

PwC Austrian Tax News

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Direct Taxes

Exit Taxation: United Kingdom and Switzerland

I. Austrian Domestic Tax Law

Under Austrian tax law, capital gains taxation is triggered if capital gains are realised upon a sale of assets. The same applies if **Austria loses its taxing right** because assets are moved outside Austria and the applicable double tax treaty prevents Austria from exercising its taxing right. However, such **exit tax** can be deferred upon application where the assets will be migrated to another EU Member State. In subsequent years, if the property is sold to a third party or leaves the EU, Austrian capital gains taxation falls due.

In case shares are sold or moved by a non-resident, capital gains taxation is triggered if capital gains are realised by the non-resident upon a sale of a qualifying share of 1% or more of the nominal capital in a company with its seat or place of effective management in Austria.

Presented below are two **letter rulings** recently published by the Austrian Ministry of Finance regarding exit taxation:

II. Double Tax Treaty: Austria-Switzerland (“Austria-Switzerland DTT”)

An Austrian individual shareholder moved to Switzerland. At that time he held a qualifying participation in an Austrian company. The Austria-Switzerland DTT stipulates that Austria **does not lose its right to tax capital gains** with regard to shares if an Austrian individual moves to Switzerland. **No exit taxation was triggered** and no claim for deferral was necessary. However, according to the treaty, upon the sale of the participation Austria’s taxing right is limited to the capital gain derived based on the shares’ fair market value at the moment when the individual moved outside Austria.

III. Double Tax Treaty: Austria-United Kingdom (“Austria-UK DTT”)

An individual resident in Austria held shares in an Austrian company. The individual moved to the United Kingdom (“UK”). After six years he realised capital gains upon the sale of the shares.

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Because the individual migrated to the UK he is no longer subject to unlimited tax liability in Austria and is **treated as a non-resident**. Under UK domestic tax law he becomes a **“resident but not domiciled”**. This means the individual is only taxed on income from foreign sources if the consideration is being paid into a UK bank account.

The Austria-UK DTT stipulates that Austria’s right to tax capital gains is **maintained for another three years** after an individual has moved from one state to the other. In addition, pursuant to the so-called remittance clause in the Austria-UK DTT, **Austria**

may tax capital gains in case the taxing right is allocated to the UK but not exercised there.

In the case at hand, **no exit taxation** was therefore triggered when the individual **lost its resident status** in Austria. Later, upon the sale, it has to be verified whether the consideration was transferred to a UK or non-UK bank account.

If the consideration is transferred to a UK bank account, the **capital gain is subject to tax in the UK**. As a result, **Austria loses its taxing right**. Following the letter ruling of the Austrian Ministry of Finance, **exit taxation is**

triggered in the year of the sale for the capital gain accumulated during the period in which the individual was an Austrian resident.

In other cases, if the consideration is transferred to a non-UK bank account, **the UK does not tax the sale** at all. As a consequence, **Austria does not lose its right to tax**, and taxes the whole capital gain.

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Allocation of expenses to permanent establishments

In a recent letter ruling, the Austrian Ministry of Finance dealt with the tax treatment of charging of costs between a head office and its permanent establishment in Turkey.

An Austrian company had been operating a deep borehole in Turkey for more than six months, thus constituting a construction site permanent establishment (“PE”) pursuant to Article 5 Austria-Turkey DTT. Article 7 Austria-Turkey DTT states that an arm’s length profit has to be allocated to the PE. From a tax point of view, in accordance with Austrian Transfer Pricing Guidelines, machinery used on a construction site PE remains the business property of the Austrian headquarters and is not allocated to the PE.

Under the Austria-Turkey DTT, it is not possible for the head office to conclude rental agreements with its

own PE. Instead, the head office is obliged to allocate expenses incurred for the PE to this PE and vice versa. By providing machinery to the PE for its own use, expenses to be allocated to the PE could include depreciation, insurance fees, costs for periodic maintenance, etc.

The 2010 Model Convention stipulates a separate entity approach (“AOA”), meaning fictitious contracts between the PE and headquarters can be applied for tax purposes in order to determine the PE profits. In line with Austrian treaty practice, when interpreting a DTT, only materials may be used that existed at the time the DTT was concluded. Only

clarifying remarks/changes to existing materials may be applied to older treaties. This is the reason why the AOA, introduced in the 2010 OECD update, is not fully applied in Austria. To apply the functionally separate entity approach to older DTTs, Austria would have to revoke and update the respective Article 7 in the treaties to the 2010 version.

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Direct Taxes

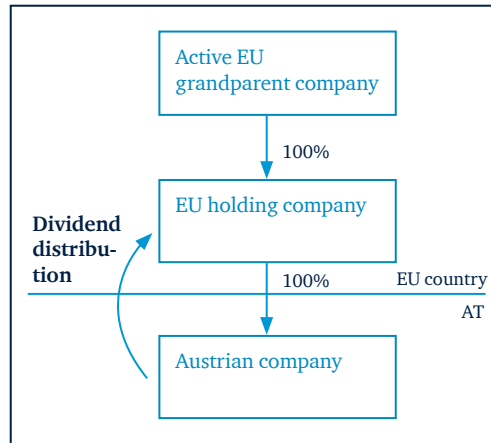
Withholding tax relief – Latest from the Austrian Ministry of Finance

According to the Parent Subsidiary Directive, dividend distributions from an Austrian company to parent companies located within the EU can be made without deducting withholding tax (WHT) at the level of the Austrian company under the following circumstances:

- The EU parent company holds at least 10% of the shares in the Austrian company;
- The shares are held by the EU parent company for at least one year;
- There is no suspicion of abuse.

Generally, a suspicion of abuse is deemed to exist if the EU parent company cannot issue a statement on a special Austrian form (provided by the Austrian tax authorities) that it carries out an active business, has its own employees and its own office space. Consequently, the relief-at-source from WHT is often not applicable to EU holding companies. Instead, the EU holding company has to initiate a costly and time consuming refund procedure in Austria to get the WHT paid back by the Austrian tax office. The background of this rule is the avoidance of treaty shopping.

On 31 October 2011, the Austrian Ministry of Finance issued a new opinion regarding the dividend distribution to an EU holding company which is held by another EU company with an active business (so called “active EU grandparent company”). The EU holding company does not carry out an active business, has no own employees and does not have any office space in the underlying case. The structure can also be seen in the following chart:



Under the general anti-abuse rule, the Austrian company would generally be obliged to deduct Austrian WHT from the dividend distribution.

However, the Austrian Ministry of Finance outlined that **the dividend distribution via an EU holding company to an active EU grandparent company is generally not seen as an abusive measure**. Consequently, the Austrian company is entitled to distribute the dividend without deducting Austrian WHT.

Furthermore, the Austrian Ministry of Finance explained that certain documentation requirements have to be fulfilled for the relief-at-source. The Ministry distinguished between two possible structures:

1. The EU holding company does not carry out any economic function

If the holding company does not carry out any viable economic functions (e.g. the only participation of the holding company is the Austrian company and the management of the holding company is carried out by the management of the grandparent company), the dividend distribution

is directly attributed to the active EU grandparent company. Consequently, only the EU grandparent company has to issue the signed form provided by the Austrian tax authorities stating that it carries out an active business, has its own employees and its own office space. This statement has to include a certificate of residence of the EU country where the EU grandparent company is located.

2. The EU holding carries out an economic function

Under this scenario, the EU holding company has a viable economic function (e.g. the holding of several participations), meaning that the dividend distribution is assigned to the EU holding company. The EU holding company has to provide the special form provided by the Austrian tax authorities including a certificate of residence. However, since the EU holding company cannot issue the confirmation that it carries out an active business, has its own employees and its own office space, the holding company has to provide further evidence that its parent company (i.e. the active EU grandparent) fulfils the required conditions for the relief-at-source (active business, own employees, own office space and tax resident within the EU).

Note that this opinion of the Austrian Ministry of Finance is not binding on the Austrian tax offices. However, Austrian tax inspectors typically follow the opinion of the Ministry.

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Indirect Taxes

Real Estate Transfer Tax applicable to contributions in kind made to a corporation

In practice, it is common to make a contribution in kind in the form of real estate to a corporation. In such cases, the fiscal effects depend on whether there is a capital increase or not.

In general, 3.5 per cent real estate transfer tax has to be paid for the transfer of domestic real estate. According to Section 4 Paragraph 1 Austrian Real Estate Transfer Tax Act (RETT), the tax base is the value of the consideration, which is everything that the buyer or a third party has to spend to become the owner of the real estate. Usually there is a sales contract and the tax base for the real estate transfer tax (RETT) is the purchase price (as this is the consideration). However, there are also other potential considerations, like the assumption of a debt or of value added tax in connection with the real estate by the acquirer.

If, however, there is no consideration, or if the consideration cannot be determined or if the consideration is too low, Section 4 Paragraph 2 RETT states that the value of real estate shall be the tax base. For this purpose, the threefold historically assessed value is considered to be the value of the real estate. In fact, the threefold historically assessed value is in most cases substantially below the actual fair market value. Therefore it is generally beneficial for the tax payer when the assessed value is taken as the tax base. In a few cases, where the fair market value of the real estate is less than the threefold assessed value at the time the tax liability arises, the substantiated fair market value can be used as the tax base for the RETT.

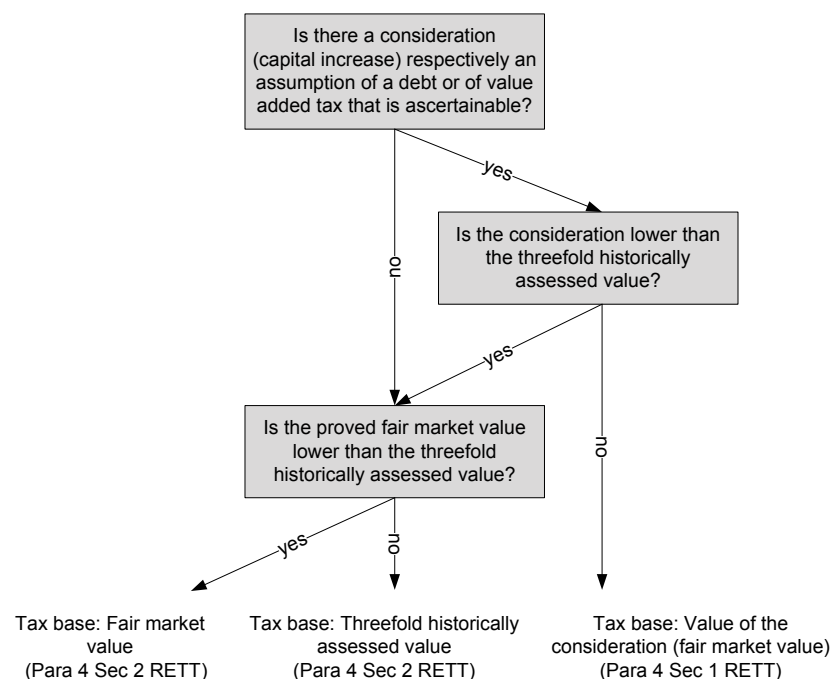
Tax base contributions in kind made in the form of real estate

If a contribution in kind is made to a corporation in the form of domestic real estate, 3.5 per cent RETT has to be paid as well. The determination of

the relevant tax base for this RETT will depend on whether the contributing shareholder receives consideration or not. It is beyond dispute that consideration for the contribution of real estate exists if there is a capital increase. In line with the capital increase, the contributing shareholder in such cases receives new shares and/or additional shareholder rights not previously possessed. For example, if a contribution in kind in the form of real estate is made in the course of the formation of the corporation and the contributing shareholder receives new shares, the RETT is to be calculated on the basis of the value of these new shares (which represent the consideration). Generally, this value corresponds to the fair market value of the contributed real estate. In contrast, if a contribu-

tion in kind is made in the form of real estate without a capital increase taking place, then (in accordance with prevailing legal opinion and jurisprudence) no consideration exists within the meaning of RETT. The inner increase in the value of the shares that goes along with the contribution in kind is not deemed to be consideration because it is not based on an obligation of the acquirer. Therefore, the RETT is to be calculated on the basis of the threefold historically assessed value if a contribution in kind in the form of real estate is made without a capital increase taking place, provided that no other consideration is made by the acquirer. However, whenever value added tax is assumed by the corporation, consideration may be deemed to exist.

Study Schedule RETT in connection with contributions in kind of real estate to a corporation



Indirect Taxes

Since the Constitutional Court has decided that the using the historically assessed value as the tax base for the land register entry fee is unconstitutional (see next article), the use of the assessed value as the tax base for real

estate transfer tax purposes could be unconstitutional as well. Future developments with regard to assessed value matters remain to be seen.

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Unconstitutional: Historically assessed value as tax base for the land register entry fee

The Austrian Constitutional Court (VfGH) decided on 21 September 2011 that using the historically assessed value of property as the tax base for the registration fee in the land register is unconstitutional.

In order to enter vested title in a property, a land register fee of 1.1 per cent has to be paid. The tax base for this fee is calculated differently, depending on whether it concerns a legal transaction with consideration (acquisition for remuneration) or without consideration (gratuitous acquisition). With respect to an acquisition for remuneration, the tax base is the purchase price or the value of the consideration. In contrast, with gratuitous acquisitions like donations or inheritance, the (threefold) historically assessed value of the property serves as the tax base. Frequently though, this assessed value, which

measures the value of the property, has not been adapted to the effective growth (over decades) of the value of the property. In most cases the threefold historically assessed value of the property is substantially below the actual fair market value. As a result, the tax base is higher where there is consideration, and consequently the tax burden is higher for acquisitions for remuneration than it is for gratuitous acquisitions. Hence, the Austrian Constitutional Court decided that the historically assessed value is not an adequate tax base for the land register entry fee and repealed the law on unconstitutional grounds. The

Constitutional Court set a time period, ending on 31 December 2012, during which new legislation can be passed that is in accordance with the Austrian constitution. If no such legislation has been passed by this time, the tax base for the land register entry fee will be the fair market value of the respective property not only concerning acquisitions for remuneration, but also for gratuitous acquisitions.

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Administrative VAT Guidelines: Amendment decree 2011

The BMF (Austrian Ministry of Finance) incorporated a number of changes in the recently published amendment decree 2011 to the Administrative VAT Guidelines. Below are some of the main points:

Restriction of VAT groups

In previous cases the Administrative High Court had originally recognised a VAT group as existing between sister companies having the same shareholder. The fiscal authorities are now following a decision of the German Federal Fiscal Court (Bundesfinanzhof – BFH), meaning that a VAT group between sister companies is only

possible if both sister companies are closely bound to the joint shareholder by financial, economic and organisational ties, i.e. if the common shareholder is also the joint controlling company of the VAT group.

Customer base and goodwill is still a supply of goods

The fiscal authorities still – contrary to

the initial draft – consider the goodwill and the customer base as goods and therefore qualify the supply of a goodwill/customer base as supplies of goods. However, within the EU (in the meantime also in Germany), these supplies are qualified as supplies of services. The qualification of the fiscal authorities as a supply of goods seems to be contrary to the

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ECJ decision dated 10 October 2009 (C-242/08, “Swiss Re”), where the transfer of reinsurance portfolios was regarded to be a supply of services.

Payment processing fee

An additional fee for certain types of payment (e.g. payment slip, telecommunication services) is treated as ancillary and thus shares the VAT treatment of the principal service. Such an additional fee does not constitute consideration for an independent VAT exempt financial service. Therefore, the additional consideration is generally subject to VAT.

Place of supply of services

Regarding the place of supply of services, the legal terms “Sitz” (seat) and “Betriebsstätte” (fixed establishment) of the recipient are defined in more detail.

Conferences and seminars

Seminars, which are generally accessible to the public, (i.e. services of a taxable person to another taxable person) are treated as “admissions” in the B2B sector and therefore are deemed to be effected where the seminar actually takes place. Events that principally can be accessed by everyone are considered publicly accessible. Such events are events which are not restricted to a limited group of participants. Contrary to the above, events in the B2B sector with a per se limited group of participants are deemed to be effected where the recipient is established, since this case will not fall under “admission”. If a non-resident taxable person organises a publicly accessible seminar or a congress (admission) in Austria, as from 1 January 2012, the VAT liability in the B2B sector will not be accounted for by the recipient (no reverse charge). The

non-resident taxable person is liable to charge and pay VAT and to register for VAT in Austria. Under Art 27 (4) Austrian VAT Act, the recipient is not affected by any obligation to withhold and to pay VAT.

Factoring

The ECJ decision of 27 October 2011 (C-93/10, “GFKL”) has not been incorporated in the VAT Guidelines. In this decision, the ECJ ruled that the sale of non-performing loans does not qualify as a factoring service of the buyer to the seller but rather as a VAT exempt sale of a receivable by the seller to the buyer. Unfortunately, the ECJ does not clarify where the line between a mere sale of receivables/loans and factoring has to be drawn. Sales of receivables/loans should therefore still be analysed thoroughly to establish whether they qualify under “factoring case law” (purchaser is providing taxable and not exempt services to the seller; see ECJ, C-305/01, “MKG”) or if “GFKL case law” (purchaser is not providing taxable services to the seller) is to be applied.

Underwriting guarantee

By filing an underwriting guarantee, a financial institution commits itself to the issuer to place a certain amount of securities at a specified price or to take over these securities at a fixed price itself. The fiscal authorities have now clarified that underwritings by financial institutions to issuers in return for a payment are VAT exempt (ECJ, C-540/09, “SEB”).

Gambling

Clarification has also been given in connection with gambling. Besides other issues, statements concerning

the definition of gambling types, types of VAT exemption, about the VAT base as well as concerning the taxpayer can be found.

Postal services

The amendment decree includes statements on universal postal services and on the conditions for the VAT exemption.

Proof of export in the context of electronic customs declaration

The fiscal authorities have clarified that it is a prerequisite for zero-rating of export supplies that under the Electronic Control System (ECS) the data records transmitted by the customs office has to be retained (either as hard copy or electronically).

Reverse charge

Regarding construction services, as from 1 January 2011 the VAT liability has had to be accounted for by the recipient for the cleaning of buildings as well. As from 1 January 2012, the supply of mobile devices and integrated circuits falls under the reverse charge system if the invoice amount exceeds EUR 5,000. The amendment decree 2011 now explains the terms “cleaning of buildings”, “mobile device” and “integrated circuit” as well as the conditions when the reverse charge system applies.

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ECJ decision on capital duty for the absorption of losses

The ECJ has decided that capital duty does not fall due for shareholder contributions in connection with general obligations to cover future losses of a company if the relevant obligation is undertaken before the losses are generated (C-492/10, “Immobilien Linz”).

Facts

In the case in hand, at the end of 2004 the municipal council of the City of Linz decided to transfer the real estate of the city of Linz as well as its real estate management activities to a newly established partnership with a company solely owned by the City of Linz acting as unlimited partner and the City of Linz as limited partner. At the same time, it was decided to fund any losses in connection with the administration of the real estate as specified in the respective annual budget estimates for the business years as from 2005 onwards by annual shareholder contributions.

In December 2005, the supervisory board of the partnership approved the budget estimate for the year 2006. Based on this, the City of Linz thus undertook the obligation to grant a shareholder contribution to cover losses at the necessary amounts up to the maximum figure specified in the budget estimate. The capital contribution was effected in 2006.

The competent tax office treated this capital contribution as being subject to 1% capital duty as this measure was deemed adequate to increase the assets of the partnership. The City of Linz filed an appeal against this as-

essment before the referring tribunal based on the argumentation that by way of the resolution of the municipal council at the end of 2004, a general obligation, arising from the shareholder relationship, was undertaken to cover any future losses generated in connection with the administration of the real estate of the City of Linz.

Until now, the Austrian Courts and tax authorities solely deemed any absorption of losses pursuant to a profit and loss takeover agreement not to increase the assets of the company. However, the referring tribunal was doubtful whether the form of the legal arrangement based on which a shareholder undertakes an obligation to cover future losses of a company might impact whether the assets of a company may be deemed to be increased or not. It therefore referred the case to the ECJ.

Decision of the ECJ

The ECJ confirmed its earlier judgment (Case C-38/88, “Siegen”) that any absorption of losses pursuant to a profit and loss takeover agreement that was established before the losses have been generated is not subject to capital duty. Such losses are no longer attributable to the company and may thus also no longer influence

the company’s assets. According to the ECJ, this qualification thus also holds true if, under a different legal arrangement (such as in the case in hand), the shareholder undertakes the general obligation to cover any future losses of the company before losses are actually being generated.

Impact of the ECJ decision

Following this decision, capital duty does not fall due on shareholder contributions in connection with general obligations to cover future losses of a company by its shareholder if the relevant obligation is undertaken before the losses are generated; this holds true irrespective of the specific form of the legal arrangement. It has to be noted that this case again only concerned the takeover of losses on a continuing basis. Accordingly, this decision may not be automatically qualified to also confirm that all loss absorptions for individual years are also capital duty exempt, if concluded in advance.

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Austrian Tax Facts & Figures

Taxation of corporations

Corporate income tax rate (Basis – adjusted statutory accounts)	25%	Non-deductible expenses (examples)	
Dividend withholding tax	25%	Long-term accruals	20%
Withholding tax on licences/royalties	20%	Business meals	50%
Interest withholding tax	0%	Excessive car expenses for luxury cars	
Significant allowances		Tax loss carry forwards	
Research & Development (R&D) (premium in cash)	10%	Losses may be carried forward for an indefinite period of time	
Learning & Education (L&E) (Alternatively premiums in cash: 6%)	up to 20%	Usage of tax losses: 75% of taxable income	

Double taxation agreements with 83 countries – mainly exemption method

International participation exemption for holding companies		Consolidation of tax losses with taxable profits	
Conditions: Investments >10%, 1 year holding		Conditions: Qualifying participations > 50%	
Dividends and Capital gains	0%	Group agreement and agreement on allocation of cost	
Dividend EC portfolio (shares) < 10%	0%		
Thin capitalization rules	None	Losses of foreign participations may be offset against profits of group leader	
CFC rules	None		

Group taxation valid from January 2005

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

Social security on monthly earnings up to € 4.230

Employer's share	up to 21.83%	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%	Real estate transfer tax	3.5%
Reduced rate (Food, rent, public transportation etc.)	10%	Capital tax	1.0%
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.		Stamp duties –	
		- Assignment agreements	0.8%
		- Rent agreements	1.0%
		- Suretyship agreements	1.0%

Other taxes

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