Austrian Tax News

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Austrian Research Premium and Employment Bonus

In June 2017, several legal amendments passed the National Council. As regards incentives, the increase of the Research Premium and the implementation of the Employment Bonus were resolved.

Increase of the Austrian Research Premium to 14%

A major incentive of the Tax Reform 2015/2016 was the increase of the Austrian R&D Premium from 10% to 12%. As of 1 January 2018, the Austrian R&D Premium is further increased from 12% to 14% and is also applicable on a pro-rata basis for non-calendar financial years 2017/2018.

This recent government programme aims to stimulate R&D activities in Austria and to safeguard and generate qualified jobs. Furthermore, the increase of the R&D Premium has an important signal effect in strengthening the Austrian R&D landscape.

Employment Bonus ("Beschäftigungsbonus")

Companies are entitled to apply for a refund of 50% of incidental wage costs for additional employments. Applications to the AWS (Austria Wirtschaftsservice Gesellschaft mbH) are possible as of 1 July 2017.

The funding is available to all Austrian enterprises, independent of their size or the sector in which they operate. Nevertheless, several requirements and restrictions have to be considered. For example, only particular employees (persons registered as unemployed at the Public Employment Service Austria, graduates from an Austrian educational institution or persons previously employed in Austria) are subsidised.

The Austrian Government provided a budget of EUR 2 billion, the programme ends as soon as this budget is exhausted or after expiry of the funding period of 3 years. Given the timeline, applications should be filed as soon as possible.

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Austria's Position to the Multilateral Instrument (MLI)

On 7 June 2017 Austria together with 66 other states signed the „Multilateral Instrument"(MLI). This multilateral agreement allows for several OECD recommendations against Base Erosion and Profit Shifting (BEPS) to be incorporated into the existing Double Tax Treaties (DTT) all at once.

The goal of the MLI is the efficient implementation of these provisions and the avoidance of time-consuming individual amendments to each DTT. The states are flexible in the implementation of the provisions to the extent that various options and reservations are available. They may also decide which DTTs should be affected by the changes. In total 38 DTTs with Austria shall be affected by the MLI (including the DTTs with Germany, Italy and Switzerland). Generally, Austria focused on implementing the minimum standard, therefore, no revolutionary changes in the DTT network are expected.

The following section gives an overview of Austria's position to the most important provisions of the MLI, which have already passed the national ratification process. Changes may still occur, as the effectiveness of most provisions depends on the position of and ratification by the respective contracting state.

Closing loopholes in the granting of tax treaty benefits

To tackle hybrid mismatch arrangements (BEPS Action 2), Austria decided to implement Art 23A OECD-MC through the MLI, so that in case of double-non taxation due to qualification conflicts, the exemption method does not apply and the residence state can tax. The inclusion of this article is already common tax treaty policy in Austria.

BEPS Action 6 intended a compulsory mutual agreement procedure for dual resident companies. However, Austria has not implemented this provision. Therefore, the tie-breaker rule for companies will not undergo any changes.

In order to fight treaty shopping, Austria agreed to insert a clarification in the preamble of every DTT stating that the DTT is intended to eliminate double taxation without creating opportunities for non-taxation or reduced taxation. Further, the principle-purpose-test (PPT) has been inserted as a general anti-abuse rule (GAAR). It remains to be seen how the PPT will interact with domestic GAAR as already applicable in treaty situations. Another provision which Austria agreed to implement is an anti-abuse rule for PEs situated in third countries.

No significant changes in PE definition

BEPS Action 7 recommended several changes to the permanent establishment (PE) definition. First, to combat commissionaire arrangements, stricter rules for agent PEs were introduced. Since Austria in practice already follows the suggested changes by interpreting current Art 5 OECD-MC with a substance-over-form approach, Austria decided not to change the DTTs with regard to this provision.

Second, the specific activity exemption in Art 5 (4) OECD-MC was amended. In Austria's administrative practice the activities listed are only exempt from PE status if they do not form part of a company's main activities. Therefore, the MLI provision stating that the activity exemption only applies, if the activities are of preparatory or auxiliary nature, was accepted and the wording will be changed in the DTTs. The anti-fragmentation rule covering cases

where activities in a country are split amongst group companies in order to meet the activity exemptions, has not been implemented in Austria.

Third, Austria decided not to implement the anti-abuse rule concerning the splitting of contracts of construction site PEs, since – as outlined above – a GAAR is available in these situations anyway. The provision will therefore have no effect on DTTs with Austria, since both contracting states are required to accept it.

Creating More Effective Dispute Resolution Mechanisms

Signing the MLI will not lead to major changes with regard to the Austrian "regular" mutual agreement procedure (MAP) rules (Art 25 OECD-MC). However, Austria committed to implementing mandatory arbitration. This means that, if the MAP remains unsuccessful for three years, mandatory arbitration can be started. It only applies to DTTs where both contracting states have accepted this provision, for instance the DTTs with Germany, Italy and Switzerland. Additionally, Austria denies the initiation of an arbitration procedure, if the issue has already been decided upon by national courts, and the arbitration procedure may be terminated if national courts issue a ruling in the course of the procedure. The type of arbitration procedure applicable for Austria is by default the "Final Offer" method. Hereby, the arbitrator simply decides between the solutions proposed by the relevant tax authorities. Alternatively, the contracting states may opt for the "Independent Opinion", which becomes applicable if Austria's counterparty has opted for the "Independent Opinion" procedure. In most cases the "Final Offer" procedure will apply, however for instance with Greece, Malta, Portugal or Slovenia the "Independent Opinion" procedure will apply.

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No import of foreign (final) losses despite transfer of place of management (PoM)

In its decision of 29.03.2017 (Ro 2015/15/0004) the Austrian Supreme Administrative Court (VwGH) clarified that losses incurred abroad may not be considered even after the PoM is shifted to Austria.

Background

The German S-GmbH operated exclusively in Germany and ceased its operations there in 2004 followed by shifting its PoM to Austria. It just maintained its German legal seat until its merger with an Austrian corporation in 2011. In 2008 and 2009 S-GmbH claimed the usage of German losses incurred in 2002 and 2003 in Austria, which was denied by the national tax office. The appeal was dismissed by the Federal Fiscal Court (BFG), which rejected the taxpayer`s legal concerns relating to the compliance of Austrian law with the freedom of establishment (Art 49 TFEU).

Decision

The applicant`s complaint was rejected, as the VwGH held that Austrian law does not constitute a violation of Union law. According to the court it clearly follows from the decision of the ECJ in Futura Participations SA and Singer (C-250/95) that Art 49 TFEU does not preclude a state from making the carrying forward of previous losses subject to the condition that the losses must be economically related to income earned by the taxpayer in that state. Furthermore, the Austrian VwGH – with respect to the usage of foreign tax losses – denied the comparability of a resident company with a company situated abroad.

Implications

The possible qualification of the foreign tax losses as "final" was considered irrelevant and their import was categorically denied due to a lack of comparability (no discrimination). This appears to be in line with recent case law (Timac Agro (C-388/14)), the jurisprudence in this area, however, remains unclear.

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Austrian Supreme Administrative Court on the utilisation of not yet utilised deferred write-downs of participations ("offene Siebentelabschreibungen")

With its decision of 31.05.2017 (Ro 2015/13/0024) the Austrian Supreme Administrative Court decided that not yet utilised deferred write-downs of participations ("offene Siebentelabschreibungen") are not treated as tax losses arisen in previous years and are thus not subject to the utilisation limitations for pre-group tax losses in Austrian tax groups.

Introduction

Within an Austrian CIT group, tax losses resulting from years before the CIT group was formed or before the respective member joined the tax group ("pre-group tax losses") can only be offset with the own income of the respective group member and not within the tax group itself. Furthermore, write-downs of long-term participations have to be spread over seven years ("deferred write-down") for tax purposes. The question arose if not yet utilised parts of the deferred write-down of a participation must be treated as pre-group tax losses and can thus only be offset by the CIT group member itself.

In such cases the Austrian Ministry of Finance argued in the CIT guidelines that deferred write-downs of participations were to be treated as pre-group tax losses. However, due to this decision, this opinion of the Austrian tax authority cannot be upheld anymore.

Decision

The Austrian Supreme Administrative Court based its decision on the fact that the deferred write-downs of participations are not treated as losses incurred in previous years. Thus they can also not be subject to the limitation rules for the utilisation of tax loss carry-forwards within a CIT group. According to the view of the Court, this interpretation is furthermore not influenced by the fact that the not yet utilised parts of the write-down originate from a write-down made in a previous year.

Implications

As a result, not yet utilised deferred write-downs of participations reduce the taxable income of the CIT group member in the year they are utilisable. They could then be offset with the income from other CIT group members, if the company generated a tax loss in the respective year.

Furthermore, since deferred write-downs of participations are held not to be tax loss carry-forwards, the decision might also be relevant for other loss-trafficking rules (e.g. for the forfeiture of tax loss carry-forwards in the course of share deals and reorganisations).

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Electronic submission of CbC Report and CbCR notification

Based on the BEPS Action 13 Final Report, Austria introduced a Country by Country Reporting ("CbC Report") requirement. According to the provisions of the Transfer Pricing Documentation Act ("Verrechnungspreisdokumentationsgesetz"), a CbC Report has to be filed in Austria for the tax years starting on or after 1 January 2016. CbC Reports must be submitted within 12 months after the end of the group's fiscal year (i.e. for calendar year taxpayers the CbC Report for 2016 has to be filed by 31 December 2017).

The Austrian Ministry of Finance ("BMF") recently announced that from autumn/winter 2017 it will be possible to submit CbC Reports electronically via the BMF customer portal ("FinanzOnline").

The technical implementation will take place in three stages. As a first step, technical instructions will be available on the BMF homepage describing the process for converting CbC Report data into the internationally prescribed XML data format, which can then be filed online. In the next step (planned for September 2017), taxpayers will have the opportunity to submit their data via FinanzOnline as a test run to verify their accuracy and completeness, in order to ensure timely submission of

the CbC Report by the end of the year. At the beginning of November 2017, the test phase should be completed and all companies concerned should have the opportunity to submit their complete CbC Reports electronically via FinanzOnline.

Further, as of July this year, it is also possible to submit the CbC notification electronically via FinanzOnline. CbC notifications are intended to disclose to the tax authority, which entity in which country will file the CbC Report on behalf of the whole MNE group. CbC notifications in Austria have to be filed until the last day of the year concerned.

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Austrian Supreme Administrative Court on zero-rated intra-EU supplies of goods with interrupted delivery

In a recent decision on intra-EU supplies of goods, the Austrian Supreme Administrative Court confirmed that mere transport interruptions are – in general – not harmful for the assumption of one consistent supply.

In the case at hand, two parties (“supplier”, established in Austria, and “recipient”, established in Germany) were involved in a cross-border supply of goods between Austria and Germany. The first part of the transport within Austria was organised by the supplier, the second part from Austria to Germany was organised by the recipient. The transport was interrupted in Austria for logistical/cost-saving reasons only. The goods were not altered in any way, and the recipient had already been determined at the moment the (first) transport organised by the supplier started.

The Austrian tax authorities assumed two separate supplies of goods due to the interruption of the transport, with the first supply being subject to Austrian VAT and the second one qualifying as a deemed intra-EU supply of goods which can be zero-rated under the general conditions. This argument was based on the view that the transport of goods in the course of an intra-EU supply of goods must be organised either by the supplier or by the recipient, but not by both.

The Austrian Supreme Administrative Court did not follow this argument and decided that – as the recipient of the supply was already determined at the start of the (first) transport, and a clear temporal and material link between the transportation and the supply of the goods was given – the supply was not to be treated as interrupted, and hence as two separate supplies of goods, but rather as one consistent supply of goods. The fact that the transport of the goods was split in two parts and organised by different parties does not affect this qualification.

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Fiscal criminal liability in connection with the recipient's obligation to withhold and pay VAT on supplies of goods (sec 27 (4) of the Austrian VAT Act)

If a taxable person without seat or fixed establishment in Austria carries out a supply of goods subject to VAT in Austria, the recipient of the goods has to withhold the VAT due and pay it to the tax office on behalf of the supplier (i.e. to the supplier's tax account). If the recipient fails to do so, he might be held liable for the VAT.

In practice, the question arises whether failure to withhold the VAT due can constitute tax evasion according to sec 33 (1) of the Austrian Fiscal Criminal Act (FCA).

Based on sec 33 (1), a person commits tax evasion if he intentionally evades taxes by violating a statutory obligation to correctly notify or disclose material facts for taxation to the tax authorities. The recipient of the goods, however, is not subject to such an obligation. He is merely obliged to withhold and pay VAT to the tax office. Therefore, he cannot commit intentional tax evasion. The same is true for grossly negligent tax evasion (sec 34 FCA), as it requires the same violation of obligations stated in sec 33.

If the non-withholding is based on intent, the recipient of the goods commits a minor fiscal offense based on sec 49 (1) FCA. In this context, "intent" means that the recipient considers it possible that he would have to pay VAT and – by not doing so – approvingly accepts a potential shortfall in VAT.

It is often hard to tell in advance whether or not a specific behaviour would be regarded as "intentional" or just "negligent" wrongdoing. In practice, this risk can be eliminated by filing a voluntary self-disclosure. However, as in the majority of cases such non-payment is the result of an understandable or negligent ignorance of the law along with an incorrect invoice issued by the supplier, a self-disclosure is mostly not necessary.

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Expats

Net-wage assumption – a GPLA (joint audit of wage-dependent levies)-related issue with expanded regulations as of 1 January 2017

The net-wage assumption is used to combat illegal work and illegal wage payments. With the net-wage assumption it is possible to "project" the tax basis, levies are imposed according to a higher fictitious gross amount. The law modifying taxes (AbgÄG 2016) newly defined and expanded the legal provisions regarding the net-wage assumption with the aim of making it easier for the tax authorities to apply this provision. Please find the new regulations below. Knowing the requirements helps in developing defence strategies at an early stage.

As of 1 January 2017 the net-wage assumption applies – besides the offence of illegal work – also to not taxed salaries of real employees, if the employer

- has not recorded the wages paid (including other remunerations and advantages) in the payroll account,
- has not (completely) paid the related income tax,
- despite the fact that the employer knows or had to know that this was neglected unlawfully (on purpose or violating his duty of care), and
- cannot provide evidence of a gross-wage agreement.

The net-wage assumption does explicitly not apply, if

- the employer has reported or taxed this income in the course of a self-employed activity,
- this income represents benefits in kind or employee discounts.

According to the explanations accompanying the government bill, calculation or assessment errors when making use of tax concessions shall not trigger the net-wage assumption.

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Austrian Tax Facts and Figures

Taxation of corporations

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 2017
0 to 11,000	0%
11,001 to 18,000	25%
18,001 to 31,000	35%
31,001 to 60,000	42%
60,001 to 90,000	48%
90,001 to 1,000,000	50%
above 1,000,000	55%

Social security on monthly earnings up to € 4,980			
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

Value added tax	
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

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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