to adapt the Austrian customs rules to the newly introduced Union Customs Code (UCC). The major adjustments are as follows:

The special authorisation for applying the electronic compliance procedure (e-customs) currently in place will be abandoned, as the UCC defines the filing of electronic customs declarations as the standard case. In future, only the access codes will have to be obtained.

The distinction of customs warehouse types provided in the UCC is also considered in the national legislation.

The authorisation to act as representative before the customs authorities will no longer be limited to certain professions (e.g. freight forwarders), as the UCC only requests that the representative fulfils the AEO criteria. The limitation of the authorisation to represent in the appeal procedure will be abandoned.

Regarding the statute of limitations in connection with customs duties arising from criminal actions, the UCC provides a statute of limitations of 5 to 10 years. In this connection, the Austrian legislator has decided to apply the maximum period provided in the UCC (10 years). The obligation to keep documents relevant for customs procedures is prolonged from 3 to 5 years.

The current provision that travellers can avoid a fiscal criminal procedure regarding customs duties of up to EUR 400 by paying a corresponding surcharge and declaring a waiver to file an appeal will be generally applied in future (also to cases beyond travelling). Furthermore, the threshold will be increased from EUR 400 to EUR 1,000.

The described changes are to come into force in Austria as of 1 May 2016.

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Conclusions of the Salzburg Tax Dialogue 2015 on International Tax Law

The Salzburg Tax Dialogue on International Tax Law, held on 27 October 2015, dealt with unclear issues regarding the short-term cross-border provision of employees.

In a ruling issued in 2013, the Austrian Administrative Court – in assessing the term of employer within the meaning of Article 15 OECD MTC – for the first time applied the economic employer term, which is already used in most countries. Accordingly, the country where the activity is performed has the right to taxation if the wage costs are borne by the party to whom the employees are provided. A presence of more than 183 days is not required (see PwC Newsletter).

In a decree issued on 12 June 2014, the Austrian Ministry of Finance confirmed the application of the economic employer concept (see PwC Newsletter). It was made clear that the company receiving the employees can only become an economic employer if passive services are being rendered. If active services are being rendered, the 183-day rule remains applicable if such activities do not lead to the set-up of a permanent establishment.

The conclusions of the Salzburg Tax Dialogue on International Tax Law, published on 28 October 2015, deal with the following issues regarding the short-term cross-border provision of employees.

Application of the decree in case of very short-term deployments

Contrary to the hopes of many companies, no minimum period was defined for the transfer of the economic employer role to the company receiving the employees. In the case of extremely short deployments within the scope of business trips, assistance services are prima facie deemed to exist, which means that the 183-day rule is applicable. No further definition of what precisely constitutes a business trip was provided.

Assumption of leading functions (particularly those of a managing director) as part of group deployments

According to the conclusions of the Salzburg Tax Dialogue, the assumption of leading functions as part of (group) deployments may constitute either active or passive services. Two examples are given for differentiation purposes between active and passive services. These examples were already part of the decree issued on 12 June 2014 and correspond to examples listed in the commentary on the OECD MTC. The nature of services rendered by managing directors deployed by parent companies to subsidiaries as part of a group deployment is to be determined on the basis of these example scenarios as well. It is clearly stated in the conclusions of the Salzburg Tax Dialogue that – in cases when an Austrian parent carries out managing director activities as active services over a longer period of time via changing domestic employees – the relevant times are to be cumulated so as to be able to assess whether a permanent establishment has been set up in the country where the company receiving the employees is domiciled.

The conclusions of the Salzburg Tax Dialogue state that in cases of doubt – when it comes to deployments between affiliates – passive services are to be deemed to exist in principle. However, a scenario involving active services is provided as well.

Relevance of group transfer pricing for the differentiation between active and passive services

The conclusions of the Salzburg Tax Dialogue state that it cannot be determined exclusively on the basis of the nature and scope of the internal group billing of costs whether active or passive services are being rendered or whether the economic employer role is transferred to the receiving company. The issue of whether a fee is charged or whether staff costs are merely passed on may serve as an indicator. The nature of a specific service is to be determined on the basis of its true economic content and not its formal appearance under civil law.

Summary

The conclusions of the Salzburg Tax Dialogue provide several indicators for the differentiation between active and passive services, including the following: party bearing the costs, economic incorporation within the receiving company, interest in the activities of the parent or subsidiary, deployment between parent, subsidiary or affiliated companies, reporting obligation of the employee, etc. On the basis of the principle of free appraisal of evidence, all circumstances relevant to an individual case are to be considered when forming an overall assessment. However, a clear list of criteria – which would be essential for an assessment in practice – is not provided.

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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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