Austrian Tax News

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Austria implements new transfer pricing documentation and country-by-country reporting requirements effective from 2016

On 14 July 2016, the Austrian Parliament enacted the European Union (EU) Tax Amendment Act 2016 ("EU-Abgabenänderungsgesetz 2016") including new mandatory transfer pricing documentation requirements ("Verrechnungspreisdokumentationsgesetz") as defined in Action 13 of the OECD's Action Plan on Base Erosion and Profit Shifting (BEPS). The European Union Tax Amendment Act 2016 was announced in the Austrian Federal Law Gazette on 1 August 2016.

The legislation follows the three-tiered approach to transfer pricing documentation requiring multinational enterprises (MNEs) to prepare a Master File, a Local File, and a country-by-country (CbC) Report. A corresponding Ministerial Ordinance was published in draft form on 25 May 2016. Under the legislation, the new regulations on transfer pricing documentation are effective as of 1 January 2016.

How it works

New transfer pricing documentation requirements
Under the new rules, Austrian taxpayers must prepare a package of information following the three-tiered approach to transfer pricing documentation as defined in Action 13 of the OECD's Action Plan on BEPS. The entire documentation is to be prepared in either German or English.

Master File and Local File
Austrian companies with a turnover above EUR 50 million in the two preceding fiscal years are subject to transfer pricing documentation requirements under the Master File/Local File concept. Further, a Master File is to be provided to the competent tax office upon request in case the local entity's turnover is below the above threshold if such documentation requirements exist for a foreign group company which has prepared a Master File accordingly.

The Master File is to provide an overview of the business of the MNE, including a description of the nature of the business activities, its general transfer pricing policy and the worldwide allocation of income and economic activities.

The Local File is to contain more detailed information relevant for the transfer pricing analysis of related party transactions in which the Austrian taxpayer is involved.

Additionally, Austrian specifics such as local market conditions and special documentation requirements, e.g. on business restructurings, need to be considered. Precise details on the transfer pricing documentation in the Master File and Local File are provided in a separate draft Ministerial Ordinance.

CbC Report
MNEs operating in Austria with consolidated annual group revenues of at least EUR 750 million in the preceding fiscal year are subject to the new CbC reporting requirement. In accordance with the OECD proposal, the CbC Report should provide aggregated tax information for each jurisdiction in which the MNE operates. This includes information relating to the global allocation of income, the taxes paid, and certain indicators of the locations of economic activity.
The report should include a listing of all countries where the multinational group is active, specifying the nature of the main business activities carried out by each entity.

Austrian based parents of MNEs covered by the reporting requirement must disclose this fact to the Austrian tax authorities by the end of the relevant fiscal year. Additionally, reporting requirements exist for surrogate parent entities, meaning that any Austrian business unit of a qualifying foreign MNE may take over its parent's duty to report if at least one of the following conditions is met:
- The ultimate parent entity is not obligated to file a CbC Report in its jurisdiction of tax residence.
- No qualifying competent authority agreement is in place with tax jurisdiction of the ultimate parent entity which provides a basis for the exchange of the CbC Report.
- In case of a 'systematic failure' of the tax jurisdiction of the ultimate parent entity, i.e. a jurisdiction has a qualifying competent authority agreement with Austria but has suspended automatic exchange of information or otherwise persistently failed to automatically submit CbC Reports to Austria.

The competent tax office has to require an Austrian business unit of a foreign MNE to file a CbC Report if one of the above conditions is met and no other Austrian business unit has taken over the ultimate parent entity's filing obligation by the end of the relevant fiscal year. Such Austrian business unit can be relieved from its filing duties if a foreign business unit has taken over the reporting obligation and a qualifying competent authority agreement is in place with its country of residence.
The Austrian CbC Report follows the OECD's template format presented as Annex III of the Action 13 Report.

Timeline
The transfer pricing regulations enter into force for tax periods starting on or after 1 January 2016. The Master File and Local File must be prepared contemporaneously. However, the transfer pricing documentation must be readily available when the tax returns are filed at the latest.

Once the tax returns for a given year are filed, the transfer pricing documentation (Master File/Local File) must be provided to the competent tax authority upon request within 30 days.

The CbC Report must be submitted within 12 months after the end of the group's financial year. This means that the CbC Report for 31 December 2016 year ends must be submitted by 31 December 2017 at the latest.

Penalties
The Austrian Criminal Tax Act stipulates that the failure to provide the CbC Report on time, or filing incomplete or incorrect reports, are subject to penalties of up to EUR 50,000. No specific transfer pricing penalties are foreseen if obligations regarding the Master File or Local File are not met.

Implications
The Austrian transfer pricing documentation requirements apply for fiscal years starting on or after 1 January 2016 and adopt the format and standard recommended by the OECD. This means a key challenge for many Austrian taxpayers as the new requirements – given the absence of specific transfer pricing documentation rules in current tax law – substantially exceed the standards developed in Austrian tax practice.

Further, qualifying taxpayers would be well advised to take prompt action reviewing their transfer pricing system in place as to its appropriateness and to the impact of the new reporting and wider transparency initiatives.

Another focus will be the need to organise data collection from potentially different sources of the MNE's systems.

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ECJ update on energy tax refund

On 3 August 2016 the BFG Linz rendered its decision (RV/5100360/2013) in a case that follows a preliminary ruling by the European Court of Justice (ECJ) in a case (C-493/14) concerning the compatibility of the new legislation on energy tax rebates (EAVG) arising from the Ancillary Budget Act (BBG 2011) with the General Block Exemption Regulation (GBER).

Facts

The BBG 2011 resulted in the exclusion of service providers from the energy tax rebate entitling only those enterprises operating primarily in the manufacturing of goods to claim the energy tax rebate (ENAV). Also for manufacturing companies the reform resulted in a less favourable calculation mechanism compared to the status quo before. Although the implementation of the new rules was subject to the state aid approval to be issued by the EU, the European Commission was not formally notified of this change of law since the Austrian government took the view that the amendment was within the ambit of the GBER.

Decision

A service provider (Dilly's Wellnesshotel) submitted an application for the ENAV for 2011, which was rejected. The lodged appeal was dismissed. The BFG Linz referred three questions to the ECJ for a preliminary ruling. The ECJ held that the formal conditions of the GBER were not fulfilled, meaning that no state aid approval was available regarding the 2011 tax reform. The BFG – based on the ECJ's decision – concluded that the exclusion of service providers from the ENAV under the BBG 2011 had not entered into force yet.

Implications

Service providers will be able to submit an application for the ENAV for periods from 2011 onwards if no application has been filed so far. Also for production companies the court's ruling may result in a higher refund entitlement. However, any possible adjustments have to be analysed on a case-by-case basis.

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New documentation requirements to qualify for the withholding tax exemption at source under a tax treaty or based on the EU Parent Subsidiary Directive

The Austrian Ministry of Finance recently published a letter ruling on the certificate of tax residence required when applying a reduced withholding tax rate based on a tax treaty. The underlying case was about payments for commercial and technical advice from an Austrian company to a foreign expert. Such payments are subject to withholding tax under Austrian domestic rules, but Austrian withholding tax may, subject to the treaty, be reduced to nil under an applicable double tax treaty. To apply for a reduction at source, the Austrian company has to have available in its files – among other items of evidence – a certificate of tax residence of the foreign expert which has to be shown to the Austrian tax authority upon request. The Austrian Ministry of Finance has now clarified that the original of the document has to be available in Austria. It is not sufficient to keep a copy of the document received, e.g. by e-mail.

Further, an amendment of the income tax guidelines has been published by the Austrian Ministry of Finance

stating that a copy of the completed and confirmed ZS-EUMT form has to be filed with the Austrian tax authority in order to qualify for the withholding tax exemption at source under the EU Parent Subsidiary Directive. The ZS-EUMT form comprises the confirmation of the fulfilment of the substance criteria by the foreign company receiving the dividend as well as the certificate of tax residence of the foreign company confirmed by the foreign tax office. In the past, the completed ZS-EUMT form had to be available in the files of the Austrian distributing entity and only had to be shown to the Austrian tax office upon request.

According to the amended income tax guidelines, a copy of the completed and confirmed ZS-EUMT form has to be filed with the Austrian tax office within one week after the dividend payment together with the withholding tax return. In practice, this means that the Austrian company has to ask for the completed and confirmed form before actually distributing the dividend so as to meet this short timeframe.

Even though there is no legal basis for this filing requirement tax payers should follow these new rules in practice.

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Indirect Taxes

VAT treatment of employee benefits Draft legislation following the Salzburger Steuerdialog 2016

After the introduction of tax exemption thresholds through the Income Tax Act as of 1 January 2016, the VAT treatment of employee benefits is to be clarified.

Companies often grant employees own goods or services for a reduced price. Such price reductions are usually part of the employee's remuneration and hence benefit in kind subject to income taxation.

As of 1 January 2016, a tax exemption threshold for employee benefits was introduced by the Austrian Income Tax Act. No income taxation is triggered if the benefit/price reduction granted by the employer to the employee for the receipt of own goods or services does not exceed 20%. In case the price reduction granted exceeds 20%, the whole benefit is generally subject to income taxation, with EUR 1,000 per calendar year being income tax exempted.

From a VAT perspective, the open market value and not the reduced amount actually paid is deemed to be the tax base for supplies of goods or services if

- the supply involves a relationship between employer and employee;
- the recipient does not have the full right to input VAT deduction or
- the supplier does not have the full right of input VAT deduction and the supply of goods or services is tax exempt without credit.

For simplification purposes, the special tax base for benefit in kind income tax purposes ("Sachbezug") can be used as the open market value. If the tax exemption thresholds as shown in the Income Tax Act are not exceeded, no VAT will become due for the benefit granted.

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Austrian Federal Ministry of Finance specifies its clarification for the evidence requirements for triangulation supplies of goods not qualifying for the simplification rule

In our last issue we covered the notification of the Austrian Federal Ministry of Finance on new evidence requirements for triangulation supplies not qualifying for the simplification rule.

These new requirements are to apply when the middle man fails to indicate the reference to the triangulation supply on the invoice issued to the final recipient or to report the triangulation supply properly on its Austrian EU Sales Listing provided that the Member State of destination would apply the simplification rule in such cases.

The authorities provided means of evidence which enable the middle man to avoid VAT registration in the country of destination, (e.g. confirmation of the local tax authorities of the country of destination or local VAT returns of the recipient showing the correct taxation, etc.).

Recently, the Federal Ministry of Finance issued a second notification in which it further specified that – in contrast to its previous statement – a confirmation of the correct taxation of the particular case of the local tax authorities is not compulsory in such cases.

In order to prove the proper taxation in the Member State of destination, an abstract confirmation indicating that the triangulation simplification is applicable in the Member State of destination is now regarded as sufficient.

However, in case the triangulation simplification is also denied by the tax authorities of the Member State of destination, the middle man is still obligated to register for VAT purposes in the Member State of destination in order to avoid a cumulative intra-EU acquisition in Austria.

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Austrian Supreme Administrative Court on invoicing requirements

The implications of a recent decision by the Austrian Supreme Administrative Court on invoice requirements (especially in connection with the correct address of the supplier) and input VAT deductibility are currently being discussed in Austria.

In short, the Court recently held that the recipient of a supply of goods is – if the other general invoice requirements are fulfilled – entitled to deduct the VAT shown on an invoice as input VAT if

- the supply was in fact carried out by the supplier shown on the invoice,
- the address of the supplier shown on the invoice is valid as the seat or the actual place of business is located there and
- no VAT fraud or similar such wrongdoings were committed in connection with this supply.

This decision is in line with the decision of the ECJ in "PPUH Stehcemp", in which the ECJ ruled that it is neither required that the supplier is actually physically accessible under the address shown on the invoice nor that any business activity has been carried out under this address, especially if it is not required due to the structure of his business (e.g. in chain supplies of goods).

Based on the above, current commentaries point to the fact that the deductibility of the input VAT must not be restricted purely based on a seemingly invalid address. As long as the address shown on the invoice is either listed in the companies' register or is otherwise connected with the supplier, an actual physical accessibility under the address shown on the invoice is not required.

The tax authorities, however, argue that it must be possible to contact the taxable person under the address shown on the invoice.

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VAT in connection with the on-charging of educational expenses

The VAT treatment of training costs initially borne by the employer and on-charged to the employee in the course of the termination of his employment contract often raises questions. Below is a brief overview and guideline on this issue.

In general, training sessions for employees purchased by the employer entitle the employer to a VAT deduction. Although they are for the benefit of the employee, the granting of the training to the employee is not subject to VAT, as the training predominantly serves the employer's interest.

When the employment contract is terminated and the employer decides to on-charge the costs for the training to the employee, a predominant interest of the employer is no longer given. Therefore, the on-charging of the costs is treated as the supply of services rendered by the employer to the employee for consideration, which is subject to the general VAT rate of 20% (regardless as to whether the training purchased was subject to a different VAT rate or even VAT exempt). The employer has to issue an invoice showing 20% Austrian VAT to the employee and to report this supply in the VAT return. The employee is in general not entitled to deduct the input VAT as he is not a taxable person.

The VAT treatment does not change if the reimbursement of the costs is effected via a deduction from the salary of the employee. The employer has to deduct the amount including 20% Austrian VAT from the employee's salary and report the VAT in the VAT return. The issuing of a separate invoice to the employee is not required unless the employee would be entitled to deduct the VAT charged as he uses the training for his own business.

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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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