

PwC Austrian Tax News

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In this issue

- 1 **Direct Taxes**
Highlights of the “Abgabenänderungsgesetz 2009” (AbgÄG 2009) – amending Income Tax Law published on 17 June 2009
by Michael Podesser
- 2 Modernisation of the Austrian Finance Administration
by Sandra Oberhuber
- 3 Benchmarking studies for determining arm’s length transfer prices
by Melinda Perneki
- 4 Update on the Austrian DTC network
by Christian Gatterer
- 5 ECJ Decision in the Papillon case (C-418/07)
by Carina Buerger
- 6 **Indirect Taxes**
8th Directive Refund Claim
by Katharina Poelzl
- 7 Insurance premium tax in connection with group companies
by Gerhard Schoenbeck
- 7 New VAT treatment of the sale of telephone calling cards as of 1 January 2010
by Verena Grob
- 8 **Austrian Tax Facts & Figures**

Direct Taxes

Highlights of the “Abgabenänderungsgesetz 2009” (AbgÄG 2009) – amending Income Tax Law published on 17 June 2009

On 17 June 2009 the AbgÄG 2009 was published. It includes numerous amendments having significant impact on the taxation of income. The key elements are as follows:

Income Tax Act

According to the Austrian Income Tax Act 50 per cent of pension provisions have to be covered by securities. To exclude any associated exchange rate risk, the AbgÄG 2009 provides that only Euro denominated bonds will be accepted as coverage for securities for pension provisions. The new rules will apply to bonds acquired after 30 June 2008.

Another adjustment of the Income Tax Act relates to cooperatives. Under the new regulations, cooperatives – like limited liability companies and corporations – will be able to distribute their profits to EU companies free of withholding tax.

Another adjustment made in the AbgÄG 2009 is that real estate

transfer tax will not be deductible for income tax purposes, in cases where the transfer of real estate is free of charge.

Corporate Income Tax Act

Tax Group

For Austrian tax purposes, tax losses of group members can be deducted against taxable profits of the group parent and other group companies. As an Austrian tax group can also include foreign group members, losses of foreign group members can be offset against Austrian profits within a tax group. The foreign tax losses have to be calculated according to Austrian tax law. Profits realized by foreign subsidiaries are not subject to taxation in Austria under the tax group scheme.

There are recapture provisions which eliminate “double utilization” of tax losses. Foreign tax losses previously offset against profits at the level of the Austrian group parent are subjected

Direct Taxes

to recapture if they could subsequently be offset by the foreign group member in the source state. There is also a recapture if the foreign group member drops out of the tax group (e.g. due to liquidation). It was possible to eliminate the recapture taxation; typically by eroding the foreign group member and keeping a shell company only.

The AbgÄG 2009 eliminates this option. As a consequence, foreign group members will be subjected to recapture taxation in Austria if they – from a substance over form approach – lose their economic identity because the size of their business is not comparable to the size/volume of their business at the time when the losses were accumulated.

The new regulation is applicable since 30 May 2009.

International Participation Exemption

According to the current version of the Austrian Corporate Income Tax Act the international participation exemption only applies if,

- the direct or indirect investment amounts to at least 10 per cent of the foreign company's capital for a period of at least one year;
- the Austrian parent company or the

foreign corporation is both subject to unlimited taxation and in addition is equivalent to a company taxable under Section 7 Para. 3 Corporate Income Tax Act.

- The foreign company is comparable to a domestic corporation
- There is no suspicion of abuse (= foreign tax rate is below 15 per cent and foreign subsidiary mainly earns passive income.

These restrictions do not apply to domestic dividends. In response to a recent decision of the Austrian Administrative High Court the draft of the AbgÄG 2009 contains the following changes:

Dividends from subsidiaries in the EU, or EEA-states with assistance in administration and recovery of tax claims (at the moment only Norway), will be exempt from Corporate Income Tax regardless of the percentage and the duration of shares being held.

However, irrespective of this exemption, the credit-method will apply to portfolio dividends from countries with low tax rates (Switch-over clause if tax rate is below 15 per cent). According to the draft of the AbgÄG 2009, foreign taxes on capital gains will remain not creditable.

Portfolio dividends (i.e. an investment below 10 per cent) received from third countries will still be taxed under these proposals. This has been criticised by tax experts as not being in line with the EU principle of free capital movement which applies also to non member states of the EU. The Austrian Fiscal Court of Appeal forwarded two cases to the ECJ (C-436/08, Haribo and C-437/08 Salinen AG) in this regard. The final judgement remains to be seen.

Capital gains/losses and depreciation will remain tax exempt with respect to international participations (minimum 10 per cent shares held for at least one year) only. The possibility to opt for taxation will not be modified and the switch-over to the credit method in cases of suspicion of abuse will also remain applicable.

The new rule will apply to all unassessed tax periods.

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Modernisation of the Austrian Finance Administration

Large traders audit units will be reformed fundamentally. The introduction of advanced rulings should improve legal certainty; electronic payment of taxes is enabled

In 2007, tax audits resulted in an additional revenue for the fiscal authorities of EUR 2.07 bn. The majority of this income (EUR 1.19 bn) resulted from tax audits of large firms, and the fiscal authority plans to achieve the same outcome in future periods. Therefore following measures and reforms will be introduced, with the aim of moder-

nising the tax audit to reach a consistent interpretation of Austrian tax law and a more efficient organisation and structure.

There will be a single large traders audit unit (LTAU) responsible for large companies and groups in Austria. The previous eight local branches of the

LTAU will continue to exist as locations of the centrally organised audit unit. After completion of this reform of the LTAU, over the next few years, there will be about 400 employees in the unit.

Since 1 June 2008 the focus of the LTAU has been on companies with a minimum annual turnover of EUR 9.68 m

Direct Taxes

instead of EUR 4 m. It is the view of the fiscal authority that tax payers' life will become easier because companies must have a higher turnover before they fall under the responsibility of the audit unit for large traders.

One of the key purposes of the new LTAU structure is to strengthen cooperation between the Austrian tax authority and other European tax authorities.

The tax audit of medium-size companies with an annual turnover less than EUR 9.68 m will be carried out by local tax offices.

Advanced Ruling

The Austrian tax administration plans to introduce a more formal advance ruling procedure in the near future. This process will help large traders by reducing uncertainties arising from the interpretation of tax law. The tax ad-

ministration will be required to provide advance rulings. Such rulings will be binding following the principle of good faith, unless the ruling contradicts legal provisions. The aim of advance rulings is to avoid later legal disputes concerning tax assessments or tax audits. By introducing formal procedures for advance rulings the Austrian tax administration is following international trends. In the early stages, large traders might anticipate delays in the system because of the complexity of setting-up the new structures.

Electronic Payment of Taxes

Taxpayers now have the option to make tax payments via the tax online system (FinanzOnline) from any location without additional input. The aim of the tax administration is to promote payment of taxes by electronic means because it is secure, easy and convenient. The e-payment system can be

used for paying all kind of taxes e.g. value added tax, wage tax or corporate income tax. To make an e-payment of taxes, the taxpayer first logs on to the finance ministry's website "FinanzOnline", then chooses the "Elektronische Zahlung" option. The next step will be to choose the bank connection, which will connect the taxpayer with the Internetbanking-System, entering security details etc. to complete the transaction. If the taxpayer is already using the FinanzOnline system, there is no need for additional registration or another access code to access the e-payment system. For more detailed information please look at the homepage of the Austrian Federal Ministry of Finance.

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Benchmarking studies for determining arm's length transfer prices

PwC provides practical advice on how to meet the Austrian tax authorities' requirements regarding benchmarking studies conducted in databases.

Austrian tax auditors are increasingly stressing the importance of the arm's length nature of transfer prices. According to this principle, the same prices have to be applied in a group as used between third parties under similar circumstances. Based on this, internal comparables (prices or margins between a group entity and a third party) are often the most reliable. If such data is not available, benchmarking studies are usually conducted using a database such as AMADEUS and ORBIS.

Search criteria

The Austrian requirements regarding

benchmarking studies are much stricter than those in the US or other European countries. In particular, the following elements of the search strategy are critically examined by the tax auditors:

- Different market situations within an industry may influence profitability in a geographic region; i.e. old EU member states are not readily comparable to CEE.
- Classification of business activities based solely on industry codes (e.g. NACE) can lead to unreliable results. Therefore, key word screening should be used as a supplemental search step.
- Independence criterion: Austrian tax auditors prefer a conservative approach of 25 per cent.
- The entity size should be similar, therefore there is a need to analyse the revenue and number of employees of comparable entities.
- Significant intangibles (trade marks and patents) are evidence of additional functions performed and risks assumed. A corresponding rejection criterion yields more reliable results.
- An observation period of three to five years is advisable in order to eliminate short term economic fluctuations and the impact of product life cycles. Only comparables with

Direct Taxes

sufficient multiple year financial data are acceptable.

- Entities suffering losses should be eliminated.
- Companies in the start-up phase are not comparable.

The purpose of these search criteria is to enhance the comparability between the tested party and comparables. However, each case must be considered on its own merits when judging whether it makes sense to apply all the above criteria. For example, the extent to which profitability of an entity correlates with its size will vary between industry. Moreover, start-up companies do not necessarily generate less profit or loss and the independence criterion may also differ per country. In the current economic climate, the automatic rejection of lossmakers may also not be supportable.

Qualitative screening

An additional internet search for each comparable is expected by the Austrian tax authorities in order to support and evidence the actual data. In practice, finding the comparable's homepage and then arranging for language translation is time consuming and costly. Information from on-line company registers is generally not sufficient.

Documentation

Each step of the benchmarking study has to be accurately documented, in order to demonstrate the transparency of the search process and the comparability of the selected companies. The tax authorities regularly examine if the benchmarking study is comprehensive enough.

PwC recommendation

In the light of experience gained from working on Austrian tax audits, the taxpayer is well advised to develop a search strategy based on the functional and risk profile of the tested party. Furthermore, he/she should perform more detailed local work in order to test and evidence the various criteria listed above. Tax auditors might otherwise reject the comparable search during an audit, which could lead to high additional tax and interest payments and cumbersome mutual agreement procedures with foreign tax authorities.

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Update on the Austrian DTC network

The following article briefly summarises recent developments in the Austrian Double Tax Treaty network.

Albania

The new Double Taxation Convention (DTC) between Austria and Albania principally follows the OECD Model Convention. The source state's right to tax dividend payments out of portfolio participations is limited to 15 per cent. The maximum Withholding Tax (WHT) rate is reduced to five per cent for dividends paid to corporate shareholders out of qualifying participations (at least 25 per cent). In general, the WHT levied in the source state on most interest payments and royalties may not exceed five per cent. A permanent establishment will be constituted in the source state in the cases of building sites or installation projects (including supervisory

activities) which exceed the period of nine months. Moreover, the furnishing of services (including consultancy services) also leads to a permanent establishment, in case such services will be rendered for more than six months within the respective calendar year. Austria exempts active income using the exemption with progression-method whereas for dividend, interest and royalty payments the credit-method applies. The DTC contains a special clause that Austria will not be forced to exempt the income in case of a potential qualification conflict (double non-taxation). In Albania, double taxation is eliminated by means of the credit-method.

The DTC entered into force on 1 September 2008 and its provisions apply for fiscal years beginning on or after 1 January 2009.

Denmark

The updated DTC between Austria and Denmark generally provides for a maximum WHT rate on portfolio dividends of 15 per cent. The WHT rate is reduced to nil for dividends paid to corporate shareholders out of participations of not less than ten per cent. Interest and royalty payments may only be taxed in the state of residency of the receiving person. A building site or installation project will only constitute a permanent establishment if its duration exceeds twelve months.

Direct Taxes

Furthermore, activities in connection with preparatory examinations, the exploration or exploitation of hydrocarbons will also lead to a taxable presence in the source state if they last more than 30 days within a twelve months period. With regard to such offshore activities of drilling rigs, this period amounts to 365 days within an 18 months period. Following the OECD Model Convention, profits from the operation of ships or aircraft in international traffic may only be taxed in the state where the place of effective management of the enterprise is situated whereas such profits also include income in connection with the container business. To eliminate double taxation, Austria generally implements the exemption with progression-

method. The credit-method applies for dividend payments out of portfolio participations. Further, Austria as the state of residency has the right to tax income in case of a potential qualification conflict provided a mutual agreement procedure has been effected. Denmark generally uses the credit-method to avoid double taxation.

The updated treaty entered into force on 27 March 2008 and applies for taxable periods starting on or after 1 January 2009.

Poland

The existing DTC between Austria and Poland has been amended. To avoid double taxation, Poland basically implements the exemption with

progression-method. The credit-method still applies for dividends, interest payments, royalties and capital gains.

The new provision can be applied for fiscal years starting on and for taxes withheld at source on income derived on or after 1 January 2009.

With regard to the new DTC between Austria and Greece which will become applicable beginning 2010, please see our next edition of the Austrian Tax News.

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ECJ Decision in the Papillon case (C-418/07)

On 27 November 2008 the European Court of Justice (ECJ) issued its decision in the Société Papillon case. French tax law states that a French parent company may not include in its tax group a French lower-tier subsidiary which is held indirectly via a subsidiary established in another EU Member State, whereas it may include in its tax group a lower-tier subsidiary held via a French subsidiary. The ECJ decided that such a restriction is not in line with the freedom of establishment (Article 43 EC).

The French Government argued, to justify the restriction, that a balanced allocation of taxing powers between the Member States needs to be maintained, and that the coherence of the French tax system must be guaranteed.

The first justification (balanced allocation of taxing power) was rejected

by the ECJ because Papillon did not request any cross border tax consolidation. Regarding the second argument brought forward by the French Government (coherence of French tax system), the ECJ acknowledged that the neutralisation of intra-group operations affects the coherence of the French tax group regime. In the specific circumstances, tax losses could be used twice in France since a lower-tier French subsidiary's losses are taken into account via the group taxation regime while losses are also used through the write down of shares held by the French parent in the EU intermediate company (resulting from a write down of shares in the French lower tier entity). Consequently the coherence of the French tax regime appears to be at risk.

However, the ECJ ruled that there are alternatives and less restrictive measures which can be adopted by

France to avoid a double utilization of losses. Therefore, France could ask the French parent to justify the rationale and origin of the write down of shares in the intermediate company to avoid the double utilization of the losses and it could claim financial and accounting information with regards to the intermediate EU Company by referring to the Mutual Assistance Directive (77/799/CEE).

Consequences on the Austrian group taxation regime

The French group taxation scheme is similar to that in Austria; although it differs significantly in the fact that foreign entities are not allowed to be included in a French tax group. Under the Austrian tax group regime, foreign first-tier subsidiaries can be included in the Austrian tax group. Furthermore, under the French tax group regime a minimum participation in shares of

Direct Taxes

95 per cent must be guaranteed, whereas under the Austrian scheme the interest to qualify for the participation in the tax group must be more than 50 per cent only. Profits or losses (in case of foreign group members only losses) of the lower tier company (group member) will then be assigned to the superior group member/parent. A write down of the shares in the lower tier entity is not tax deductible under the Austrian tax group regime in order to avoid a double utilization of losses.

Like the French tax regime, the Austrian Fiscal Authorities do not allow the inclusion of an Austrian lower tier

subsidiary which is held via a foreign subsidiary in an Austrian tax group. However, if the lower tier subsidiary would be held via an Austrian subsidiary, it could be included in the tax group. According to the ECJ's judgement this restriction appears to be not in line with the EU freedom of establishment. The justification brought forward by the French government in the Papillon case which was considered by the ECJ as being reasonable is not valid for Austria: The coherence of the tax regime must be guaranteed by avoiding a double utilization of losses. A write down of the shares held in the foreign group member is generally not regarded as being tax deductible at

the level of the Austrian shareholder. Therefore, the EU confirm the interpretation of the Austrian tax group regime as defined under the Austrian Corporate Income Tax Act. The regime must allow the inclusion of Austrian lower tier subsidiaries – even if they are held indirectly via foreign EU/EEA subsidiaries – into an Austrian tax group. Also, the interposition of more than only one foreign EU/EEA subsidiary should be possible as a consequence of principle of free establishment.

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Indirect Taxes

8th Directive Refund Claim

The process for filing 8th Directive VAT refund claims will change as from 1 January 2010.

With effect from 1 January 2010, 8th Directive refund claims will have to be filed electronically. The claimant has to file the 8th Directive refund claim in the Member State of residence, not in the Member State to which the claim relates. Each Member State will introduce an electronic system where such claims can be filed. It is planned that filing in Austria will be done via the existing FinanzOnline system. The Member State of residence reviews the claim for both completeness and whether the claimant generally qualifies for a refund. Subsequently, the Member State of residence forwards the claim to the Member State of refund. Obtaining a certificate of taxable person is no longer required.

The new refund claim has to include the following:

- Name and address of the claimant;
- Period for which the input VAT will be claimed back;
- VAT-Identification number;
- Banking details;
- Breakdown of invoices including

import documents including date of issue and number.

The goods and services purchased have to be classified by specific codes, e.g. 1 stands for fuel; 7 for food, drinks and restaurant services etc.

No original paper invoices and import documents have to be filed. However, invoices with a net amount of at least EUR 1,000 and invoices regarding fuel of at least EUR 250 (net amount), have to be provided via electronic copy (together with the claim) if this is required by the Member State of refund. The Member State of refund can require the submission of the original invoices at a later stage if the Member State wants to review the correctness of the invoices.

The claim period has to be at least three months. The claim amount has to be at least EUR 50 for one calendar year. If the period in which the input VAT will be claimed back is less than a calendar year, the claim amount has

to be EUR 400. It will be possible to file the 8th Directive refund claim by September 30 of the following year at the latest (up to now the 8th Directive refund claims have to be filed by 30 June of the following year at the latest).

The Member State of refund has to decide on the claim within four months. This period can be extended if additional information is required. At least within eight months the Member State of refund has to decide on the claim. If the Member State of refund does not decide in this timescale or does not make the repayment, the claimant will get interest on the claimed amount. In Austria, a two per cent surcharge for late repayment will become due.

The procedure for VAT refunds by taxable persons from outside the EU will not be changed in Austria.

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Indirect Taxes

Insurance premium tax in connection with group companies

When the parent company of a group closes an insurance contract regarding its affiliates, questions in connection with insurance premium tax (IPT) and fire brigade tax (FBT) may arise.

Previously, IPT liability depends on the domicile of the insurer. If the insurer is domiciled inside the EEA, IPT liability in Austria arises when the entity to which the insurance contract applies is located in Austria (e.g. in connection with liability insurances). For cases regarding insurance contracts with insurers based outside the EEA, IPT liability in Austria occurs when the policy holder or the object covered by the insurance contract is located in Austria.

Due to a modification of the IPT Act, IPT liability in Austria will in future not depend on the domicile of the insurer. Thus, insurance premiums allocated to entities located in Austria are subject to

IPT regardless of the location of insurer. The modification is still in draft. We will inform you when it comes into effect.

Generally the policy holder, i.e. the parent company of a group with respect to risks concerning its affiliates, is liable for IPT. When the risks of affiliates located in different countries are covered in one single insurance policy, the insurance premium has to be split appropriately between the affiliates to calculate the particular amount subject to IPT. The split can be based on the ratio of the turnovers, the earnings etc.

Even though the policy holder carries the IPT liability, IPT has to be paid

by the insurer on behalf of the policy holder. If the insurer is based in the EEA outside Austria, he has to appoint a tax representative. If the insurer is not based in the EEA nor has a representative in Austria, the policy holder has to pay the IPT. Furthermore, the policy holder can be held liable if the insurer does not pay the IPT accordingly.

Insurance premiums are also subject to FBT in Austria, if the insurance premium is partly allocated to risks possibly covered by fire insurance.

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New VAT treatment of the sale of telephone calling cards as of 1 January 2010

The Austrian Ministry of Finance will introduce a new VAT treatment on the sale of calling cards from 1 January 2010.

With effect from 1 January 2010, the respective administrative guideline issued by the Austrian Ministry of Finance will be applied. Initially it was planned that this administrative guideline which was released in December 2008 would have applied as from 1 January 2009 onward. Due to the necessary administrative changes which have to be implemented by telecom providers and distributors (e.g. adapted invoicing systems) the implementation was deferred to the beginning of 2010.

Currently, the sale of calling cards from network providers to distributors and from distributors to end-users is usually treated as a chain supply of services (in practice as a down-payment for telecommunication services). The Aus-

trian network provider issues an invoice including VAT to the Austrian distributor and the distributor issues its invoice in its own name to Austrian end-users including VAT.

From 1 January 2010, the telecommunication service will be seen as being supplied directly from the network provider to the end-user.

The passing on of the calling cards via distributors (e.g. tobacconists, etc) to end-users is not taxable as the telecom provider renders a telecommunication service directly to the end-user. The margin of the distributor is to be seen as the consideration for a taxable intermediary service rendered by the distributor to the telecom provider.

The intermediary service is not exempt and its place of supply is regarded as the place where the recipient of the services has his legal seat or a fixed establishment receiving the service.

The new VAT treatment shall apply on both single-purpose cards (calling cards) as well as on multifunctional cards.

Telecom providers as well as distributors have to make sure that they have implemented the changes as of 1 January 2010.

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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	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 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%		
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 EUR 4,020

Employer's share	up to 23.4%	Payroll related taxes	approx. 8.0%
Employee's share	up to 18.2%		

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.		Stamp duties – Loan agreements	0.8%
		Rent agreements	1.0%

Other taxes

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