Austrian Tax News

pwc

Season's Greetings
and a Happy New Year!

In this issue

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Reminder

According to the Austrian transfer pricing documentation legislation a CbC notification has to be filed annually no later than the last day of the reporting financial year of the MNE group (i.e. if the reporting financial year of the MNE group ending December 31, 2017, the CbC notification is already due as of December 31, 2017 for the reporting period 2017). The CbC notification can be filed with the Austrian tax authorities electronically via FinanzOnline or in hard copy.

Authors:
sandra.staudacher@pwc.com
+43 1 501 88-3230
steve.froese@pwc.com
+43 1 501 88-3258

Indirect change of shareholders does not trigger loss-trafficking rules

In its decision dated September 13, 2017 (Ro 2015/13/0007) regarding the Austrian loss-trafficking rules, the Austrian Supreme Administrative Court focused on the interpretation of the term "change of the shareholder structure" and rejected the look-through approach previously taken by the Austrian Fiscal Court (see ATN no. 50/2015).

In the case underlying the Court's decision, 100% of shares in an Austrian limited liability company were transferred to an interposed holding, whereby the indirect shareholder structure remained largely unchanged. Against prevailing opinion, the Austrian Fiscal Court had considered the indirect shareholder structure to be relevant in the analysis of whether there was a substantial change in the shareholder structure and held that the loss-trafficking rules would not apply.

The Court now rejects the Fiscal Court's view and reasons that the change in the shareholder structure means a transfer of shares, for which the direct transfer of (economic) ownership of the shares is decisive. According to the Court, the loss-trafficking rules do not stipulate a look-through approach.

As a consequence, a mere indirect change in the shareholder structure should not trigger the loss-trafficking rules and thus not impact the tax loss carry forward. This is particularly relevant for M&A transactions in which the ultimate group parent is acquired and the direct shareholders of an Austrian group subsidiary remain unchanged.

Authors:
Veronika Daurer
nikola.breinhoelder@pwc.com
+43 1 501 88-3241

Tax law amendment on the tax treatment of dividend distributions vs. capital repayments

According to a legislative amendment, there are now new and detailed requirements for the distinction between dividend distributions and capital repayments. Dividend Distributions within companies are tax-free based on the domestic participation exemption. By contrast, capital repayments are tax neutral and reduce the tax book value of the shareholding. Only if a capital repayment exceeds the amount of the tax book value does it result in a taxable capital gain. Pursuant to the new statute, the company is generally free to decide whether a distributional payment is deemed to be a dividend distribution or a capital repayment, regardless of any corporate actions made under civil law. However, the framework for this option is quite sophisticated.

Under current law, capital contributions of shareholders granted to their company are tax neutral at the level of the receiving company and increase the tax book value of the shareholding at the level of the shareholder. Such payments have to be recorded in a paid-in capital account (Einlagen Evidenzkonto). Operating profits are generated by the company itself and are subject to corporate income tax at the level of the company and a possible withholding tax upon distribution to the shareholder. Starting from 2016, operating profits also have to be recorded in a so-called internal financing account (Innenfinanzierungsevidenzkonto). Both accounts are further divided into disposable and non-disposable parts. For example, operating profits are part of the disposable internal financing account. However, if any profits have been allocated to the statutory reserve they are part of the non-disposable internal financing account.

Provided that both the disposable paid-in capital account and the disposable internal financing account are positive, the company may choose whether a distribution to its shareholders is deemed to be a dividend distribution or a capital repayment for tax purposes. This option is widely independent of any corporate actions like a resolution of a capital reserve, etc. However, if for example the internal financing account is zero or negative while only the disposable paid-in capital account is positive, it is obligatory to perform a capital repayment for tax purposes. Moreover, the non-disposable part of the paid-in capital account may only be repaid to the shareholders for tax purposes by performing a corresponding corporate action.

The general option, nevertheless, gives the taxpayer the opportunity to defer income tax on dividend distributions by declaring the payments as capital repayments as long as a sufficient amount is recorded on the paid-in capital account. Such deferral may be beneficial if the recipient is an individual taxpayer or a non-resident company, as resident taxpayers benefit from the participation exemption anyway.

The statute has been substantiated in a recently published decree of the Austrian Federal Ministry of Finance. Accordingly, the first time the new internal financing account and the paid-in capital account have to be filed with the tax authority is together with the corporate income tax return 2016. Also the internal financing amount has to be calculated for the first time. This can be based on the yearly financial statements starting at the time of incorporation. Alternatively, the taxpayer may apply a simplified determination of the internal financing account at the end of the fiscal year 2014. The subsequent determination of both the paid-in capital and internal financing account is based on the qualification of a distribution as dividend distribution or capital repayment for tax purposes.

To sum up, the new statute introduces a clear-cut regime for the qualification of distributional payments from a company to its shareholders as either a dividend distribution or a capital repayment for tax purposes. As capital repayments reduce the tax book value of the shareholding at the level of the shareholder, it will be necessary to record deviations between accounting and tax book value. This is especially important if the shares are disposed of in the future, since the tax book value influences the capital gain subject to taxation. The new requirements are applicable for shareholder resolutions on dividend distributions after 31.12.2015.

Authors:
hannes.rasner@pwc.com
+43 1 501 88-3622
katharina.koenigseder@pwc.com
+43 1 501 88-3644

New Double Tax Treaty

New Double Tax Treaty between Austria and Israel

A new double tax treaty between Austria and Israel was negotiated in November 2016, intended to replace the current treaty dated 1970. The new tax treaty passed the Austrian National and Federal Council in June and July 2017. There is currently no information on when the new tax treaty will be published.

Compared with the current treaty, the main changes include the following:

- The withholding tax rate on dividends is reduced from 25% to 0% (if the beneficial owner is a company which holds directly at least 10% of the capital of the company paying the dividends) or 10% (in all other cases). Further, Article 10 foresees a specific provision concerning dividend distributions made by real estate investment funds;

- The withholding tax rate on interest is reduced from 15% to 5%;

- As regards the taxation of income from employment, the 183 days requirement as an exception of the principle of the place of work relates to any twelve month period commencing or ending in the fiscal year concerned (instead of 183 days in the fiscal year).

New Double Tax Treaty between Austria and Japan

In January 2017, Austria signed a new tax treaty with Japan, expected to enter into force in the course of 2018 and replacing the current tax treaty dated 1963. The new tax treaty basically follows the latest version of OECD Model Convention and already contains some provisions in line with the BEPS measures and standards. In this regard, amendments via the "Multilateral Instrument" (MLI) are not necessary.

Compared with the current tax treaty, significant changes include the following:

- Double residency issues for a person other than an individual are to be solved by mutual agreement procedures between the states (instead of the application of a tie-breaker rule). In the absence of such agreement, the entitlement for relief or exemption under the treaty is denied;

- The withholding tax rate on dividends is generally reduced to 10%. Exemption may be granted if the beneficial owner of the dividends is a pension fund (under certain circumstances) or a corporation which has owned directly or indirectly, for six months ending on the date on which entitlement to the dividends is determined, at least 10% of the voting power of the company paying the dividends;

- Interest and royalties are principally exempt from withholding tax;

- Due to inclusion of a limitation on benefits (LOB) provision, the exemption at source on dividends, interest and royalties mentioned above is only granted if the resident is entitled to the benefits, i.e. meets the requirements stipulated in the tax treaty;

- The extensive taxation at source of capital gains on the alienation of shares, as provided in the current treaty, has been limited in line with the OECD model convention.

Authors:
valentin.loidl@pwc.com
+43 1 501 88-3657
andre.gusmao@pwc.com
+43 1 501 88-3361

Case law: Right for input VAT deduction in connection with the disposal of shares

The Austrian Administrative High Court recently decided (VwGH 28.06.2017, Ro 2015/15/0014) on the right to deduct input VAT paid on consulting services supplied in connection with a disposal of shares.

Basic VAT treatment in Austria and background of the case

According to the Austrian VAT law, the disposal of shares is VAT-exempt (without input VAT deduction). As a basic principle, services purchased in connection with VAT-exempt supplies do not entitle to input VAT deduction.

In the case at hand, it was in dispute whether the consulting services received by the company prior to the sale of shares were purchased in connection with the VAT-exempt sale of shares and thus did not allow input VAT deduction.

Decision of the Court

The European Court of Justice previously ruled (29.10.2009, C-29-08, SKF) that in order to deny input VAT deduction for purchased services, the disposal of shares and the services in question need to be directly and immediately linked to each other. Furthermore, it has to be determined whether the costs incurred are likely to be incorporated in the price of the shares sold. If such a link cannot be identified, input VAT may be claimed if the services in question can be attributed to the company's general expenses. If there is a direct and immediate link between the consulting services and the disposal of shares, the input VAT cannot be deducted, as the disposal of shares qualifies as VAT-exempt supply.

In the case at hand, the Austrian Administrative High Court followed the line of argument of the European Court of Justice and identified a direct and immediate link between the consulting services and the disposal of shares due to the scope of services stated on the invoice in this connection ("continual support in the course of the sales process of the shares of xxx in the period xxx"). The assessment of the Austrian Court is that the consulting services were purchased for the purpose of being used in connection with the disposal of the shares, as the disposal of shares would not have been carried out without the consulting services in question.

In the case at hand, the Austrian Administrative High Court stated that there is undoubtedly a direct and immediate link between the consulting services and the disposal of shares. It is not necessary to analyse whether the costs for the concerned services are on-charged to the purchaser of the shares.

This assessment is also in line with a decision of the German Federal Fiscal Court (BFH 27.01.2011, V R 38/09).

Practical implications

In the light of the above, it is not only the impact of certain services on the realization price of the disposal of shares that decides whether or not a direct and immediate link between the services and the disposal of shares can be identified. In practice, there might be a variety of factors leading to the denial of input VAT deduction on the disposal of shares and the underlying services in this context.

Authors:
anna.schefzig@pwc.com
+43 1 501 88-3684
rene.adam@pwc.com
+43 1 501 88-3613

Austrian Supreme Administrative Court on the retroactive effect of amendments of invoices and VAT deduction

In a recent decision, the Austrian Supreme Administrative Court confirmed that in case of invoices not satisfying all formal requirements, the amendment and the claim for VAT deduction for the period in which the initial irregular invoice has been issued is allowed under certain conditions.

Background

In the case at hand, an incoming invoice was issued without the indication of the mandatory VAT identification number of the supplier as the VAT identification number was granted by the Austrian tax authorities only after the issuance of the invoice. The formally incomplete invoice was amended after the VAT identification number was granted. The tax authorities refused to allow the deduction of input VAT for the period of issuance of the initial invoice. The appeal filed by the taxable person was granted by the Austrian Fiscal Court (BFG).

Decision of the Austrian Supreme Administrative Court

The Austrian Supreme Administrative Court dismissed the tax authorities' objection and granted the input VAT deduction for the period the initial invoice was issued. The Court did not follow the tax authorities' argumentation and referred to the ruling of the European Court of Justice (Rs C-518/14, Senatex), according to which the EU VAT law allows the retroactive effect of the amendment of invoices in connection with mandatory invoicing requirements. Accordingly, in case of amended invoices due to formal incompleteness, the VAT deduction might already be claimed in the period of the initial issuance of the invoice if the amendment was carried out before the issuance of the final VAT assessment.

Implications

According to the Austrian Supreme Administrative Court's decision, an invoice not indicating the supplier's VAT identification number may therefore generally be amended with retroactive effect. However, the Court will have to discuss and determine on an individual case basis whether this decision applies for other formal incompleteness as well.

Authors:
rupert.wiesinger@pwc.com
+43 1 501 88-3642
ewa.kalinska@pwc.com
+43 1 501 88-1807

Legal

New Register for Ultimate Beneficial Owners (UBO Register)

The UBO Register Act (Wirtschaftliche Eigentümer Registergesetz, WiEReG), announced on 15 September 2017, imposes a registration obligation on Austrian corporate entities and other legal entities regarding their ultimate beneficial owners. As of 15 January 2018, all direct or indirect owners holding more than 25% of the share capital have to be disclosed in the new register maintained by the governmental institution Statistics Austria. The data already disclosed in the Austrian Companies' Register will be transferred automatically to the UBO Register.

UBO Register provides more transparency

The UBO Register Act (WiEReG) introduces a new register, into which specific personal data has to be entered from 2018 onwards. Generally speaking, the purpose of the register is to make the owners behind business companies and asset holding entities visible and verifiable, thus to contribute to the prevention of money laundering and terrorist financing. The WiEReG serves to implement the 4th EU Anti-Money Laundering Directive and becomes effective as of 15 January 2018.

The UBO Register will be maintained by the Federal Institute Statistics Austria (Bundesanstalt Statistik Österreich). The recorded data will be compared automatically with the Central Register of Residence Registrations (Zentrales Melderegister, ZMR), the Companies' Register (Firmenbuch) and the Central Register of Associations (Vereinsregister).

Who has to register?

In general, the registration obligation applies to all companies and legal entities with registered offices in Austria as well as to trusts or trust-like structures managed from within Austria.

The management boards of the relevant entities will have to register their beneficial owners to Statistics Austria by 1 June 2018. For newly established legal entities (i.e., those established after 2 May), a registration period of 4 weeks applies, beginning with their entry in the Companies' Register or (regarding trusts) with the establishment of an administration in Austria. Data already disclosed in the "core register" (i.e. the Companies' Register) is basically exempt from the registration obligation. The legal entities (i.e., the management boards) are not only obliged to identify and verify their beneficial owners, but also have to review such data annually.

What has to be registered?

Subject to registration are the beneficial owners, i.e. all natural persons that ultimately own or control a legal entity.

In the first place, beneficial ownership is indicated with respect to natural person(s) who directly hold an interest of more than 25 % in the legal entity (direct beneficial owner). Equally registrable indirect ownership is given, if a corporate shareholder (parent) holds an interest of more than 25% in the respective company and is (directly or indirectly) controlled by a natural person.

Control is deemed to be exercised through an ownership interest of more than 50% in a corporate entity; also relevant, however are any other criteria of control used for the purpose of preparing consolidated financial statements, such as through a shareholders' agreement, the exercise of dominant influence, or the power to appoint the majority of board members.

If, after having exhausted all means of identification and provided that there are no grounds for suspicion, no natural person is identifiable who ultimately owns or exerts control over a legal entity, the natural persons who hold the position of senior managing officials of the legal entity (in particular, but not exclusively, members of the management board) are considered as beneficial owners.

The information to be registered includes name, date of birth, nationality, place of residence as well as type and volume of the beneficial interest or the share quota or the function of the relevant natural person.

Special rules and exceptions

With respect to private foundations, subject to registration are the founder(s), members of the foundation council (management board) and any beneficiaries receiving distributions of more than € 1,000 in a calendar year; similar rules apply to trusts.

Exempt from the registration obligation are associations in general, but also limited liability companies and partnerships where the shareholders or (regarding OG/KG) general partners are exclusively natural persons, as they are disclosed in the Companies' Register anyway.

The described exceptions and threshold values are only general rules in cases of doubt; basically, all natural persons exerting a dominant influence on an obliged legal entity (corporate entity) have to be registered.

Means of registration

Registration has to be done electronically via the "Unternehmensserviceportal" ("USP", www.usp.gv.at). Apart from the legal entity itself, also professional advisors, such as attorneys-at-law, tax advisors or notaries, may comply with the registration rules on behalf of the obliged entity.

Who can access the UBO Register?

All persons that are obliged to carry out money laundering and terrorism financing checks according to § 9 WiEReG as well as any person demonstrating a legitimate interest shall be granted access to the UBO Register. Besides, all registered legal entities are entitled to review the registered data concerning themselves via USP (free of charge). Furthermore, an extended register excerpt containing additional data may be retrieved. A user fee will be charged for access to the database, the amount of which is yet to be determined.

Penalties for violation of the registration obligation

Failure to register, the registration of incorrect data, as well as accessing the register without entitlement all constitute financial misdemeanors and may trigger fines up to € 200.000 or other coercive measures.

PwC Legal will gladly assist you with the assessment of and compliance with the new registration requirements.

The legislative text as well as the pertaining parliamentary materials are accessible via the following link:

https://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00313/index.shtml

Tags: WiEReG, beneficial owner, UBO register, money laundering, terrorism financing, AML directive

Author:
verena.heffermann@pwc.com
+43 1 501 88-3661

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 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

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	0.8%
- Rent agreements	1.0%
- Suretyship agreements	1.0%

Contacts

PwC Österreich GmbH
Wirtschaftsprüfungsgesellschaft
Erdbergstraße 200, 1030 Vienna
Austria
Tel. +43 1 501 88-0
www.pwc.at

Tax Partners:

Monika Berndl	ext. 3064
Gerald Dipplinger	ext. 3648
Peter Draxler	ext. 27[1]
Claudia Grabner	ext. 1335
Herbert Greinecker	ext. 3300
Peter Hadl	ext. 8003[2]
Bernd Hofmann	ext. 3332
Martin Jann	ext. 3206
Rudolf Krickl	ext. 3420
Kurt Lassacher	ext. 200[3]
Peter Perktold	ext. 3345
Thomas Steinbauer	ext. 3639
Thomas Strobach	ext. 3640
Christine Weinzierl	ext. 3630
Christof Wörndl	ext. 3335

1) +43 732 611750-ext.
2) +43 316 825 300-ext.
3) +43 662 2195-ext.

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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Copyright and Publisher: PwC Österreich GmbH Wirtschaftsprüfungsgesellschaft, Erdbergstraße 200, 1030 Vienna, Austria

Editor: Christof Wörndl, christof.woerndl@at.pwc.com

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