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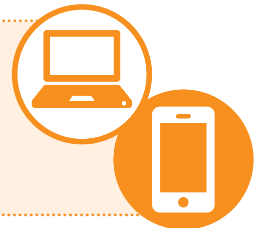

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Independence of auditors of public-interest entities

The EU audit legislation (comprising a Directive and a Regulation) entered into force on 16 June 2014 and its provisions with regard to the independence of auditors will be applicable to the first financial year starting on or after 17 June 2016. As part of this legislation, the EU audit Regulation introduces stringent rules concerning the independence of auditors of public-interest entities (PIEs).

PIEs are basically defined as all EU companies with listed securities which are incorporated in an EU Member State, all banks and insurance undertakings as well as entities designated by Member States as public-interest entities. The Regulation has direct effect in the EU though it does contain a number of Member State options which have to be transposed into domestic law by the individual Member States.

In Austria, the implementation will take place through the Austrian Audit Amendment Act (Abschlussprüfungsrechts-Änderungsgesetz; APRÄG) 2016. The changes regarding the independence of auditors of PIEs caused by the Regulation and the APRÄG 2016 government bill are briefly described below. It should be noted that the existing strict independence rules as set out in the provisions of Section 271 and 271a para 1 to 4 of the Austrian Commercial Code (Unternehmensgesetzbuch; UGB) for auditors of all other (non-PIE) companies remain unchanged (except for the rules regarding internal rotation).

Article 5 of the Regulation contains a list of prohibited non-audit services ("black list") which a statutory auditor or an audit firm carrying out the statutory audit of a PIE (and any member of the network to which the statutory auditor or the audit firm belongs) is not to directly or indirectly provide to the audited entity, to its parent undertaking or to its controlled undertakings within the EU. In particular, the statutory auditor is not to provide:

- tax services relating to payroll tax and customs duties;
- services that involve playing any part in the management or decision-making of the audited entity;
- bookkeeping and preparing accounting records and financial statements;
- payroll services;
- designing and implementing internal control or risk management procedures related to the preparation and/or control of financial information or designing and implementing financial information technology systems;
- legal services, with respect to the provision of general counsel, negotiating on behalf of the audited entity and acting in an advocacy role in the resolution of litigation;
- services related to the audited entity's internal audit function;
- services linked to the financing, capital structure and allocation, and investment strategy of the audited entity, except providing assurance services in relation to the financial statements, such as the issuing of comfort letters in connection with prospectuses issued by the audited entity;
- promoting, dealing in, or underwriting shares in the audited entity;
- certain human resources services.

The non-audit services cited below are prohibited in general, but can individually be permitted by Member States if certain requirements are complied with. The Austrian government proposed (within the APRÄG 2016 government bill) to permit the following non-audit services:

- preparation of tax forms;
- identification of public subsidies and tax incentives unless support from the statutory auditor or the audit firm in respect of such services is required by law;
- support regarding tax inspections by tax authorities unless support from the statutory auditor or the audit firm in respect of such inspections is required by law;
- calculation of direct and indirect tax and deferred tax;
- provision of tax advice;
- valuation, including valuations performed in connection with actuarial services or litigation support services.

Pursuant to the proposed Section 271a para 6 UGB, the above-mentioned services can be provided by the statutory auditor of a PIE if:

- they have no direct or have immaterial effect, separately or in the aggregate, on the audited financial statements;
- the audit committee approves these services with regard to the independence of the auditor and the protective measures applied;
- the estimation of the effect on the audited financial statements is comprehensively documented and explained in the additional report to the audit committee.

All non-audit services not prohibited by Article 5 of the Regulation or national legal provisions are basically permitted and therefore can be provided by the statutory auditor if:

- the audit committee of the PIE approves these services in accordance with Article 5 para 4 of the Regulation;
- the fee cap under Article 4 para 2 of the Regulation is complied with (70% of the average audit fee of the previous three years).

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Austrian Administrative High Court (VwGH) extends scope of the Austrian goodwill amortisation to EU/EEA targets

On 10 February 2016, the VwGH rendered its decision (2015/15/0001) in a case that follows a preliminary ruling by the CJEU in which the Court stated that the Austrian goodwill amortisation restricts the freedom of establishment (Finanzamt Linz, C-66/14).

Facts

An Austrian company (group parent) formed a tax group with a Slovakian subsidiary (group member) and claimed a goodwill amortisation with regard to that holding. Under the Austrian Corporate Income Tax Act, group parents are only able to amortise the goodwill that results from the acquisition of a domestic group member. The case was brought to the VwGH, which then referred to the CJEU two preliminary questions, namely (1) whether the Austrian goodwill amortisation scheme constitutes illegal State aid and (2) whether it restricts the freedom of establishment. In its preliminary ruling the CJEU argued that the first question was inadmissible, since the group parent was unable to draw

any benefit from a possible breach of State aid rules. With respect to the second question, the CJEU stated that the non-granting of the goodwill amortisation to a group parent which acquired a holding in a non-resident EU company is not in line with the freedom of establishment.

Decision of the VwGH

The VwGH – based on the CJEU's decision – concluded that the difference in treatment between Austrian targets and EU/EEA targets is incompatible with the freedom of establishment. The provisions regarding the goodwill amortisation have to be interpreted in such a way that holdings in EU/EEA group members also qualify for the scheme. This holds true irrespective of whether or not the option for taxation of gains/losses in respect of the holding in the EU/EEA group member was exercised. The goodwill amortisation is recaptured upon the disposal of the target as the international participation exemption is not applicable in this respect.

Unlike the CJEU, the VwGH considers the answer to the State aid question as relevant to solve the case. While the European Commission qualified the goodwill amortisation as State aid during the litigation process, the VwGH follows the arguments of AG Kokott, who came to the conclusion that the scheme is not selective.

Implications

Austrian tax groups with foreign EU/EEA group members (just applicable to those acquired up to 31 March 2014) should analyse the possibility of claiming goodwill amortisation for those holdings. It should also be analysed whether and how any corporate income tax assessments of group parents which have already come into legal force can be challenged if the goodwill amortisation for EU/EEA group members was not granted initially.

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Update on the Austrian energy tax refund and the ECJ

Background

In accordance with the Ancillary Budget Act 2011 ("BBG 2011"), only firms whose focus is verifiably on the production of tangible assets qualified as manufacturing firms, thus making them eligible to apply for energy tax refunds ("ENAV"). The limitation of the energy tax refund effective from 1 February 2011 onwards led to a blurring between a manufacturing firm's refundable energy taxes and a service company's non-refundable energy taxes. The restriction of ENAV by the BBG 2011 was reported and published by the European Commission in the official journal of the European Union.

Preliminary ruling of the ECJ

Due to a decision of the ECJ in 2001 (C-143/99, Adria-Wien Pipeline) the scope of Austrian energy refund had to be permitted also for service companies. However, Austrian legislators qualified the limitation on manufacturing firms in BBG 2011 as covered by provision 25 para. 1 of the General Block Exemption Regulation ("AGVO"). This article determines that environmental aid schemes are exempt from information requirements to the European Commission if special conditions are fulfilled. The BFG Linz requested a preliminary ruling to clarify if the specific procedures of the AGVO are applicable for the exclusion of service companies. According to the judgment of AG Wahl on 17 March 2016 regarding the pending case (C-493/14, Dilly's Wellness Hotel GmbH), the relief from notification requirements of the State aid regime can only be granted if all formal and material requirements of the provision are met. He concluded that the provisions of the AGVO are to be strictly interpreted. As the legislative text of the energy tax refund does not contain any reference to the AGVO, Austria infringed (inter alia) a formal requirement for the application of the exemption under the AGVO.

Implications

The risk of a prohibited reclaim of energy taxes for periods from 2011 onwards can – in view of the fact that the energy refund is indeed qualified as State aid – be considered low. According to the explanatory notes on the BBG 2011, the restriction on production facilities only finally enters into forces upon approval by the European Commission. Should the Court come to the conclusion that there is no such required approval, it could be argued that the restrictions of the BBG 2011 are not applicable. This means that service providers too could be entitled to an energy tax rebate from 2011 onwards.

The Court's judgment in the pending Dilly's Wellness Hotel GmbH case, expected in summer 2016, is thus being eagerly awaited.

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VAT: New developments for consignment stocks

In European trade, it is quite customary for supplying businesses to set up consignment stocks at the customer's premises in order to optimise logistics, mitigate storage costs and enhance customer loyalty. In practice, the consignment stock is either equipped at the supplier's discretion, or adapted to the customer's requirements.

Austrian VAT treatment

The general rules in the Austrian VAT Act apply also to intra-EU supplies of goods to/from a consignment stock. According to the Austrian VAT Guidelines, customers generally obtain the right to dispose of the goods at the time of withdrawal from the consignment stock. On this basis, the dispatch of the goods from the premises of the Austrian supplier to his consignment stock in another EU Member State qualifies as a deemed intra-EU supply of goods. Consequently, a local supply of goods is effected at the time of withdrawal in the respective Member State, which basically results in a mandatory registration for VAT purposes.

In Austria, simplification rules exist in order to avoid registration for VAT purposes in the Member State of destination, provided that numerous prerequisites are met. Following the simplification rule, a regular intra-EU supply would be carried out at the time of withdrawal.

German VAT treatment

Similarly to Austria, in Germany the general rules for intra-EU supplies of goods apply as well. This means that registration for VAT purposes is mandatory for foreign companies maintaining a consignment stock in Germany. As with the Austrian VAT Guidelines, the German tax authorities foresee a general simplification rule in this regard.

German developments

Recently, German courts have ruled (in line with German commentaries) against the German tax authorities' view. Subsequent to the decisions by the Fiscal Courts of Lower Saxony (June 2015) and Hesse (August 2015), the Dusseldorf Fiscal Court followed their judgment in November 2015, stating that a regular intra-EU supply of goods might be effected at the time of transporting the goods into the consignment stock. As a result, the supplier would not have to register for VAT purposes in Germany. According to the Lower Saxony Fiscal Court, it has to be assessed individually whether the following conditions are met:

- Merely one customer is able to dispose of the goods
- The goods are specifically manufactured for the customer's needs
- There are binding orders by the customer
- The goods are temporarily stored for a maximum duration of four weeks and recorded in the customer's systems
- The storage costs are paid by/ passed on to the customer

Moreover, the Hesse Fiscal Court adds that a transfer of the right to dispose of the goods and thus an intra-EU supply of goods can be assumed in case the customer is able to dispose of the goods without any kind of release declaration by the supplier.

The Dusseldorf Fiscal Court stated most recently that an obligation to return unsold goods to the supplier would indicate that no transfer of the right to dispose of the goods took place.

Now that the German tax authorities have filed an appeal against the decision of the Hesse Fiscal court, we are awaiting with anticipation the Fiscal Supreme Court's decision, which is expected in the near future.

Conclusion

These developments in Germany have an impact on Austria given that the German Supreme Court has to assess the provision in conformity with European law. It may therefore also have implications on the view the Austrian tax authorities will take.

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Austrian Ministry of Finance clarifies evidence requirements for triangulation supplies not qualifying for the simplification rule

Generally, in cases where the middleman in a triangulation supply of goods using an Austrian VAT ID fails to indicate the triangulation supply on the invoice issued to the final recipient and to report it in the Austrian EU sales listing, the triangulation simplification is not applicable in Austria. As a consequence, the middleman is deemed to carry out an intra-EU acquisition in the Member State of destination and – due to the use of the Austrian VAT ID – a further intra-EU acquisition in Austria. He is not entitled to deduct the Austrian acquisition VAT as input VAT. This cannot be avoided by amending the invoice or retroactively reporting the triangulation supply in the EU sales listing. The middleman is required to register VAT in the Member State of destination for regularisation purposes.

Recently, the Austrian Ministry of Finance stated that in such cases a VAT registration of the middleman in the Member State of destination can be avoided when the local tax authorities apply the triangulation simplification (although not applicable in Austria). The middleman is required to prove that the supply of goods to the final recipient has been correctly taxed in the Member State of destination (confirmation by the local tax authorities or – if such confirmation cannot be obtained – via documentation from the VAT return and the accounting system of the final recipient).

However, in case the triangulation simplification is also denied by the tax authorities of the Member State of destination (e.g. because the participants in the triangulation supply are not established in three different Member States), such proof is not possible. The middleman would be under an obligation to register the VAT in the Member State of destination to avoid the Austrian VAT costs.

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Update: PoS systems in Austria: New requirement as of 1 May 2016 at the earliest – Decision of the Constitutional Court

As already mentioned in Issue 51 of Austrian Tax News, the Tax Reform Act 2015/16 introduced the requirement to use electronic cash registers where annual sales exceed the threshold of EUR 15,000 and cash sales exceed EUR 7,500 in Austria.

Recently, the Austrian Constitutional Court had to issue rulings following three individual complaints in this matter in order to determine whether this new obligation is compatible with Austrian constitutional law.

Ultimately, the Austrian Constitutional Court stated that the

- requirement to implement electronic cash registers (PoS) for the purpose of recording all cash sales as well as
- the obligation to issue receipts to all customers

are in line with the Austrian constitution and these requirements are an appropriate measure towards hindering possible tax evasion.

However, the Austrian Constitutional Court also made clear that entrepreneurs who exceeded the mentioned thresholds had to establish the PoS system not by 1 January 2016 but by 1 May 2016 at the latest.

Therefore, if you carry out your business in Austria and you receive your payments in cash (or by credit card), please consider the new obligations regarding cash registers and the issue of receipts.

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VAT treatment of supplies with fractional transport

In its judgment dated 15 May 2015 (RV/2100710/2014), the Austrian Fiscal Court (Bundesfinanzgericht) ruled on the VAT treatment of cross-border supplies of goods in case of a fractional transport (i.e. shared transport by both the supplier and the recipient and possible temporary storage of the goods upon handover due to logistical reasons).

Single supply of goods in case of fractional transport

According to the Austrian Fiscal Court, a cross-border supply of goods can be considered a single supply of goods (i.e. intra-EU supply of goods) in spite of fractional transport if the following conditions are met:

- final destination of the goods is known before the transport (within the EU);
- final recipient is known at the time of transportation;
- evidence is identifiable on the transportation to the final destination;
- close link exists between the supply of goods and the transport of the goods.

The intention was not to split one single economic supply of goods into two separate transactions due to temporary storage and shared transport. However, an appeal against the decision of the tax court was filed with the Austrian Supreme Court.

Previous approach

Prior to the decision of the Austrian Fiscal Court, a cross-border supply of goods could not be considered a single supply of goods in case of fractional transport. If both parties were responsible for part of the transport, then two transactions were deemed to be carried out (local supply of goods followed by a deemed intra-EU supply of goods).

Open issues

The tax court did not clarify how long the goods could be stored upon handover in order to qualify for the close link between the supply of goods and the transport. This should be reviewed on a case-by-case basis.

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Austrian Ministry of Finance issues information on real estate transfer tax

Recent amendments:

Real estate transfer tax has fundamentally been amended as of the beginning of 2016 in the following fields:

- The reduction of the threshold regarding the consolidation of shares from 100% to 95%
- The consolidation of the shares within a tax group
- Shares held by a trustee are attributed to the trustor
- The transfer of 95% of the interest in a partnership to new partners within a period of five years

The Austrian Ministry of Finance has recently published details aimed at clarifying its position on certain open issues. Below are some of the highlights:

Consolidation of shares within a tax group:

According to the new legislation, the consolidation of 95% of the shares within a tax group triggers real estate tax.

- The acquisition of shares in a company owning Austrian real estate and the establishment of a tax group within the same tax year triggers real estate transfer tax, provided that the tax group members finally hold more than 95% of the shares in the company owning Austrian real estate.
- If the tax group is established in a subsequent year, real estate transfer tax is not triggered.
- If a tax group already exists at the beginning of 2016 and holds in total more than 95% of the shares in the company owning Austrian real estate, any transfer of these shares within the tax group will trigger real estate tax.

Transitory provisions:

The threshold for the consolidation of shares in a company owning Austrian real estate was reduced from 100% to 95%. The transitory provisions are rather complex and aim to generate tax revenue as soon as possible. Former structures (e.g. 99% - 1% shareholder structures) which have not been subject to real estate transfer tax yet are to be taxable due to the next transfer of shares.

- Real estate tax is triggered if the principal shareholder (≥ 95%) sells or acquires shares and due to this transaction its stake amounts to bet-

ween 95% and 100% afterwards.
- The transitory provisions do not apply if minority shares are purchased or sold by persons other than the principal shareholder (≥ 95%).
- Tax restructuring measures may also trigger real estate tax, provided that the stake of the principal shareholder (≥ 95%) amounts to between 95% and 100% afterwards.

The above mentioned view as taken by the Austrian Ministry of Finance applies to all transactions since 13 May. Transactions regarding shares or interest in entities owning Austrian real estate need to be reviewed carefully in light of the new legislation and the information published by the Ministry of Finance in order to ascertain their real estate transfer tax implications.

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Applications to the Austrian tax authority sent by e-fax or e-mail inadmissible

The Austrian Federal Court recently published a decision with regard to the inadmissibility of applications sent to the Austrian Tax Authority by "e-fax".

The appellant filed an application for a decision of the Austrian Fiscal Court electronically. It was not signed and the remark "electronically dispatched" was added. Considering that the header included the fax-number, date and page number, the Court came to the conclusion that the application was filed as an "e-fax".

The Court also concluded that the filing of an application (to enforce rights or fulfil obligations under § 85 Austrian Fiscal Code) by e-fax has to be treated as if it had been filed by "e-mail". Applications sent in such way are not lawful. Generally the correct way of filing such requests is regulated in § 86a (1) Austrian Fiscal Code and the Austrian Fax Machine Applications Regulation. These provisions set out that applications may only be filed personally, with post service or with "normal" fax using a fax machine. As a result, applications which are not sent in the legally intended way do not qualify as legally submitted and thus do not initiate the decision making duty of the authority nor do they empower the authority to render a legal decision. Additionally, the tax authority is not obliged to instruct the appellant regarding the correction of deficiencies.

The Court furthermore held that even if the remark "electronically dispatched" had been erroneously included, the application was not filed correctly because applications sent by fax need to be signed.

In summary, applications to enforce rights or fulfil obligations cannot be properly filed by e-mail or e-fax. In order to use a "normal" fax, the application has to be signed before being sent. If the application is not sent in the legally intended way, the tax authority is not obliged or allowed to render a decision. Furthermore, the tax authority is not under any obligation to alert the appellant as to any deficiencies.

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Austrian Tax Facts and Figures*

Taxation of corporations

Corporate income tax rate (Basis – adjusted statutory accounts)	25%
Dividend withholding tax	25%
Witholding tax on licences/royalties	20%
Interest witholding tax	0%
Significant allowances	
Research & Development (R&D) (premium in cash)	10%
Learning & Education (L&E) (Alternatively premiums in cash: 6%)	up to 20%

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%

Annual taxable income		Income Tax		Effective Tax Rate	Marginal Tax Rate
to	€ 11,000	€ 0		0%	0%
over to	€ 11,000 € 25,000	$\frac{(\text{Income} - 11{,}000) \times 5{,}110}{14{,}000}$		0 - 20.44%	36.50%
over to	€ 25,000 € 60,000	$\frac{(\text{Income} - 25{,}000) \times 15{,}125}{35{,}000}$	+ 5,110	20.44 - 33.73%	43.21%
over	€ 60,000	(Income - 60,000) x 50%	+ 20,235	> 33.73%	50%

Social security on monthly earnings up to € 4,650			
Employer's share	up to 21.63%	Payroll related taxes	approx. 8.0%
Employee's share	up to 18.07%		
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 and for EU enterprises up to September 30 of the following year.	

Other taxes

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

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*) The facts and figures are based on Austrian tax law effective in 2015 Amendments effective from 2016 onwards have not been considered due to the Tax Reform will be reflected in the first 2016 issue.

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