AUSTRIA

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INTERNATIONAL DEVELOPMENTS

1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

Exit taxation

From 1 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.

Real estate transfer tax (RETT)

RETT is levied on all real estate transactions and furthermore on share deals in real estate companies:

- The applicable tax rate in the course of asset deals depends on the transaction. In case of a free-of-charge transaction a progressive tax rate applies (0.5%–3.5%), while for transactions in connection with a valuable consideration a flat tax rate of 3.5% applies.
- Since 2016 the regulations concerning share-deals have been amended. If at least 95% of the shares in a company (= corporation or partnership) that owns Austrian real estate are acquired by a single shareholder or by group members of a CIT group, RETT is triggered in the amount of 0.5%. Apart from that RETT is triggered in the amount of 0.5% if the real estate is owned by a partnership and a 95% change of ownership occurs within five years.

If real estate is transferred in the course of a reorganisation under the Austrian Re-organisation Tax Act (e.g. merger), RETT is at a tax rate of 0.5%.

2. WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVES?

With regards to certain BEPS actions the following legislative changes have already been made:

- **Action 2 – Hybrid mismatches:** In January 2011, Austria enacted a provision to avoid double non-taxation with regard to hybrid instruments. Dividends distributed by a foreign subsidiary to the Austrian shareholder are not tax exempt under Austrian law, if they are a tax deductible expense at the level of the subsidiary.
- **Action 3 – CFC rules:** Austria has no CFC rules, however the international participation exemption regime, applicable for qualified international participations (> 10% participation, holding period > 1 year), is replaced by a credit method regime, whereby underlying foreign corporation taxes are credited against Austrian corporation tax, if the foreign subsidiary generates mainly passive income (interest, royalties, rental and lease income, capital gains from the disposal of shareholdings) (passive business focus), and the effective tax rate of the foreign subsidiary is 15% or lower. Apart from that, a switch-over between regimes is also applicable for international portfolio participations (≤ 10%) if the foreign distributing company is subject to low taxation in its country of residence, irrespective of the type of income. A low tax is defined as an effective tax rate of not more than 15%.

- **Action 4 - Limitation for interest deduction:** As of 1 March 2014 interest payments and license fees paid by an Austrian entity to a low taxed foreign affiliated corporation are not tax deductible. Although this regulation should enable Austria to implement the interest limitation rule at a later time, it cannot be excluded that the interest limitation rule will be implemented earlier.
- **Action 5 - Transparency and substance; Action 6 - Treaty abuse:** Under the Austrian corporate tax law a substance over form approach is applied. Thus, entities are ignored for Austrian tax purposes (look through approach) where they do not meet certain substance requirements (i.e. office space rented or owned in own name, employment of people, management carried out at the seat of the company).

  Recently the double taxation treaty with Liechtenstein, effective since 1 January 2017, has been adapted in order to avoid treaty abuse (BEPS action 6).
- **Action 7 - Preventing Permanent Establishment (PE) status:** To counter downsising of sales structures, the Austrian tax administration views that a commissionaire constitutes a PE for its principal.
- **Action 8 - 10 - Aligning TP to value creation:** We expect that the Austrian Transfer Pricing Guidelines issued by the Austrian Ministry of Finance will be amended to reflect the BEPS Actions 8-10. Although respective changes have not yet been made, we observe that tax authorities already apply a BEPS compliant approach in the course of tax audits.
- **Action 12 - Mandatory disclosures:** In 2011, horisontal monitoring was implemented on a voluntary basis. Mandatory disclosures are demanded by some politicians, but are not yet implemented.
- **Action 13 – CbCR:** On 1 August 2016 the Austrian Transfer Pricing Documentation Act was officially published in the Federal Law Gasette. Therewith it became official that the three-tiered standardised approach to transfer pricing documentation, including Master File, Local File and CbCR, is obligatory in Austria. The requirements for multinational groups will apply to fiscal years starting as of 1 January 2016 if certain thresholds are exceeded.
- **Action 14 - Dispute Resolution:** Austria is a member of the EU Arbitration Convention. In relation to non EU countries Austria utilises the respective agreements for mutual administrative assistance to solve qualification or transfer pricing conflicts.
- **Action 15 - Multilateral Instrument:** Austria has submitted its position to the OECD regarding BEPS action 15 in January 2017 and will soon start to negotiate with affected States.

With regards to the PSD there have not been any legal changes within the last year. However in order to conduct a relief at source in the course of outbound dividend distributions since 2016 the Austrian Tax Authorities require that the distributing Austrian subsidiary submits the form SS-EUMT (certificate of residence, activity certificate) to the responsible tax office proactively, as proof that all requirements are met by the dividend receiving parent company.

GENERAL

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 are basically maintained. The following tax advantages and tax disadvantages have to be kept in mind:

Tax advantages:

- Tax loss carry forwards available at the level of the target can be utilised in the future, provided that the "Mantelkauf" provision (purchase of a corporate shell) is not applicable. This is the case, if the company is considered to have lost its identity, which means a cumulative substantial change in the economic structure, the organisational structure and in the ownership of the company. The limitation does not apply if those changes take place in the course of a reorganisation which is intended to preserve jobs.
- In general, interest resulting from a share deal are deductible. In case the seller was an affiliate company, the interest is not tax deductible. Furthermore interest are not tax deductible if the acquisition was financed through an intra-group loan and the recipient of the interest is subject to low taxation.
- The transfer of a shareholding is tax-exempt in terms of Austrian VAT.
- Depending on the structuring RETT could be avoided, as RETT is only due if at least 95% of the shares in a company that owns Austrian real estate are acquired by a single shareholder or by companies which are part of a CIT group.
- No stamp duty is triggered (if however due to "change-of-control-clauses" new contracts have to be concluded, any stamp duty aspects have to be considered).

Tax disadvantages:

- The assets book value cannot be stepped up.
- Goodwill amortisation is not available.

B. Asset deal

In an asset deal all or part of the assets of an enterprise are acquired, thus all assets and contracts must be transferred individually. The following tax advantages and tax disadvantages have to be kept in mind:

Tax advantages:

- If a business is acquired in the course of an asset deal the acquirer may receive a step-up in the assets' book value and therefore higher depreciation.
- Any goodwill can be depreciated over a period of 15 years.
- Interests resulting from an asset deal are tax deductible.

Tax disadvantages:

- 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).
- Tax loss carry forwards cannot be transferred to the purchaser.
- The purchase of assets of a business attracts real estate transfer tax (RETT) and registration fees in case real estate is transferred.
- The renewal of certain agreements (i.e. lease agreements) and the assignment of receivables and other rights to the new owner may lead to stamp duties, provided that a document within the meaning of the Austrian Stamp Duty Act is executed.

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?

In general 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. The tax book values would however remain at the same level.

5. WHAT ARE THE PARTICULAR RULES OF AMORTISATION OF GOODWILL IN YOUR COUNTRY?

Goodwill can only be recognised if acquired via 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 in an immediate tax deduction.

In case of a share deal, no goodwill amortisation is allowed but a tax deduction can be achieved by way of a write-down under certain conditions or in course of liquidation.

6. WHAT ARE THE LIMITATIONS TO THE DEDUCTIBILITY OF INTEREST ON BORROWINGS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

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

As of March 1, 2014 Austria has implemented restrictions on the tax deductibility of interest payments at the level of an Austrian company if the following criteria are fulfilled:

- interest payments are made to an Austrian corporation or to a comparable foreign corporation; and
- the recipient of such payments is a direct or indirect affiliated corporation or is under the controlling influence of the same shareholder; and
- the interest payment 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 for interest and licence payments,
  - a tax refund to the receiving entity or the shareholders of the receiving entity is granted, resulting in an effective tax burden of below 10%.

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. If the receiving corporation is not the beneficial owner, the tax regime applied to the beneficial owner is relevant. In this way, back-to-back financing is covered as well. In case of a partnership as receiving entity, the tax rate of the corporate shareholders behind the partnership determines the level of taxation.

With regards to BEPS Action 4, it is expected that an appropriate interest limitation rule will be implemented in line with the Anti-Tax Avoidance Directive. Although the existing regulation should enable Austria to implement the interest limitation rule at a later time, it cannot be excluded that the interest limitation rule will be implemented earlier.

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 THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

Recently a draft concerning the amendment of the Medium Sised Financing Company Law (Mittelstandsfinan sierungsgesellschaften-Gesets, MiFiGG 2017) has been disclosed. Medium sised financing companies could be temporarily used to bundle equity capital from different investors in order to invest target-oriented in companies in the early phase or growth phase. Thus the access to equity capital should be easier such companies. The investment in the target companies is limited up to a certain amount and with the sise of the equity holding.

In this context the following incentives would be available (however the legislative process remains to be seen):

- dividends paid by the medium sised financing companies to private investors are tax exempt up to TEUR 15
- with regards to investments in corporations dividend distributions or any capital gains/losses as well as depreciations or appreciations are tax exempt
- with regards to investments in partnerships any capital gains/losses as well as depreciations or appreciations are tax exempt

9. 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 (i.e. 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 (i.e. merger, spin-off, etc.) as these can also make tax loss carry forwards disappear.

10. ARE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?

Stamp duties are levied on numerous legal transactions, provided that a document within the meaning of the Austrian Stamp Duty Act is executed. Stamp duties are payable after being assessed by the tax authorities, in certain cases after self-assessment. The following written agreements – inter alia – attract stamp duty:

- lease and rental agreements (1%),
- assignments of rights, e.g. receivables (0.8%),
- suretyships (1%).

The limitation period starts with expiration of the year in which the tax obligation arose, but may be extended for one year, if an official act for the enforcement of the tax obligations has occurred during this 5-year period. The limitation period might be extended further, although the maximum limitation period amounts to 10 years.

11. 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 CIT group. Apart from that real estate transfer tax is triggered if the real estate is owned by a partnership and a 95% change of ownership occurs within five years.
- 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 the 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 rights in Austria 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).

12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX 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. Recently the Austrian Higher Administrative Court determined in a ruling that buy-side due diligence costs could be treated as part of the acquisition costs of the participation (instead of immediate operating expenses) even if the acquisition of the shares is only intended (e.g. in form of a letter of intent) and the final decision has been concluded after the due diligence process. Only any measures for the preparation of a total indefinite and as the case may be possible future acquisition decision (e.g. market study or analysis concerning the selection out of different alternatives) could qualify as immediate deductible operating expenses.

13. CAN VAT (IF APPLICABLE) BE RECOVERED ON ACQUISITION COSTS?

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

Due to the fact that share deals are basically tax exempt for VAT purposes, the question of input VAT deduction does not arise.

14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION BY FOREIGN COMPANIES?

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.

15. 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. Depending on the reorganisation measure (e.g. merger, spin-off, contribution in kind, etc.) the respective conditions for the application of the Austrian Restructuring Tax Act need to be fulfilled. 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.

16. IS THERE ANY PARTICULAR ISSUE TO CONSIDER IN CASE OF TARGET COMPANIES OF WHICH MAIN ASSETS ARE REAL ESTATE?

There are no special provisions for real estate companies.

If at least 95% of the shares in a company (= corporation or partnership) that owns Austrian real estate are acquired by a single shareholder or by group members of a CIT group, real estate transfer tax is triggered. Apart from that real estate transfer tax is triggered in the amount of 0.5% if the real estate is owned by a partnership and a 95% change of ownership occurs within five years.

17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?

Austria has implemented a CIT group taxation regime for corporations. A precondition for group membership is a direct or indirect majority shareholding and the majority of the voting rights in a corporation. Beside domestic corporations, also first-tier subsidiaries resident in an EU member state or in a state that has entered into an extensive administrative assistance agreement with Austria can be included in a tax group if certain conditions are fulfilled. The group must exist for at least three years.

Under the group taxation regime profits or losses of group members are attributed to the group parent for corporate income tax purposes. For foreign group members, only losses (no profits) can temporarily be offset at the level of to the group parent according to the percentage of the stakeholding, but have to be recaptured under certain circumstances in subsequent periods (e.g. foreign tax losses are or may be offset against profits abroad in subsequent years).

SELL-SIDE

18. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY?

A) Share deal

For qualified international participations (> 10%, holding period > 1 year, comparable to a domestic corporation) there is an election model allowing a corporate taxpayer to choose between a tax effective and a tax neutral 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 the participation is acquired and can be exercised differently for all international participations. 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. In case the seller is an Austrian individual resident, the capital gain is generally 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.

19. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES ARE REINVESTED?

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

20. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING 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 structures. 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 (i.e. rented office space, staff).

21. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?

Reorganisation measures under the Austrian Reorganisation Tax Act can be basically carried out tax neutral with retroactive effect of up to 9 month for CIT purposes. Reorganisation measures are also not taxable for VAT purposes, but retroactivity does not apply for VAT purposes. Therefore appropriate compliance aspects need to be considered.

In case the transferring entity has concluded contracts that include so called "change-of-ownership-clause" any tax consequences would need to be analysed (stamp duty aspects; for VAT purposes especially with regards to renting agreements, as such a regulation could as the case may be trigger a input VAT correction).

Any reorganisation measures in connection with CIT groups have to be analysed carefully in order to avoid any negative tax consequences (e.g. concerning the seamless continuation of a tax group, endangering tax loss carry forwards, etc.).

MANAGEMENT INCENTIVES

22. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES?

For employee participation programmes (e.g. granting of shares free of charge or shares offered at a reduced price, granting options for the purchase of shares at a reduced price) tax incentives in the form of a tax exemption for income tax purposes with a limited amount if certain conditions are fulfilled. In order to benefit from that tax incentive the shares must be granted to all employees or a certain group of employees (whether managers qualify as such a group of employees needs to be analysed on a case by case basis) and the respective employees must hold the shares for at least 5 years (holding period).

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