



### **CFC rules in Austria: final ordinance on the application of the CFC rules published**

On 25 January 2019, the ordinance on the application of the CFC rules in Austria was published in the Federal Law Gazette (BGBl. II Nr. 21/2019). Compared to the draft version, several important changes were made regarding the calculation of the effective tax rate, the determination of the relevant threshold for the passive income and the substance requirements.

Christoph Plott / Kasper Dziurdz

### **Austrian Federal Finance Court on the qualification of an up-stream-loan as a hidden distribution**

In a recent case, the Austrian Federal Finance Court re-qualified an up-stream loan as a hidden distribution as in particular the following criteria were fulfilled: no concluded formal written loan agreement, no documented credit assessment over the borrower, lack of creditworthiness and unprofitable economic situation of the lender, no securities. As the loan was qualified as a hidden distribution, the impairment of the loan receivable at the level of the lender is tax non-deductible.

Markus Vaishor / Katrin Postlmayr

### **Austrian Federal Finance Court on withholding tax qualification of deemed distributions**

From an Austrian tax perspective, dividends may either be qualified as a dividend triggering withholding tax or a repayment of capital that is not subject to withholding tax. In principle, the dividend-distributing company can freely choose to qualify a dividend as a dividend or a repayment of capital for tax purposes provided that there is a sufficient balance on the respective "evidence account".

Recently, the Austrian Federal Finance Court came to the conclusion that even a hidden distribution can be qualified as equity repayment for tax purposes at the level of the shareholder for past years, if

- it can be demonstrated that economically only equity was distributed (ie only equity could have been distributed as no profits were available) and
- the respective evidence account on contributed capital shows sufficient amounts for an equity repayment.

The Austrian tax authorities already filed an appeal to the Austrian Administrative Supreme Court.

Lukas Andreus / Anja Kirisits / Norbert Ungar

### **Austrian Federal Finance Court confirmed non-deductibility of costs for bank guarantee connected to the acquisition of a shareholding**

Generally, interest on the acquisition of shares are tax-deductible for an Austrian corporate taxpayer unless the shares are acquired from a related party or the interest is paid to a related low-taxed recipient. However, the Austrian Federal Finance Court recently confirmed that – even under the old rules - costs for bank guarantees are not deemed as “interest” and are, thus, tax non-deductible.

Markus Vaishor / Anja Kirisits

### **New procedure for refund of Austrian WHT**

As of January 2019 the refund procedure for Austrian WHT was revised. The new procedure is based on a revision of Art 240a Austrian General Fiscal Code as well as a related decree which was recently published. It is applicable for individuals as well as corporations. According to the new procedure, an online-application has to be submitted to the Austrian tax office first, containing information on the applicant as well as the refund and legal basis (such as double tax treaty or Parent-Subsidiary-Directive). There are a number of different templates available, depending on the kind of WHT. The online-application can be filed in the year subsequent to the withholding of tax at the earliest. Also a unique number („ABZ-number“) is given to each foreign applicant which should be used for further refunds in the future.

In a second step, the foreign certificate of residence must be obtained on the Austrian form. Only with regard to certain states a certificate of residence by the foreign tax administration is accepted on a separate non-Austrian form. The Austrian Ministry of Finance has summarized this view in a recently published official guidance statement, where only Mexico, Thailand, Turkey and the US are listed as such exceptional jurisdictions. In practice, this requirement can lead to difficulties.

Barbara Polster / Flora Endel

## Impact of the multilateral instrument on Austrian Double Tax Treaties

Through the multilateral instrument (MLI) numerous measures from the OECD/G20-BEPS-project shall be implemented into the international DTT network. The first Austrian DTTs amended by the MLI will come into effect as of 2019. Precisely, this applies to the Austrian DTTs with Poland and Slovenia and in subareas (ie with regard to withholding taxes) also to the DTAs with France, Israel, Lithuania, Serbia and Slovakia. For these DTTs, the Austrian Federal Ministry of Finance (BMF) provided "synthesized versions" on its [homepage](#), which shall help tax practitioners to correctly apply the revised DTTs. In addition, it is expected that MLI-related amendments will also be effective for numerous other Austrian DTTs as of 1.1.2020. The anticipated changes for individual Austrian DTTs can be predicted by using the "[OECD Matching Database](#)".

Florian Rosenberger / Thomas Hahn / Thomas Rasslagg

## Austrian Ministry of Finance published draft bill regarding tax dispute resolution mechanisms in the European Union

With the draft bill, it is intended to implement the EU-directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union into Austrian domestic law. The purpose of the new law is the introduction of mechanisms in the Union that ensure the effective resolution of disputes concerning the interpretation and application of bilateral tax treaties and the Union Arbitration Convention, in particular disputes leading to double taxation.

Werner Rosar

## Austrian Federal Finance Court confirms that sale of real property can qualify as a trade irrespective of the taxpayer's intention at the time of the acquisition of the property

If an Austrian (individual) taxpayer sells real property, the capital gains may be taxed as "income from private sales of real properties" which entails a favorable taxation regime (30% flat tax rate). However, if the taxpayer constitutes a trade or business and is qualified as a real estate trader, the capital gains are subject to the standard progressive income tax rate (of up to 55%).

Recently, the Austrian Federal Finance Court concluded that the sale of 12 flats may be qualified as a trade even though the sellers had not intention to develop a condominium building and sell the flats at the time of the acquisition of the land (10 years before the development of the property commenced).

Markus Vaishor / Florian Popl

## **Inclusion of transfer prices in the determination of the customs value**

The Finanzgericht München (Finance Court, Munich) decided at November 15th, 2018 (14 K 2028/18) that transfer prices - agreed during the year - represent the actual customs value even though these prices get subsequently amended in order of the OECD-Transfer-Pricing-Guidelines.

Esther Freitag

## **Amendments to EU VAT law as of 1 January 2020 – Quick fixes**

On 4 December 2018, amendments to EU VAT law („Quick fixes“) were adopted, which will apply from 1 January 2020 and are to be implemented into Austrian VAT law by then.

Esther Freitag / Draga Turic

## **Exemption for import VAT under „customs procedure 42“ in case of tax evasion concerning following supplies**

In its judgment of 14 February 2019, Vetsch Int. Transporte (C-531/17), the CJEU ruled that the exemption for import VAT according to Art 201 VAT Directive cannot be refused for an importer designated and recognized as a tax debtor, if a tax evasion was committed on a subsequent transaction and the importer did not know or should not have known that this subsequent transaction was included in a tax evasion.

Esther Freitag / Draga Turic

## **Deductible proportion for a branch established in a member state other than that of its head office**

In its judgment of 24 January 2019, Morgan Stanley & Co International (C-165/17) the CJEU commented the calculation of the deductible proportion for expenditure connected with tax-exempt and taxable supplies of a branch registered in one member state effected by the head office in another member state.

Esther Freitag / Draga Turic

## **No input VAT deduction based on an estimation in absence of invoices**

In its judgment of 21 November 2018, Vădan (C-664/16) the CJEU ruled that a deduction of input VAT cannot be claimed solely based on an estimation in an expert opinion unless the amount of the deduction of input tax can be proven by presenting invoices or other documents.

Esther Freitag / Draga Turic

## **Publication of the Austrian Stamp Duty Guidelines 2019**

Recently the Austrian Ministry of Finance (BMF) published the Austrian Stamp Duty Guidelines 2019. The Stamp Tax Guidelines were published for the first time in 2007 and have remained unchanged since then. Thus, the 2019 Guidelines take into account changes in legislation and case law since 2007.

Michael Petritz / Dominik Pflug

## **New Legislation on Revision Proceedings after Expiration of Limitation Period**

Due to the case law of the Austrian Constitutional Supreme Court, Art 304 of the Austrian Federal Fiscal Act had to be amended by the legislator. From the 1st January 2019 onwards it is possible to start revision proceedings even within three years after an assessment entered into legal force. The new provision is also applicable to assessment notices, which were issued before 1st January 2019.

Stefan Papst / Maximilian H. Ringhofer

## **Suspension of tax liabilities after self-disclosure: no exemption from punishment**

A self-disclosure results in an exemption from punishment only, if the resulting tax payment is made on time. The payment can be deferred by means of an application for deferment for a maximum time period of two years. Until now there has not been case law of the Austrian supreme courts on the question, whether the timeliness of the payment is still preserved, even if an appeal is filed after the self-disclosure and an application for a suspension of tax liabilities is made for the time period of the pending proceeding. Due to the recent case law of the Austrian Constitutional Supreme Court, an application for suspension does not preserve the timeliness of the tax payment and therefore prevents an exemption from punishment.

Stefan Papst

## **Austrian tax court on undeclared foreign income: No intentional tax evasion in case of wage tax deduction abroad**

According to the Austrian Federal Finance Court, there is no intentional tax evasion, if the taxpayer has assumed that he has already fulfilled his national tax obligations due to a wage tax deduction abroad. The intent necessary for tax evasion is not fulfilled, if the accusation by the tax authorities is based on presumptions only. This applies, even if a tax reduction could have been avoided by consulting a tax advisor.

Stefan Papst / Katharina Stur

## **Social Security: new regulation on the third-party employment of managing directors within the Group**

In our Tax News 11-12/2018 we informed about the proposed amendment of the General Social Security Act with respect to employees who are seconded to group companies to exercise the function of a managing director. The amendment (granting an exception from multiple employment relationships for purposes of social security law) was implemented with BGBl I Nr. 8/2019, effective January 10, 2019.

Irmgard Herndl

## **Mobile App instead of meal voucher**

In the latest update of the Austrian Wage Tax Guidelines (margin number 95b) the Austrian tax authorities confirmed, that the prerequisites for tax-free meal subsidies granted to employees (Art 3 sec. 1 subsec. 17 Austrian Income Tax Act) can also be ensured by means of a mobile app.

Ulf Zehetner / Christoph Glantschnig

## **Summary of Tax Personnel News**

In our Tax Personnel News we have recently informed about the following topics:

*TPN 1 Regulations and values in social security, labour and income tax law applicable in 2019*

This article presents important changes in the regulations and values in social security, labour and income tax law.

*TPN 2 Remuneration in kind for private use of demonstration vehicles*

§ 4(6) of the Ordinance on the Valuation of Remuneration in Kind stipulates that the remuneration in kind for the private use of demonstration vehicles is to be calculated on the basis of the actual acquisition costs increased by 20%. The Administrative Court has decided that this provision applies to cases in which motor vehicle dealers allow their employees the private use of demonstration vehicles. However, contrary to the previous opinion of the tax authorities, a notional Normverbrauchsabgabe (NoVA) must not increase the actual acquisition cost when applying this rule.

Tatjana Schrefl

## Impacts of a „no-deal Brexit“ on social security and immigration matters for U.K. Nationals in Austria

### *Immigration*

On February 27 the Austrian National Assembly approved a law including special rules regarding the future treatment under the immigration laws of U.K. citizens residing in Austria in the event of a “no-deal Brexit.”

The law aims to address the rights and opportunities that concern U.K. citizens as well as their third-country family members residing in Austria, and provide for a “transition period” that would start on March 30, 2019 (unless Brexit is postponed), during which these individuals could avail themselves of these rights and opportunities.

The law was approved by the Austrian National Assembly and also is expected to be approved by the second chamber of the Austrian parliament. It will only come into force in case of a No-Deal Brexit.

*The special rules are as follows:*

Following a No-deal Brexit (March 30, 2019 unless postponed), a six-month transition period starts, during which U.K. citizens can apply for a national residence/work permit to continue legally residing and working in Austria.

U.K. citizens as well as their third-country family members residing in Austria for a period of less than five years will be given simplified access (e.g. no proof of German language skills required, etc.) to apply for a Red-White-Red Card Plus.

U.K. citizens and their third-country family members (non-EU) residing in Austria for more than 5 years, who meet the general criteria of the Austrian Settlement and Residence Act (“NAG”) would qualify to apply for a national residence permit (Daueraufenthalt-EU).

## *Social security*

In the event of a “no-deal Brexit”, the current EU regulation 883/2004 on the coordination of social security systems will no longer be applicable. For the Austrian Ministry of Social Affairs, a national, but also a Union-wide regulation for the limited continuation of the EU regulation 883/2004 may be a solution currently being evaluated. Nevertheless, even upon a possible continuation of the regulation concerned, a gap between the date of a “no-deal Brexit” and the enforcement of the continued regulation cannot be ruled out.

Ferdinand Kleemann / Maria Magdalena Ebner

## **New IRS FAQs and Proposed Regulation on FATCA and QI**

IRS issued “Last-Minute-FAQs” for COPA and first FATCA Periodic Compliance Certification

IRS publishes Updated FAQ addressing Expiring FFI Agreements

IRS publishes Proposed Regulation on changes to Chapter 3 and 4 for burden reduction

Stefan Haslinger / Philipp Peter Rümmele / Christiane Edelhauser

## **Reliefs and Updates on Austrian UBO Registry Law (WiEReG)**

- Effective as of October 1, 2018 amendments to the Austrian UBO Registry Law (WiEReG) grant relief for subsidiary registration of senior managing officials and provide for UBO application to restrict insight into reported data in case of significant personal endangerment.
- The mandated automatic data matching between the Austrian commercial register and the UBO registry was yet implemented by the MoF only on January 29, 2019 .

The Austrian implementation law for the **Ultimate Beneficial Owner (UBO) Registry** (Wirtschaftliche Eigentümer Registergesetz, **WiEReG**) has already been amended twice, which induced the following significant changes:

**Effective as of October 1, 2018**, the (subsidiary) registration of senior managing officials (in case no genuine UBO was detected for a reportable entity) only has to be indicated to the electronic reporting tool, yet no personal data of these subsidiary “UBOs” has to be reported anymore – all required data including changes and updates will be automatically adopted from other public registers (e.g. commercial register, resident register) henceforth.

However, the mandated automatic transfer of reportable data from the Austrian commercial register to the UBO registry did not work until recently. The Ministry of Finance (MoF) managed to deploy the new data matching functionality only on January 29, 2019.

Also **effective since October 1, 2018**, UBOs may apply to the Austrian MoF for restriction of insight into their personal reportable data (e.g. their permanent residence address) in case of significant, personal endangerment of registered UBOs. However, these preconditions will be assumed in cases of (evidenced) excessive risk of falling victim to certain listed crimes (like fraud, hijack, blackmail, severe threat, crimes against health and life, etc.) or generally in cases of minors or legally incompetent persons.

In general, the mere fact that beneficial ownership may become publicly known does not establish an (evidenced) excessive risk of endangerment. In case the MoF grants the requested restriction of data insight UBO-Registry-Excerpts will not contain any reported data with respect to the applicant anymore (unless requested by FIs, notaries or public authorities).

Stefan Haslinger / Christiane Edelhauser