PricewaterhouseCoopers

*connectedthinking

PwC Austrian Tax News*

Issue 6, June 2006

In this issue

Direct Taxes
1 Recent developments in the international law as of 1 January 2006 for Austria
by Gabriela Fertl

Indirect Taxes
2 Indirect taxes on energy and refund of these taxes
by Siegbert Nagl

3 Stamp duties and transfer taxes
by Georg Zehetmayer

3 News in Austrian VAT law
by Caroline Hofmann

Legal
4 New regulation on the squeeze out of minority shareholders
by Robert Pfeiffer and Giulio Verrengia

5 Share purchase programs and stock option plans under the new Capital Markets Act
by Ludwig Hillinger

Expatriates
6 International taxation of Supervisory Board members of a stock corporation or company with limited liability in Austria
by Gabriela Fertl

8 Austrian Tax Facts & Figures

Direct Taxes

Recent developments in the international law as of 1 January 2006 for Austria

Five new Double Tax Treaties entered into force during the year 2005 which will become effective as of the tax year 2006. Furthermore there are some changes in the interpretation of Double Tax Treaties.

As from 1 January 2006 Austria entered into a Double Tax Treaty (DTA) with Lithuania, Moldova, Mexico and San Marino.

The DTA's with Lithuania, Moldova and Mexico provide for the following method in order to avoid double taxation: broadly Austria applies the exemption method subject to progression. The other countries apply the credit method. San Marino: both Austria and San Marino apply the credit method. Both countries apply the exemption method subject to progression to sustainable business or self-employment income.

Furthermore a new Treaty with Poland has been concluded. There are considerable differences compared to the previous DTA, applicable for 2006.

The new Treaty with Poland follows mainly the OECD Model Treaty. The rules for permanent establishments and the principles of international profit allocation for enterprises are according to the OECD principles. A transitional rule for permanent establishments relating to construction projects has been introduced. Thus the new period of 12 months only commences for existing construction projects as of the date the treaty enters into force. The total period of the construction sites must not, however, exceed 24 months (this corresponds to the period of the old DTA).

The maximum withholding tax rate for dividends is 15% in general and 5% for inter-company dividends (already with a minimum holding of 10%), 5% for interest (with considerable exemptions of withholding obligations for bank loans and public loans) and 5% for royalties.

A 183-days-rule for employees working on a temporary basis has been introduced. Formerly an exceptional one year period applied. From 2006 onwards, employees can be assigned to Poland and stay there for 183 days per tax/calendar year without becoming taxable provided that the salary costs are not borne by a Polish company or a permanent establishment of the employer in Poland.

The exchange of information clause in the new DTA has been adapted to meet the most recent OECD standard. An extensive exchange of information regarding taxes of all kinds is applied.

Poland will commence application of the credit method in order to avoid double taxation as of January 2006. Polish resident employees working partly also in Austria will thus not be exempted any more in Poland from Polish taxes in this Austrian earned income subject to progression.

Regarding the interpretation of the Austro-Liechtenstein Treaty a new decree has been issued. The decree refers to the tax treatment of management consultants. Their income will be subject to article 7 of the Treaty as of 2006 and thus considered to be business income. For management consultants resident in Austria and having an office in Liechtenstein the credit method will thus apply and no further exemption subject to progression will be available.

A new DTA between Austria and Romania came into force on 1 February 2006 and is applicable for taxable periods beginning on or after February 2007.

Romania will apply the credit method and Austria the exemption method subject to progression. Austria will apply the credit method for withholding taxes for dividends, interest, royalties and profits from sale of participations in real estate companies.

Finally a new DTA with Kazakhstan came into force on 1 March 2006 and will apply from 2007. Also Kazakhstan will apply the credit method whereas Austria applies in general the exemption method subject to progression.

Author:
gabriela.fertl@at.pwc.com
Tel. + 43 1 501 88-3055

Indirect Taxes

Indirect taxes on energy and refund of these taxes

Austria levies excise duties on energy and these can be partially reclaimed by Austrian tax payers under specific circumstances. The following article outlines the energy duties arising in Austria as well as the requirements to be met for archiving a partial refund of these taxes.

In Austria generally the following sources of energy are subject to excise duties:
- electricity,
- natural gas,
- oil and other fuels including liquefied gas and
- coal.

Any energy used to produce electricity is generally out of the scope of energy duties.

The tax rates are EUR 0.015 per kWh electricity, EUR 0.066 per m3.natural gas, EUR 0.05 per kg coal and EUR 60 per 1,000 kg oil (if used for heating rather than as fuel) and EUR 43 per 1,000 kg liquefied gas (if not used as fuel).

According to the Austrian law on the refund of energy taxes every business that neither trades these energy sources nor uses them for producing heat (in form of steam or heated water) may reclaim part of the taxes. The computation of the refund, however, is complicated.

In principle taxes exceeding 0.5% of the so-called Nettoproduktionswert ("NPW") of each business may be claimed. The NPW is the difference between all sales and expenses (except those for employee leasing), whereby only those sales and expenses which are taxable for VAT purposes in Austria are included. In addition, expenses might also be considered if they would have been taxable in Austria, if they were rendered in Austria and if they are incurred in connection with sales taxable in Austria. Businesses with significant un-VATable expenses (e.g. personnel expenses) tend to have a high NPW which reduces the potential refund available.

However the law stipulates minimum tax rates for every source of energy so that only taxes exceeding these amounts are actually refunded. The minimum tax rates are: EUR 0.0005 per kWh electricity, EUR 0.00598 per m3 gas, EUR 0.15 per GJ coal and EUR 21 per 1,000 kg extra light oil, EUR 15 per 1,000 kg for all other oil and EUR 7.5 per 1,000 kg liquefied gas.

A minimum amount of EUR 400 is in any case not refunded.

A refund is only possible for that energy used for operational purposes (e.g. manufacturing). Taxes on energy used for heating, cooling or illumination of rooms for employees are not refunded. As it might be difficult to calculate the portion of energy used for the above mentioned purposes, tax authorities generally accept a lump sum adjustment of between one and three percent of the overall energy consumption.

An unlimited refund is possible for electricity used for non-energetic purposes (e.g. for galvanisation or electrolyses).

The application for refund has to be filed with the tax office competent for

VAT assessments within five years. An application can only be made annually except for a refund concerning electricity used for non-energetic purposes, which can be made on a monthly basis.

If an enterprise consists of more than one business (which has to be substantiated by documentation of the transactions between the different businesses) a refund claim might be filed for each business separately. In this case the minimum amount of € 400 is applied on each business.

Those businesses supplied with heat (e.g. long-distance heating) may claim a refund for those energy tax paid by the heat supplier. The supplier of the heat has to inform the tax payer on the quantities of energy used for producing the heat.

Businesses which have already filed an application for refund in the preceding year may claim a prepayment for the current years refund after 6 months from the beginning of the business year. The prepayment amounts to 5% of the preceding years refund.

Please note that the above is applicable for refunds from 2004 onwards only. For previous years different rules apply.

Author:
siegbert.nagl@at.pwc.com
Tel. +43 1 501 88-3329

Stamp duties and transfer taxes

Austrian Stamp Duties and Transfer Taxes may become a significant cost factor for transactions or business structures having a nexus to Austria. Careful structuring usually reduces these costs, but often certain risks remain due to unclear provisions in the tax law. For some of these issues, the Austrian tax authorities have now published their approach. Tax courts are not bound on these circulars.

Electronic Signature

Electronic documents will trigger stamp duty, given that these are authorised by means of electronic signature. The stamp duty will become due, even if the document is not printed out. Clearly, this development is a reaction to the change of technology, where the tax payer started to conclude contracts by means of electronically signed documents instead of using the traditional stamp duty triggering paper-contract.

Offer to enter into a contract

A mere offer to enter into a contract does not trigger stamp duty provided that the other party accepts the offer only conclusively. However, if the offer is worded such that the contract has been effectively been concluded by means of verbal agreement beforehand, the offer is seen as document making legal proof of a contract and this triggers stamp duty.

Grand-parent contributions

The Austrian Ministry of Finance upholds the long term practice, that grand parent contributions are not subjected to capital transfer tax provided that the contribution is neither caused nor initiated by the direct shareholder. This circular terminates a phase of uncertainness caused by the ECJ ruling in C-494/03 Senior Engineering in January 2006. In this case the ECJ decided that a grand parent contribution was subject to taxation at the level of the receiving subsidiary.

Author:
georg.zehetmayer@at.pwc.com
Tel. +43 1 501 88-3227

News in Austrian VAT law

Electronic Invoicing is increasingly being put on the agenda of Austrian businesses. However, not only the transmission of invoices but also the archiving of electronically transmitted invoices has to meet the criteria of Austrian VAT law. Furthermore, some interesting judgements were made by the European Court of Justice which have an impact on Austrian VAT law.

Electronic Invoicing – no paper for archiving

With the publishing of the ministerial guidelines in July 2005 regarding electronic invoicing, more and more businesses have been showing interest in the faster and less expensive alternative to create and transmit invoices by electronic means. Businesses also have to consider how to store the invoices received electronically, such as a pdf-attachment to an e-mail, in order to deduct input VAT. The common practise of printing out the invoices and archiving them in paper form is not permissible in order to reclaim input VAT. According to Austrian VAT law, invoices received electronically also have to be stored electronically for a minimum period of seven years. In addition to the invoice information, the proof of the authenticity of the origin and the integrity of the content (advanced electronic signature or electronic data interchange) has to be archived. Hence, the business should be mindful that the data must not be changed ex post. Otherwise, in case of a VAT audit the tax authorities could deny the deduction of input VAT. Thus, it is recommendable to ensure proper archiving of the invoices according to Austrian VAT law before the business agrees to electronic invoicing.

Transaction chain supplies

The Austrian tax authorities referred questions in connection with transaction chain supplies to the ECJ (C-245/04 EMAG Handel Eder OHG). According to Austrian administrative practise, depending on which party organizes the transport, the movement of the goods (transportation or dispatch), is associated with one supply in the transaction chain only: the "moved supply". The place of supply for the "moved supply" is where the transportation or dispatch of the goods begins. The other supplies in the transaction chain (before or after) are treated as domestic supplies in the country of origin or destination respectively.

The ECJ agreed with the Austrian administrative practice that:

- A transaction chain supply can only consist of one "moved supply", i.e. only one intra-Community supply;
- The place of supply for the "moved supply", the intra-Community dispatch or transportation of the goods, is where the transportation or dispatch of the goods begins;
- The other supplies carried out before or after the "moved supply" are deemed to be carried out in the country of origin respectively destination.

However, the ECJ did not comment on how to determine the "moved supply". Furthermore, it is yet to be seen how the Austrian Administrative Court will decide the position given the ECJ decision.

Fair events

In the case C-114/05 Gillan Beach Ltd. the ECJ decided that services which are carried out by the organizers of fairs for persons exhibiting goods, have to be qualified as services relating to artistic, cultural, scientific, entertainment or similar activities. Hence, the place of supply of these services is where the services are effectively carried out.

According to Austrian administrative practice, the services described above are treated as supplies of services connected with immovable property. However, there will be no changes in practice, as in most cases the place of performance of the activity coincides with the place of the immovable property. In any case it is apparent that services carried out by the organizers of fairs are not qualified as advertising services.

Author:
caroline.hofmann@at.pwc.com
Tel. +43 1 501 88-3652

Legal

New regulation on the squeeze out of minority shareholders

In the course of the implementation of the new Take Over Directive, a new regulation on the squeeze-out of minority shareholders of Austrian companies will be enacted.

The new regulation on the squeeze-out of minority shareholders, i.e. the exclusion of minority shareholders without their consent by the majority shareholder, shall become effective on 20 May 2006.

Historically, Austrian law did not recognize a right of the majority shareholder to exclude the other shareholders. However, a shareholder holding at least 90% of the nominal capital could achieve the exclusion of minority shareholders indirectly as a result of corporate restructuring transactions. The following alternatives were available:

- Transformation by a conversion ("verschmelzende Umwandlung"), a specific form of an upstream merger whereby the main shareholder assumes all assets and liabilities of the transferring company;
- Non-proportionate demerger (cash-box demerger), which was the most commonly used squeeze-out technique in the recent years.

These transactions are rather complex and impact the legal structure of a target company.

The new squeeze-out regulation

The new regulation will considerably simplify the squeeze-out procedure. An investor holding (together with affiliated companies) at least 90% of the nominal capital may resolve to exclude the remaining shareholders subject to adequate cash compensation, which means that there will be no corporate restructuring transaction required for the squeeze–out.

Procedure

In order to proceed, the majority shareholder, together with the managing directors have to establish a report on the envisaged exclusion of minority shareholders and the cash compensation. This report has to be audited by an independent auditor, who is appointed by the court. The squeezed-out shareholders are entitled to challenge the proposed cash compensation by appealing to the court. The court will then review the appropriateness of the valuation and might provide for a different level of compensation.

The new regulation does not determine valuation methods. This will be left to the courts, which generally adhere to the state of the art in economic sciences. In practice valuation methods based on discounted future cash-flows or earnings are accepted by the Austrian courts.

Elimination of Squeeze-out by demerger

Squeeze-outs by demergers will not be possible after 20 May 2006 as under the new rules they will require the consent of all shareholders.

Squeeze-out by conversion after 20 May 2006

Squeeze-outs by conversion will still be feasible. However, several provisions of the Transformation Act will be adjusted. In particular, the legal position of the minority shareholders will be brought in line with the new Squeeze-Out Act.

Squeeze-out by cooperation of several shareholders

Squeeze-outs under the new act generally require that the majority shareholder owns (together with affiliated companies) 90% of the nominal capital. If a group of (non-affiliated) shareholders, which together hold 90% of the nominal capital, intend to exclude the remaining shareholders, squeeze-outs might be achieved by inserting a common holding company prior to the squeeze-out.

Authors:
robert.pfeiffer@at.pwc.com
Tel. +43 1 501 88-3324
giulio.verrengia@at.pwc.com
Tel. +43 1 501 88-3318

Share purchase programs and stock option plans under the new Capital Markets Act

Substantial changes were made in the Austrian Capital Markets Act (KMG) due to the implementation of the EU Prospectus-Directive. Non-compliance with this Act carries the risk of high fines. The KMG is threatening the non-complaint issuers of shares with a fine up to two years imprisonment or a monetary penalty up to 360 day-fines. Management responsible face an additional monetary penalty up to EUR 35,000 for administrative offences.

Share purchase programs and stock option plans can present an extra-ordinary risk as these programs can also be covered by the KMG. The Financial Markets Authority (FMA) and also the EU-Commission basically take the offer of shares of a company or a stock option plan to the employees as a public offer. The public offer (§ 1 Para 1 No. 1 KMG) requires an approved prospectus. Violation of this requirement will lead to a fine within the above mentioned penalties.

At the moment, there is still an uncertainty of the exceptions to the rule requiring an approved prospectus for stock purchase programs and stock option plans.

For public listed companies, who are not listed on a regulated EEA market (see below), the regulations are of particular importance. They often have subsidiaries in EEA-countries and the employees are offered share purchase plans or stock option plans with stocks of the listed parent company. Experience shows that such programs are widely-used in Europe.

The advantage of the new regulation is in the multiple use of one approved prospectus in one EEA-member-country for the whole EEA. The prospectus – approved in one EEA-member-country – can be used in all other EEA-member-countries via notification to the local financial markets authority, without any further approval (except where the local authority requires special information).

There are some facilitations or exceptions to the obligation to publish a prospectus:

Companies, who are already listed at a regulated market (regulated markets means a market as defined in article 1(13) of Directive 93/22/EEC), are only obliged to provide simplified documentation of the public offer. The listed security does not need to be a share, it also can be a bond or other public listed security. Companies, who are not listed on a regulated market (e.g. New York Stock Exchange, Swiss Exchange, etc.) do not qualify for this advantage.

The main exemptions of the requirement to publish a prospectus are:

- denomination per unit of at least EUR 50,000
- the equivalent of the issued securities is less than EUR 100,000 over a period of 12 months
- an offer of securities addressed to fewer than 100 individual or legal persons per Member State, other than qualified investors

Regarding the offer of bonus-shares without any cash-payment there are still different interpretations of the established legal regulation. The question is: if the purchase of stocks is for free, would the equivalent be zero and therefore no requirement of an approved prospectus? Another argument to avoid the necessity of an approved prospectus is the exclusion of transferability of the shares or options offered to the employees.

Furthermore, there is a difference between offering securities ("Wertpapiere", e.g. equity stocks, bonds) or other investments ("Veranlagungen", e.g. stock options, partnership interests) under Austrian law.

The prospectus for securities – as far as there is no exemption – has to be approved by the FMA. Usually there will be no more approval by another party (e.g. registered prospectus-controller).

The prospectus for other investments ("Veranlagungen") has to be approved by an FMA-registered prospectus-controller.

Author:
ludwig.hillinger@at.pwc.com
Tel. +43 1 501 88-1741

Expatriates

International taxation of Supervisory Board members of a stock corporation or company with limited liability in Austria

Members of the supervisory board may receive remuneration for their activity according to their tasks and the situation of the company.

As of 1 January 2002 Austrian companies have to automatically notify the tax office of the remuneration paid to members of the Supervisory Board if the fees paid exceed EUR 900 per year. The Austrian Tax office informs the Austrian social security authority in due course, as this income is also subject to mandatory social security in most cases in Austria.

The remuneration of the members of the Supervisory Board represents income from independent work. This income has to be included in the Austrian annual personal income tax return of the Supervisory Board member. No tax return has to be filed in the case that the total income of the member of the board does not exceed the limit of EUR 10,000 per calendar year.

Members of the Supervisory Board can receive income for meetings, per diem allowances, reimbursements of expenses, reimbursements for business trips and similar income. Also fringe benefits such as a car represent part of the taxable income.

The deductions for the board member are for example, expenses for business trips. Instead of actual expenses a lump sum deduction of 6% of the turnover is permitted subject to a maximum p.a of EUR 13,200.

The turnover of the board member is currently exempted from VAT. A deduction from input-VAT for business expenses is therefore not possible.

The board member is subject to mandatory social security for independent persons. As a rule the social security liability is incurred if the monthly income limit of EUR 333.16 is exceeded (social security free limit). If this independent activity is the only activity performed within the social security provisions the social security free limit is increased to EUR 537.78 p.m.

There are currently a number of tax planning opportunities for foreign members of a Supervisory Board who are not resident or main resident in Austria according to a Double Tax Treaty.

The remuneration paid in Austria to foreign non-resident members of a Supervisory Board of an Austrian corporation is only taxable in Austria at a flat rate of 20%. The tax is withheld by the Austrian corporation at the date of payment of the income. The basis of taxation is the total gross income including reimbursements of expenses and fringe benefits. Deductions are not possible.

Austria has concluded Double Tax Treaties with several other countries. Many of these Double Tax Treaties provide that the Austrian earned remuneration of a Supervisory Board member is exempted from income tax subject to progression in the home country. Thus the income received in Austria will enjoy the reduced tax rate of 20% and will only increase the tax rate levied on the remaining income taxable in the home country which will generally result in a tax saving. In order to determine a possible tax saving the exemption provisions of the respective Double Tax Treaty should be checked in advance.

Similarly, some of the Double Tax Treaties provide that Austria has to exempt income received by board members of companies abroad from taxation subject to progression. In general this exemption is restricted to persons with a supervisory function only and does not apply to “Managing Directors and Board Members” in general.

However, as of filing year 2005, the foreign non-resident members of a Supervisory Board also have in Austria the possibility to claim taxation according to progressive income tax rates after taking a deduction for their expenses in connection with their activity. In this situation, a global addition to taxable income of EUR 8,000 will be made. This addition is necessary as the tax free limit of EUR 10,000 p.a. should only be available to Austrian tax residents in order to secure a minimum living income. For non-resident persons this minimum tax free income is reduced to EUR 2,000 p.a.

Consequently, the board member should consult an expert in advance before filing an Austrian income tax return, in order to calculate the tax saving opportunity due to a tax assessment. Basically the annual income should not amount to more than EUR 12,910 after all deductions in order to benefit from a lower progressive average tax rate in Austria.

Tax rates in Austria are progressive up to 50% top marginal tax rate for income exceeding EUR 51,000 p.a.

There is also the possibility for a non-resident board member to opt to be treated as resident taxpayer e.g. if at least 90% of worldwide income is taxed in Austria.
If a foreign Supervisory Board member can present a valid form E 101 for his activities within the EC countries, he will be exempted from the social security obligation in Austria. Where several independent activities are performed within several EC countries and the main residence is e.g. in Germany, the social security obligation is given in this state of main residence, thus in Germany.

Irrespective of main residence the social security obligation is given in the state in which an employment activity is carried out. This country can differ from the country of main residence. If thus the German resident is employed in Hungary, the mandatory social security obligation is given in Hungary and the Supervisory Board member activity in Austria is not subject to mandatory social security in Austria.

Author:
gabriela.fertl@at.pwc.com
Tel. +43 1 501 88-3055

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%
Witholding tax on licences/royalties	20%	Business meals	50%
Interest	0%	Excessive car expenses for luxury cars	
Significant allowances		Tax loss carry forwards	
Research & Development (R&D) (Alternatively premiums in cash: 8%)	up to 35%	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 68 countries – mainly exemption method

Group taxation

valid from January 2005

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

Taxation of individuals

Individual income tax rate = Progressive rate		Social security on monthly earnings up to EUR 3,630	
below 10,000	0%	Employer's share	up to 21.9%
from 10,000 to 25,000	23.0%	Employee's share	up to 18.0%
from 25,000 to 51,000	33.5%	Payroll related taxes	approx. 8.0%
over 51,000	50.0%	Income cap for social security contributions, social security totalisation agreements with various states	
after deducting personal expenses (limited)			

Value added tax

in line with the 6th EU directive

Other taxes

Standard rate	20%	Real estate transfer tax	3.5%
Reduced rate (Food, rent, public transportation etc.)	10%	Capital tax	1.0%
		Stamp duties - Loan agreements	0.8%
VAT refund for foreign enterprises – available up to June 30 of the following year.		Rent agreements	1.0%

Contacts

PwC PricewaterhouseCoopers GmbH
Erdbergstrasse 200
1030 Vienna
Austria
Tel. +43 1 501 88-0
www.pwc.at

Tax Partners and Directors:

Margit Frank	ext. 3200
Herbert Greinecker	ext. 3300
Bernd Hofmann	ext. 3332
Rudolf Krickl	ext. 3420
Johannes Mörtl	ext. 3400
Peter Perktold	ext. 3345
Thomas Pühringer	ext. 3222
Friedrich Rödler	ext. 3600
Christine Sonnleitner	ext. 3630
Thomas Strobach	ext. 3640
Ulrike Vidovitsch	ext. 3044
Christof Wörndl	ext. 3335

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.

Visit our website for archived PwC Austrian Tax News:
www.pwc.com/at/taxnews

Copyright & Publisher:
PwC PricewaterhouseCoopers GmbH, Erdbergstrasse 200, 1030 Vienna, Austria

Editors: Johannes Mörtl, johannes.moertl@at.pwc.com; Christof Wörndl, christof.woerndl@at.pwc.com