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?

The Austrian draft Tax Amendment Act 2018 (Jahressteuergesetz 2018) issued by the Ministry of Finance on 9 April 2018 provides e.g. for the following amendments:

- Implementation of a CFC-rule (based on EU-ATAD) with effect for financial years starting after 30 September 2018
- Expansion of Advance Ruling to the following topics: “International Tax”, “Abuse” (with effect as of 1 January 2019) and VAT (with effect as of 1 January 2020)
- With effect from 1 January 2019, the time frame for the payment of instalments with regard to the Austrian exit tax (generally available for exits to other EU-member states) shall be reduced from seven to five years

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?

Austria has conducted the following measures with regard to the implementation of BEPS actions:

Action 2 – hybrid mismatch: Dividend income or other payments obtained by Austrian resident corporations from participations or other forms of investments in a foreign corporation or subsidiary are disqualified from Austrian CIT exemption insofar as these payments are tax-deductible at the level of the foreign corporation. This could be especially the case where investments in a foreign company are characterised from an Austrian perspective as equity and from the foreign tax law perspective as debt.

Action 3 – Controlled Foreign Company Rules (CFC): Austria currently has no CFC rules (a draft of new CFC legislation for fiscal years starting after 30 September 2018 was recently published), 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 – Interest Deductions: With effect from 1 March 2014 Austria implemented a targeted interest (and royalty) limitation rule (not limited to the acquisition of participations) which is applicable if the following conditions are fulfilled:

- The recipient is a corporation or a comparable foreign corporation
- The recipient is a direct or indirect member of the same group or controlled directly or indirectly by the same shareholder
- The interest (or royalty) payments are not subject to tax at the level of the receiving entity owing to a personal or objective tax exemption, or if the nominal or effective tax rate (tax refunds are taken into account) is less than 10 per cent

This rule must be applied to the beneficial owner of the interest; therefore, any interposed entities are disregarded and the tax regime of the beneficial owner needs to be checked. In case of transparent entities under Austrian tax law (eg partnerships, investment funds, etc) the rule applies to the corporate entity (partner, investor) behind the transparent entity. As this targeted rule is considered by the Austrian ministry of finance as equally effective as the interest limitation rule as stipulated in Art 4 of the EU-Anti Tax Avoidance Directive, the obligation to implement the interest limitation rule by 1 January 2019 could be deferred (until 1 January 2014 at the latest), however, so far no consent of the EU commission on the equal effectiveness has been granted.

Action 5 – Harmful tax practices; 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).

Action 7 – Permanent Establishments: In accordance with the MLI and the artificial avoidance of permanent establishment status, Austria applies Option A according to Art 13 (1) MLI. Preparatory or auxiliary activities are regarded as non-PE-establishing activities, irrespective of the provisions of a covered tax treaty and the definition of the term permanent establishment in those treaties. This implies that the listing of PE-excluding activities in the respective tax treaties have to be reviewed in the light of the actual characteristic as a preparatory or auxiliary character of the activity of the company's business model. Despite the listing of the PE-excluding activities, a "core business activity" will constitute a PE.

Action 8 – 10 and 13 Transfer Pricing: On 1 August 2016 the Austrian Transfer Pricing Documentation Law (TPDL) was officially published in Austria. Based on the TPDL, transfer pricing documentation must be prepared for fiscal years starting on or after 1 January 2016 Transfer Pricing documentation requirements for prior fiscal years as well as for local constituent entities not covered by the TPDL are based on the Austrian Federal Fiscal Code (FCC), taking into account the OECD Transfer Pricing Guidelines.

With the TPDL, the three-tiered standardised approach to transfer pricing documentation, as proposed by the OECD, including master file (MF), local file (LF) and country-by-country (CbC) reporting, became obligatory in Austria:

- MNE groups must prepare a CbC report containing information on the worldwide distribution of their revenue, taxes, etc., if the consolidated group turnover amounted to EUR 750 million or more in the previous fiscal year
- Austrian constituent entities of a multinational company must prepare a MF (report about the whole company's group and its worldwide economic activity and its transfer pricing policy) and LF (report about the business transactions in the Austrian company) if their turnover exceeded EUR 50 million in each of the two previous fiscal years

The Austrian tax law does not provide for specific rules on the determination of transfer prices. In general, transfer pricing issues are governed by the provisions concerning hidden profit distributions, hidden contributions and the cross-border transfer of assets. In practice, the tax authorities generally refer to the OECD Transfer Pricing Guidelines as the main basis when examining the accuracy of transfer prices. In October 2010 the Austrian Ministry of Finance published its own Transfer Pricing Guidelines which do not have a legally binding force but are of significant practical relevance.

Binding rulings are available in transfer pricing issues (costs amounting between EUR 1,500 and 20,000 depending on the turnover of the requesting taxpayer).

Action 14 – Dispute Resolution: The EU Arbitration Convention – to which Austria is a member - establishes a procedure to resolve disputes where double taxation occurs between enterprises of different Member States. The Convention provides for the elimination of double taxation by an agreement between the contracting states including, if necessary, by reference to the opinion of an independent advisory body.

Action 15 – Multilateral instrument: Austria has signed the Multilateral Instrument (MLI – "Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting). From an Austrian constitution perspective, the MLI constitutes an intergovernmental contract, comparable to double tax treaties, which has to be transformed into domestic law. The MLI provisions regarding the alterations of the double tax treaties will enter into force as of 1 July 2018.

GENERAL

3. WHAT ARE THE MAIN DIFFERENCES BETWEEN AN ACQUISITION OF SHARES AND AN ASSET DEAL IN YOUR COUNTRY?

In a share deal situation the shares of a company are acquired and the ownership is transferred by way of universal succession. The main characteristics of a share deal are summarised as follows:

- Primarily contractual liabilities. Under certain conditions a liability based on Art 1409 Austrian civil code (ABGB) is possible
- No step-up of asset book values
- No goodwill capitalisation and depreciation
- Tax loss carry forwards are maintained at the level of the target, if the provision regarding the purchase of corporate shells (*Mantelkauf*) is not applicable. Hence the tax loss carry forwards are forfeited if the following three criteria are met cumulatively:
  - Substantial change in the economic structure
  - Substantial change in the organisational structure
  - Substantial change in the ownership of the company
- The deduction of interest resulting from the acquisition of shares is generally possible. However, interest cannot be deducted if the seller of the shares is an affiliated company or the acquisition of the shares was financed by an affiliated company and the respective company is subject to low taxation
- The sale of shares is tax-exempt under Austrian VAT legislation. Consequently, input VAT for expenses related to the sale of the shares (e.g. consulting costs) cannot be deducted
- Real estate transfer tax is triggered if 95% or more of the shares in a company which owns real estate in Austria are acquired by a single shareholder or by companies which are members of a tax group pursuant to Sec 9 CIT. Therefore, real estate transfer tax can be avoided through careful structuring. However, no registration duty is triggered due to the acquisition of shares
- In general, no stamp duties are triggered in consequence of a share deal

Asset deal

In the case of an asset deal all or specific assets of a company are acquired and the ownership of the assets is transferred through singular succession. The main characteristics of an asset deal are summarised as follows:

- Extensive statutory liabilities e.g. Art 1409 Austrian general civil act (ABGB), Art 38 and 39 Austrian Commercial Code (UGB), Art 6 Labour contract law (AVRAG), § 14 Federal Fiscal Code (BAO), § 67 (4) Austrian General Social Security Act (ASVG) and further contractual liabilities
- The book value of the acquired assets is stepped-up subsequently resulting in a higher depreciation. However, it is to be noted that a higher depreciation may result in a "cash-trap" as the net profit is reduced, which subsequently lowers the level of dividend payments which may be made

- Goodwill can be capitalised and depreciated over 15 years
- Interest resulting from the acquisition of assets can be deducted
- Tax loss carry forwards are not transferred and remain at the level of the seller
- The sale of assets is generally subject to Austrian VAT, although there may be possible tax exemptions depending on the type of the acquired assets. In particular the sale of real estate is tax exempt; however, it is possible to opt to apply VAT to such sales in certain circumstances. Furthermore, input VAT on the purchase of the assets as well as transactions costs may be deducted, if the underlying transaction is not tax-exempt
- The acquisition of real estate in an asset deal triggers real estate transfer tax and registration duty
- Stamp duties for the assignment of receivables to the new owner as well as the extension or amendment of certain agreements (e.g. lease agreements) may trigger stamp duties

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?

The step-up of the value of the tangible and intangible assets is only possible by way of an asset deal.

In the case of share deals, a step-up of the book value for accounting purposes can only be achieved through subsequent reorganisations. However, the tax book value is not stepped-up and remains the same. Furthermore, after the conclusion of a transaction it may be possible to revise the applied depreciation policy and to reverse past write-downs, which are, however, taxable. Alternatively the depreciation rate may be extended, which leads to a longer useful life of the assets.

5. WHAT ARE THE PARTICULAR RULES OF AMORTIZATION OF GOODWILL AND SIMILAR INTANGIBLE ASSETS IN YOUR COUNTRY?

Only a derivative goodwill resulting from an asset deal can be capitalised and depreciated. The Austrian tax law prescribes a fixed amortisation period of 15 years for goodwill. It is, however, possible to perform write-downs or a write-off of the goodwill with an immediate tax effect on the basis of an impairment test.

In a share deal no goodwill can be capitalised and depreciated. However, tax deductions can be achieved through write-downs due to an impairment test with certain limitations or as a result of a liquidation.

6. WHAT ARE THE LIMITATIONS ON THE DEDUCTIBILITY OF INTEREST EXPENSE? ARE THERE SPECIAL INTEREST LIMITATIONS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

The Austrian corporate income tax law does not contain thin-capitalisation rules. Based on Austrian case law, however, a re-characterisation of intercompany loans to equity is possible under very special conditions (e.g. loan agreement not in line with arm's length criteria, inadequate equity ratio). Interest payments for such re-characterised loans, as well as non-arm's length interest payments are not tax deductible. Furthermore, the following restrictions on interest deduction need to be considered:

- **No interest deduction in case of intercompany share-deals**

Interest payments for (intercompany and external) debt are not tax deductible if the debt was taken out for the acquisition of a participation that was previously owned by a group member or by a shareholder with controlling influence. This rule also applies for capital increases or equity contributions.

No interest deduction in case of low-taxed related party recipient

With effect from 1 March 2014 Austria implemented a targeted interest (and royalty) limitation rule (not limited to the acquisition of participations) which is applicable if the following conditions are fulfilled:

- The recipient is a corporation or a comparable foreign corporation
- The recipient is a direct or indirect member of the same group or controlled directly or indirectly by the same shareholder
- The interest (or royalty) payments are not subject to tax at the level of the receiving entity owing to a personal or objective tax exemption, or if the nominal or effective tax rate (tax refunds are taken into account) is less than 10 per cent

This rule must be applied to the beneficial owner of the interest, therefore any interposed entities are disregarded and the tax regime of the beneficial owner needs to be checked. In the case of transparent entities under Austrian tax law (e.g. partnerships, investment funds, etc) the rule applies to the corporate entity (partner, investor) behind the transparent entity.

As this targeted rule is considered by the Austrian ministry of finance as equally effective as the interest limitation rule as stipulated in Art 4 of the EU-Anti Tax Avoidance Directive, the obligation to implement the interest limitation rule by 1 January 2019 could be deferred (until 1 January 2024 at the latest), however so far no consent of the EU commission on the equal effectiveness has been granted.

Limitations on interest deductions in the case of divided distributions

Interest for debt financed regular dividend distributions are generally tax deductible. No tax deduction is possible if the dividend distribution qualifies as a repayment of equity or in the case of deemed dividends.

7. WHAT ARE COMMON STRATEGIES TO PUSH-DOWN DEBT ON ACQUISITIONS?

Generally the Austrian corporate law provides for various restrictions regarding debt push-down securing the interest of debtors. In this respect it is crucial not to violate these obligatory corporate law principles by pushing-down debt (incurred by a parent company) to a subsidiary.

However, in order to push-down debt (economically), an Austrian tax group could be established (see question 17 for details). In a nutshell, the tax group allows the interest expenses from the debt financing of the holding company (group leader) to be offset against the positive income of the group member companies.

Furthermore, a (limited) debt push-down can be achieved by debt financed dividend distributions made by the target.

8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

The Austrian law provides for the establishment of a Mid-Sized Business Financing Company (MSBFC) for which certain tax advantages are granted. A MSBFC is a vehicle to pool equity capital from different investors in order to invest in companies in start-up or growth phase. In this context the following benefits arise:

- Profit distributions to private investors are tax free up to an amount of EUR 15,000 annually
- At the level of the MSBFC, income associated with finance activities as well as capital gains, capital losses and other value alterations of participations are exempted from CIT

It should be noted that certain requirements have to be met to establish a MSBFC. The Austrian tax law requires the legal form of an Austrian limited liability company (GmbH), stock company (AG) or comparable foreign legal entities, a scope of business restricted to financial activities (at least 75%) and investment activities (up to 25%) of the company's equity, an economically solid investment and associate risk diversification strategy and a shareholder structure of at least five shareholders with no shareholding exceeding 49%.

9. ARE LOSSES OF A TARGET COMPANY AVAILABLE AFTER AN ACQUISITION IS MADE? ARE THERE ANY RESTRICTIONS ON THE USE OF SUCH LOSSES?

In the case of share deals tax loss carry forwards are generally available and can be offset by the target against future profits (the general limitation applies whereby losses are only deductible up to 75% of the annual profit), provided that the Mantelkauf provision (purchase of corporate shell) does not apply. This provision applies if the identity of the target is lost in the course of the acquisition, which would be the case if the economic structure together with the organisational structure, as well as the ownership structure (against consideration) is substantially (i.e. more than 75%) changed. An exception to the rule exists, if the substantial changes are made in order to facilitate the financial recovery of the company and a substantial part of the workforce is thereby maintained. No transfer of tax loss carry forwards is possible in the case of asset deals.

Loss carry forwards can also be affected (lost) in the course of reorganisations (e.g., mergers, de-mergers, contributions) and therefore need to be considered early in the planning stage.

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 selected legal transactions that are concluded in written form (e.g. protocols, official documents, easements, lease and rental agreements, guarantee and assignment agreements). The rates vary between 0.8% and 2% of the underlying value of the transaction. In some cases the stamp duties are levied at flat amounts.

11. IS THERE ANY INDIRECT TAX ON TRANSFER OF SHARES (STAMP DUTY, TRANSFER TAX, ETC.)?

The Austrian tax law does not provide for transfer taxes or stamp duties on transfer of shares. Furthermore, the transfer of shares is exempt from VAT.

However, Real Estate Transfer Tax ("RETT") is triggered if at least 95% of all shares of a corporation owning Austrian immovable property are held by or are taken over by one shareholder or by members of an Austrian tax group. In addition shares held by trustees are attributed to the trustor or settlor of the trust. RETT is also triggered if 95% of shares of a partnership have been transferred to new partners within the last five years. In the case of a unification of shares, the tax base is always the tax value of the real estate and the tax rate amounts to 0.5%.

12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX DEDUCTIBILITY OF ACQUISITION COSTS?

Acquisition costs are capitalised to the purchased asset, in a share deal and in an asset deal. Shares cannot be depreciated on a regular basis, while assets can typically be depreciated over their useful life. In the case of impairments of participations the impairment amount generally has to be spread over seven years for tax purposes. No tax deductibility of impairments is possible e.g. for international participations where the taxpayer has not elected to opt-out of the participation exemption when the participation was acquired and for participations which are a member of an Austrian tax group. Impairments which are the result of dividend distributions cannot be utilised for tax purposes (i.e. no tax deductibility).

Auxiliary acquisition costs (e.g. due diligence expenses, advisory fees, commission) incurred after a general decision has been made to acquire a company (e.g. date of signing of LoI; the purchase decision does not need to be final) have to be capitalised on the asset and thereafter are treated for tax purposes as part of the asset.

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

In general input VAT incurred on acquisition costs may be deducted, if the buyer is entitled to deduct VAT (e.g. operative company).

However, where the shares or assets are acquired by a holding company, a distinction has to be drawn between non-operating holding companies and managing holding companies. In the case of a non-operating holding company, input VAT on the acquisition costs cannot be deducted, whereas input VAT may be deducted if the holding company is arranged as a managing holding company (*Geschäftsleitende Holding*).

Moreover, share deals are generally exempted from VAT and therefore input VAT associated with this kind of transaction may not be recovered. It should be noted that brokering services for share deals are also exempted from VAT.

14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION OF A DOMESTIC COMPANY BY A FOREIGN COMPANY?

Outbound dividends

- In general, dividends and other profit distributions paid to a resident corporation are subject to a withholding tax of 25%. Withholding tax is not levied on the condition that the direct or indirect shareholding of the resident corporation is at least 10%. In all other cases, the withholding tax is credited against the final tax liability of the shareholder or refunded in the course of the annual tax return.
- Having implemented the EC Parent-Subsidiary Directive into Austrian law, Sec. 94 (2) ITA provides for an exemption of outgoing dividends from withholding tax if (i) the EU parent company has a legal form listed in the Annex to the Directive (Annex II), (ii) the EU parent company owns at least 10% of the capital of the subsidiary and (iii) the shares have been held directly or directly (via a tax transparent partnership) for an uninterrupted period of one year. The exemption is not applicable in the case of tax avoidance and abuse of law or in the case of deemed dividend distributions. Generally, tax avoidance or abuse of law is not assumed if the EU parent company provides its Austrian subsidiary with a confirmation stating that it derives income from an active business, employs its own personnel and maintains its own business facilities. The Austrian Ministry of Finance provides for the special form “ZS-EUMT” to be used in this case.
- Beyond the scope of the EC Parent-Subsidiary Directive, relief from withholding tax on outbound dividends may be provided by applicable tax treaties. Generally speaking, reduction (or even exemption) of withholding may be granted at source only if the receiving (foreign) corporation runs an operating business and has its own personnel and premises. Otherwise, treaty relief may be granted by way of a refund procedure.
- Furthermore, according to Sec. 21 (1) (1a) CITA a non-resident corporation may claim a refund of the total amount of the Austrian withholding tax under the following conditions:
  - The foreign corporation is resident in the EU or Norway
  - Under a tax treaty, the foreign corporation cannot – verifiably – wholly or partly credit the Austrian with-holding tax in its residence state

Capital gains

Capital gains of a non-resident corporation resulting from the alienation of a participation in an Austrian corporation (such as GmbH or an AG) are taxable in Austria at a rate of 25% if the shareholding amounts to at least 1% of the capital of the corporation at any time during the five preceding years. However, applicable tax treaties following the OECD model convention usually prohibit Austria form taxing the capital gain.

15. CAN THE GROUP REORGANISE AFTER THE ACQUISITION IN A TAX NEUTRAL MANNER THROUGH MERGERS OR A TAX GROUPING?

Under general income tax principles, a reorganisation of companies normally constitutes a taxable event and triggers the realisation of hidden reserves of the assets transferred in the course of the reorganisation. However, the Reorganisation Tax Act (RTA) – which is based on the EC Merger Directive 90/434/EEC – provides for a special tax regime applicable to the following types of reorganisations:

- Mergers
- Conversions
- Contributions of assets
- Formation of partnerships
- Divisions of partnerships
- Demerger of corporations

The RTA basically provides for the following tax treatment, subject to certain conditions:

- No liquidation taxation due to the reorganisation (neither on the level of the company/partnership nor on the level of the shareholder/partner)
- Tax-neutral transfer of assets
- Transfer of loss carry-forwards to the receiving entity (under certain limitations)
- Beneficial rules as to the tax base for real estate transfer tax purposes
- Exemption from value added tax

The RTA allows reorganisations with retroactive effect (basically within a nine-month period), as well as multiple reorganisations at the same effective date.

Binding rulings are available in reorganisation issues (costs amounting to between EUR1,500 and EUR 20,000 depending on the turnover of the requesting taxpayer).

For tax grouping, see question 17.

16. ARE THERE ANY PARTICULAR ISSUES TO CONSIDER IN THE CASE OF A TARGET COMPANY THAT HAS SIGNIFICANT REAL ESTATE ASSETS?

Generally, the Austrian tax law does not provide for special provisions for real estate companies. However, the following aspects should be considered:

- **Real Estate Transfer Tax (RETT):** RETT at a rate of 3.5% is levied on transfers of immovable property (land and buildings) located in Austria. Furthermore, RETT is triggered if at least 95% of all shares of a corporation owning Austrian immovable property are held by or are taken over by one shareholder or by members of an Austrian tax group. In addition shares held by trustees are always attributed to the trustor or settlor of the trust. RETT is also triggered if 95% of shares of a partnership have been transferred to new partners within the last five years. In the case of a unification of shares, the tax base is always the tax value of the real estate and the tax rate amounts to 0.5%.

- **Real estate investment funds:** Austrian tax law provides a special tax regime for real estate investment funds, which prevails over domestic tax and tax treaty rules. In short, if the regime is applicable, the fund vehicle will be treated as tax-transparent with the investors in the fund becoming subject to Austrian limited tax liability on so-called "deemed distributions". In particular, the taxation of deemed distributions provides for the taxation of annual pro-rata unrealised capital gains and interest on shareholder loans, which would be deemed rental income from Austrian situs real estate. The fund tax rules are based on a substance-over form approach, which means that companies interposed between the fund and the real estate object may be, in general, disregarded for fund tax purposes. In the case of an Austrian corporation held by the fund, unrealised capital gains are attributed to the fund and are taxable at the level of the unitholders. In the case of a partnership or a foreign corporation, the latter is just treated as transparent.

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

Yes, there is a tax grouping regime in Austria. In order to establish a tax group there must be an Austrian corporation or a permanent establishment of an EU corporation registered in Austria holding a (direct or indirect) participation of more than 50% of the capital and the majority of the voting rights in a domestic or foreign corporation. The minimum holding requirement for the group leader can also be met together with other unrelated companies provided the shareholding of one corporation amounts to at least 40% and the shareholding of the other corporation amounts to at least 15%.

A tax group has the benefit that all profits and losses of domestic group members are allocated for tax purposes to the group leader. The group may also include first-tier comparable foreign corporations which are resident in the EU or in a country that has concluded a comprehensive administrative assistance agreement with Austria. Only losses of foreign group members may be deducted from the taxable income of the group in proportion to the amount of the direct shareholding of the group in the foreign entity. However, please note the following limitations with respect to foreign losses:

- The deductibility of foreign losses derived through non-resident group members is limited to the amount as calculated under foreign rules. The foreign losses are recaptured and taxed in Austria in subsequent years if and to the extent they can be offset against profits of the foreign entity under its domestic tax regime or if the foreign entity drops out of the group (e.g. due to sale of the participation or if the foreign company is deemed to be liquidated). Profits of foreign group members are not to be included in the tax group.
- The deduction of losses from foreign group members against the tax group's profit is capped at 75% of the profit of all domestic group members (including the group leader). The remaining loss surplus may be carried forward by the group leader.

Providing that all requirements are fulfilled, the group leader may opt for group taxation simply by filing an application form with the tax authorities (subject to certain time constraints). The tax authorities approve the tax group by official notice. The tax group has to remain in existence for at least three years. If the tax group is terminated earlier, all benefits from the group taxation will be lost and each member of the group will be taxed as a separate entity with retroactive effect.

Binding rulings are available in group taxation issues (costs amounting between EUR 1,500 and EUR 20,000, depending on the turnover of the requesting taxpayer).

18. DOES YOUR COUNTRY HAVE ANY SPECIAL TAX STATUS SUCH AS A PATENT BOX FOR COMPANIES THAT HOLD INTANGIBLE ASSETS?

Austria does not have any special tax status or patent box regime in place. Instead, Austria promotes research and development activities by allowing an immediate tax deduction for R&D expenses and additionally granting a special R&D tax relief. The tax credit for R&D takes the form of a cash tax credit and amounts to 14 per cent of

R&D expenses. The cash tax credit is granted for in-house and contract R&D, however, only expenses of up to €1 million per year may be considered as the base for the cash tax credit in case of contract R&D (no limitation for in-house R&D expenses).

19. DOES YOUR COUNTRY IMPOSE ADVERSE TAX CONSEQUENCES IF OWNERSHIP OF INTANGIBLES IS TRANSFERRED OUT OF THE COUNTRY?

Private assets

Exit tax applies to financial instruments, derivative contracts and derivative financial instruments. Therefore emigration will trigger income tax of 27.5% on unrealised capital gains from financial instruments as well as shareholdings. In the case of the transfer of financial assets which are part of the non-business assets of an individual taxpayer, the income tax may be assessed, but will be deferred without late interest payment until disposal in cases of (i) individuals moving abroad or (ii) gratuitous transfer of private assets to individuals. In other situations, where Austria's right to tax with respect to such private financial assets will be lost or restricted due to transfer to an EU/EEA state, an instalment payment regime applies for the incurred tax over a period of seven years (five years for exits after 31 December 2018 based on new draft tax legislation). The statute of limitation (ten years) can no longer be applied to exits after 31 December 2005 Consequently, exit taxation for such cases can only be suspended but not ultimately avoided.

Business assets

Exit tax applies to the transfer of business assets to foreign countries of individuals, partnerships or corporations. In the case of the transfer of business assets (not exclusive to financial assets) to an EU/EEA, an option is available to apply for the payment of instalments of the incurred exit tax. This option is possible in cases where a taxpayer transfers assets to another business of the same taxpayer or transfers an entire business. The instalment period generally amounts to seven years (five years for exits after 31 December 2018 based on new draft tax legislation) and two years for current assets.

SELL-SIDE

20. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY? WHAT, IF ANY, GAINS ARISING IN AN M&A CONTEXT ARE ELIGIBLE FOR SPECIAL TREATMENT?

Share deal

- Capital gains generated by Austrian resident individuals on the sale of shares in a corporation are generally taxed at a flat rate income tax of 27.5%
- Capital gains generated by an Austrian resident corporation on the sale of shares in a corporation are generally subject to 25% CIT
- However, capital gains resulting from qualified international participations (*internationale Schachtelbeteiligung*) are exempted from Austrian CIT. An international participation requires an Austrian resident corporation to have a direct or indirect participation of at least 10% in a foreign corporation for a minimum uninterrupted period of one year. Furthermore the legal form of the foreign international participation has to be comparable to Austrian corporations or has to be listed in Art 2 in the Annex to the EC Parent-Subsidiary Directive. It should be noted that suffered losses, except ultimate liquidation losses, cannot be offset against other income correspondingly. It is possible to opt-out from this tax neutrality for each international participation separately in the respective tax return in the year of acquisition, thus making gains and losses from this participation taxable

- Capital gains of non-resident corporations or individuals resulting from the alienation of participations in Austrian resident corporations are principally taxable in Austria, if the shareholding amounts to at least 1% in the capital of the corporation at any time during a time period of the preceding five years. Nevertheless, double tax treaties usually prohibit Austria from taxing if they contain an OECD Model-type capital gains provision
- Capital gains from an M&A process aren't eligible for special treatment.

Asset deal

- Capital gains generated by Austrian resident individuals from the alienation of assets are generally taxed at the progressive income tax rate (up to 55%)
- Capital gains generated by an Austrian resident corporation from the alienation of assets are generally subject to 25% CIT
- Due to the tax transparency of Austrian partnerships, the sale of shares in an Austrian partnership is classified as an asset deal (sale of the assets of the partnership)

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

- Generally no fiscal advantage is granted to corporations in respect of the reinvestment of sales proceeds.
- Nonetheless, a special rollover relief is available for private foundation (*Privatstiftung*) regarding the reinvestment of capital gains in participations under Sec 13 (4) CITA. Hidden reserves resulting from the alienation of participations that are held as non-business assets can be transferred to the investment cost of new participations. Technically the capital gain is deducted from the acquisition costs of the new investment, lowering the amortization base, but not resulting in an immediate taxation of the realised hidden reserves.

22. 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 to the beneficial owner rather 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 a 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).

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

The Reorganisation Tax Act (RTA) – which is based on the EC Merger Directive (90/434/EEC; see Annex III) – provides for a special tax regime applicable to mergers and spin-offs. Consequently mergers and spin-offs can be conducted tax neutrally. Nevertheless, special attention should be paid to loss trafficking rules, exit taxation, RETT and possible VAT correction.

MANAGEMENT INCENTIVES

24. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES IN CONNECTION WITH SELLING OR BUYING A COMPANY?

Generally executives obtain income from employment activities and are taxed as employees or they generate income from independent professional services and are taxed accordingly under the rules regarding business profits. The generated income includes all remuneration, in cash or in kind, derived by an employed person and paid by the employer or by a third party. The personal income tax (PIT) is levied under progressive rates.

Austrian tax law provides a PIT exemption for benefits received annually of up to EUR 3,000 from an employee participation program. In this regard, benefits of the employee arising by granted shares at a discounted price or free of charge by the employer are exempted from PIT provided the following requirements are met:

- The shareholding has to be received from shares in the employer company or a related group member
- The shares must be delivered gratuitously or at a reduced price
- Approved form of shares are holdings in AG or GmbH; real silent participation etc (partnerships are excluded)
- Benefit has to be granted at least to a specific group of employees
- Shares must be held for minimum period of five years
- Valid contract of employment

FOR MORE INFORMATION CONTACT:

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