Austria

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General

1. What are recent tax developments in your country which are relevant for M&A deals?

From 1st of January 2016 onwards, whenever assets (including participations) are transferred from Austria to a foreign country in course of a M&A transaction and Austria consequently loses its taxation right regarding the intrinsic hidden reserves, these hidden reserves are subject to taxation, regardless of a realisation act (i.e. sale).

Nevertheless, it is possible to pay, on application, the tax by installments, if the assets are transferred into an EU-Member state or an EEA-Member state which has signed a comprehensive administrative assistance agreement with Austria.

In respect to fixed assets, the installments are paid over a period of seven years. In respect to current assets, the installments are paid over a period of two years.

2. What is the general approach of your jurisdiction regarding the implementation of OECD BEPS actions (action Plan 6 specifically) and, if applicable, the amendments to the EU Parent-Subsidiary Directive?

Austria has already proactively implemented some changes to the Austrian tax law as a response to the BEPS discussion i.e. predominately provisions to (i) fight hybrid mismatches (action 2), (ii) to limit base erosion via interest deductions and other financial payments (action 4) and (iii) to implement a country-by-country reporting standard (action 5). In addition, actions against the artificial avoidance of a permanent establishment (action 7) were taken in respect to commissionaire agreements before the BEPS discussion started.

To prevent the abuse of tax treaties (action 6), the Austrian tax authorities apply a substance over form approach requiring that the entity claiming benefits must be set up based on economic reasons, fulfill certain commercial functions and have a minimum substance in respect to people and office space.

With a view to the EU Parent-Subsidiary Directive, please note that the Austrian tax law provides, in respect to incoming dividends, for a switch over (from the exemption method to the credit method) in certain cases where abuse of law is assumed. This is the case, if the foreign distributing company derives mainly passive income (i.e. interest, royalties, rental and lease income from movable assets) and is subject to low taxation (effective tax rate does not exceed 15%).

As of 1 January 2011 a provision was implemented that dividends which would be exempt under the general provisions are nevertheless subject to taxation if they are tax deductible at the level of the distributing entity. This provision was implemented to combat the abusive use of hybrid debt capital instruments which are deemed as debt in the foreign state and as equity in Austria.

3. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

a. Share deal

Within a share deal generally all tax attributes including tax loss carry forwards are maintained while they are generally disappear in course of an asset deal.

b. Asset deal

The main difference from a financial and tax perspective is that an asset deal my lead to a step up in book values and thus to higher depreciation. Although a higher depreciation might be seen favorable from a tax perspective it would reduce the potential for dividend payments and thus might lead to a derogation of the ability to service the acquisition debt (thus reducing the possible leverage).

Buy-side

4. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Generally the book values of the assets in the transferred company are not affected by the transfer. However, it might be that following the transfer the company gets a new commercial perspective either by a change of strategy, additional group support or synergy effects within the group of its new shareholder(s). In such a case, the depreciation policy might be revised and as a consequence past impairments might be recaptured. However, please note that such revisions would be taxable. If only the terms of useful life of the assets are extended this would not lead to an immediate step up of book values but would have, due to the extended remaining useful life, a similar effect.

Also, in course of a subsequent reorganisation it might be possible to step up the book values for accounting purposes, tax book values would however remain at the same level.

5. What are the particular rules of depreciation of goodwill in your country?

Goodwill can only be booked if acquired in an asset deal. The useful life is invariably 15 years (with exceptions for professional service firms). A write-down or write-off due to an impairment test would however result into an immediate tax deduction. In case of shares acquisition, cost can only be utilised by way of a write-down under certain conditions or in course of liquidation.

6. Are there any limitations to the deductibility of interest on borrowings?

Austrian tax law neither provides for strict debt equity ratios nor an earning stripping regime. However, if borrowings are from related parties the loan might be re-characterised to equity which leads to non-tax deductible interest expenses, if the interest is not at arm's length. Additionally, the following restrictions apply:

a. Restriction on interest deduction if interest income is subject to low taxation

Interest is not tax deductible, if it is low taxed in the hands of the beneficial recipient. This is the case under the following circumstances:

- The recipient of such payments is a direct or indirect affiliated corporation or is under a controlling influence of the same shareholder; and
- The interest is in the hands of the receiving corporation
- not taxable due to a personal or objective tax exemption
- subject to a nominal tax rate of under 10 %
- subject to an effective tax rate of under 10 % due to a specific tax allowance or refund

The deductibility is however not affected if the effective tax rate is reduced to below 10 % due to tax loss carry forwards or the application of tax grouping.

b. Restriction on interest deduction for inter-company share-deals

If shares are acquired from an affiliate, any related interest expense is not tax deductible.

From a substance over form perspective application of the non-deductibility rule is extended also to cases where the acquisition is equity financed with funds originating from debt financed capital increases.

7. What are usual strategies to push-down the debt on acquisitions?

If the buying corporation acquires a majority interest in an Austrian target company, a tax group may be set up. Group taxation offers the advantage of offsetting profits and losses within the tax group and thus resulting economically in a debt push down.

A (limited) debt push down can be achieved by debt financed dividend distributions made by the target.

The merger route generally is not a viable alternative due to various restrictions in corporate law securing the interest of debtors.

8. Are losses of the target company(ies) available after an acquisition is made?

Tax loss carry forwards cannot be transferred in the course of an asset deal.

In the course of a share deal, tax loss carry forwards generally remain available at the level of the target and can be offset against future profits.

However such tax loss carry forwards perish, if the target company incurs a substantial change (ie of more than 75%) in the economic and organisational structure within a short period of time before or after the change in ownership. Exempted are only changes in the course of restructurings with the aim to retain employment.

Careful tax planning is required also in subsequent reorganisations (ie merger, spin-off, etc) as these can also lead to tax loss carry forwards being forfeited.

9. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc.)?

a. Share deal

For the time being there is no (share) transfer tax or stamp duty on a share deal in Austria. The EU, however, intends to introduce a financial transaction tax, in which case Austria would levy such tax.

From 2016 onwards real estate transfer tax is triggered, if at least 95 % of the shares in a company owning real estate located in Austria are acquired by a single shareholder or by two or more companies of the same tax group.

Share deals are exempt from VAT.

b. Asset deal

The renewal of certain agreements (e.g. rental agreements with landlords) and the assignment of receivables or other rights which are affected in course of an asset-deal may be subject to stamp duty. Precondition is that a document within the meaning of the Austrian Stamp Duty Act is executed.

The transfer of Austrian located real estate or similar rights generally attracts real estate transfer tax and registration fees.

In the course of an asset deal each single asset has to be evaluated separately for VAT purposes. Therefore the VAT is based on the purchase price plus transferred liabilities, less tax-exempt (e.g. accounts receivables, transfer of a partnership interest and of shares in a corporation) or non-taxable items (e.g. passenger cars).

10. Are there any restrictions on the deductibility of acquisition costs?

Acquisition costs should generally be capitalised to the purchased asset, in a share deal scenario as well as in an asset deal scenario. Only costs which were incurred prior to the purchase decision, relating rather to the decision process than to the actual acquisition process are tax deductible. Typical expenses in this respect are due diligence costs.

11. Can VAT (if applicable) be recovered on acquisition costs?

VAT incurred in course of an asset deal should generally be recoverable.

In context of a share deal it has to be observed that generally only entrepreneurs are eligible for input VAT. Thus, if a mere holding company is doing a share deal VAT recovery would generally be not possible.

12. Are there any particular issues to consider in the acquisition by foreign companies? *(for example non-resident taxation rules/substance rules and tax efficient exit routes)*

As the most efficient structure for a debt push down is the creation of a tax group between the acquirer and the target company, an Austrian tax resident acquisition vehicle might be advantageous. On the other hand it has to be noted that under the condition that treaty protection is available the sale of an Austrian entity by a foreign holding company does not trigger Austrian capital gains taxation which would be the case in a domestic scenario.

13. Can the group reorganise after the acquisition in a tax neutral environment through mergers or a tax group?

Tax neutral reorganisations can only be carried out under certain conditions. The predominant ones are that the transferred assets constitute a commercial business in the sense that the assets are not just held for investment purposes and that the transferred assets have a positive fair market value. It has to be observed that tax losses might be jeopardised by such subsequent reorganisation.

14. Is there any particular issue to consider in case of companies of which main assets are real estate?

There are no special provisions for real estate companies. From 2016 onwards RETT is triggered if at least 95% of the shares in any company owning Austrian real estate are acquired by a single shareholder or by two or more companies being part of the same tax group.

Sell-side

15. How are capital gains taxed in your country? Is there any participation exemption regime available?

a. Share deal

For qualified international participations (> 10%, holding period > 1 year, comparable to a corporation) there is an election model allowing a corporate taxpayer to choose between a tax neutral and a tax effective status of the participation.

- Tax effective status: Any capital losses or write downs reduce the company's taxable income. However, it should be spread over seven years. On the other hand capital gains or appreciations increase the company's taxable income immediately.
- Tax neutral status: In that case any expenses resulting from capital losses or write downs are not tax deductible. Correspondingly any income resulting from capital gains or appreciations are not taxable. An exceptional rule is available for actual and final liquidation losses, which can be utilised for tax purposes over seven years under certain conditions.

The election concerning the tax neutral or tax effective treatment of an international participation must be exercised in the year participation is acquired and can be excised differently for all international participation. These are one-time options and bind the holding company with regards to this specific investment.

If the seller is an Austrian resident individual the capital gain from the sale of shares is invariably subject to a flat tax rate of 27.5%.

b. Asset deal

If the seller is an Austrian corporation any capital gain is subject to 25% corporate income tax. If the seller is an Austrian individual resident, the capital gain is subject to the progressive standard income tax rate. Please note that a reduced rate might be available if the seller had run the business for more than seven years and retires at the time the business is sold. If the person does not retire it would be eligible to spread the taxation of the capital gain over three years.

16. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Rollover relief is not available for corporations. Special provisions apply for private foundations where rollover relief in available.

17. Are there any local substance requirements for holding/finance companies?

The Austrian tax law generally applies a substance over form approach. Consequently any transaction is attributed rather to the beneficial than to the legal owner. Thus generally a look through approach is applied to transactions involving strawmen or back-to-back constructions. To be considered as beneficial owner the entity generally needs to have the resources and the capacity to control the investment and the related risks.

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