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English Abstracts



Austrian Federal Finance Court on timing of claw-back of foreign tax losses in case of dissolution of Austrian tax group

According to Austrian tax law, also foreign companies in countries having mutual assistance with Austria may join the Austrian tax group. As a result tax losses derived by a foreign group member can be utilized in the Austrian tax group. The allocation of foreign losses is, however, limited with 75% of the positive tax result of Austrian group members. Furthermore, in order to avoid double-loss utilization, previously allocated tax losses are clawed back if utilized in the country of origin of the foreign group member. Furthermore, all previously utilized foreign tax losses need to be clawed back if the respective group member leaves the group or the group is dissolved.

Recently, the Austrian Federal Finance Court decided a case in which a tax group was dissolved during the year. It was questionable if the foreign losses are clawed-back in the last financial year in which the tax group still existed or in the year in which the group was dissolved. Although the Austrian Ministry of Finance apparently takes the view that the foreign losses should be clawed back in the last year the group existed, the Austrian Federal Finance Court took a different position and came to the conclusion that the foreign losses are clawed back in the financial year the tax group is dissolved. The Austrian tax authorities may file an appeal to the Austrian Administrative Supreme Court but as yet, have not done so.

Michael Petritz, Andreas Kampitsch, Matthias Malaschofsky

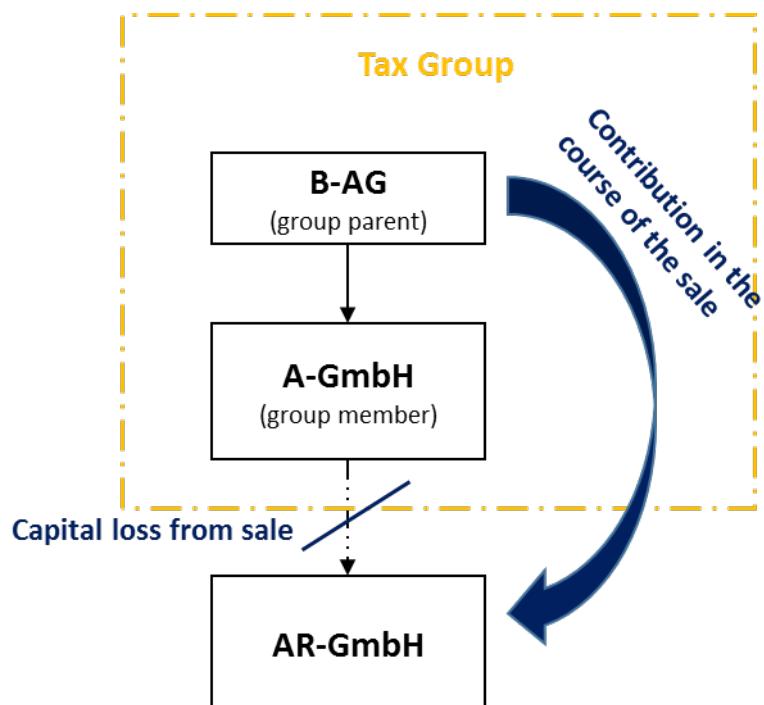
Missing documentation for accruals: risk of fiscal offence

In practice it is often difficult to determine, whether accruals are deductible for tax purposes or not. If accruals are qualified as non-deductible by the tax authorities due to a tax audit, the resulting additional tax payments can lead to fiscal criminal proceedings. A recently published decision of the Austrian Federal Finance Court follows the existing case law of the Austrian Administrative Supreme Court: If accruals for warranties are set up incorrectly, the missing documentation of the reasons for their creation can result in an allegation of tax fraud.

Friedrich Fraberger, Stefan Papst

Information by Austrian Ministry of Finance on combination of restrictions on the deductibility of capital losses of participations

Austrian tax law stipulates several restrictions on the tax deductibility of impairment of participations in other companies. Impairment of participations in group members is generally not deductible (Art 9 sec 7 Austrian Corporate Income Tax Act) as group taxation leads to an allocation of negative tax results incurred by the group members to the group parent anyway. Furthermore, there is a restriction in Art 12 sec 3 subsec 3 Austrian Corporate Income Tax Act that prevents multiple loss utilization in case of multi-tier structures. In case of multi-tier structures only the ultimate parent may depreciate its participation for tax purposes. Thus, in the below case the capital loss from the sale of the participation in AR-GmbH could not be utilized as A-GmbH could not deduct impairment due to Art 12 sec 3 subsec 3 and B-AG could not deduct impairment due to Art 9 sec 7 for tax purposes.



The Austrian Administrative Supreme Court stated in its decision 2013/15/0139 dated March 10, 2016 that B-AG may treat the impairment of the participation in A-GmbH as tax-deductible insofar the impairment of the participation in A-GmbH results from the impairment of the participation in AR-GmbH on A-GmbH-level and the impairment concerns the capitalized acquisitions costs resulting from the indirect contribution by B-AG to AR-GmbH. In practice it may be cumbersome to substantiate this, in particular in cases, where the intermediary holding companies owns other participations, as well. Furthermore, it remains unanswered if the same logic can be applied to other cases where a company cannot utilize capital losses due to the combination of deductibility restrictions.

The Austrian Ministry of Finance recently published an information clarifying how to deal with such cases from a procedural/administrative standpoint. In general, it is very difficult to correct already assessed financial years.

Markus Vaishor

The multilateral Instrument gives more boost to BEPS

In the course of the OECD BEPS project several amendments to tax treaty law have been proposed. In order to make these amendments effective as soon as possible, more than 100 jurisdictions adopted the so called "multilateral instrument" on November 24, 2016. Further to OECD Secretary-General Angel Gurría this will open a new era of tax treaty legislation: "The adoption of this multilateral instrument marks a turning point in tax treaty history".

Florian Rosenberger

Public country-by-country reporting in trouble

The EU Council's Legal Service concludes in a written statement that the adoption of the proposal to implement a public country-by-country reporting would require unanimous consent. This is, however, not to be expected according to the current political balance of power within the EU.

Florian Rosenberger, Anja Sturm

Limitation of withholding tax on assignments from European countries (European Union/European Economic Area) to Austria

According to a decision by the Austrian Administrative Supreme Court withholding tax on assignments from European countries (European Union/European Economic Area) to Austria must not be higher than the income tax (based on tax rate for net-income) which would apply for a national personnel lease provider (lessor). This taxation of net income only requires a notification of the wage expenses spent for assigned employees

Alfred Shubshizky

Austrian Tax Benefits for Moving in to Austria

Art 103 Austrian Income Tax Act - Reduction of required center of vital interest situated in Austria from 10 to 5 years (draft Tax Amendment Act 2016)

Scientists and researchers switching their center of vital interest (CVI) to Austria may be entitled to claim the following attractive Austrian tax benefits:

1. Continuing the average foreign tax burden on their foreign income (but tax rate of at least 15 % to be applied)
2. Additional tax allowance of 30 % of taxable income from scientific and research activities (on Austrian sourced scientific and research income and license fees as far as taxable in Austria with progressive rates)

Please be aware that the application for obtaining such tax benefits requires the **filing of an application** to the Austrian Ministry of Finance **within 6 months from date of moving to Austria at the latest**. After that period the claim of the tax benefit is lost.

The tax rate benefit under point 1. may be obtained if the CVI had already been outside Austria for 10 years. For the tax allowance benefit under point 2. the minimum period of CVI being abroad will be reduced from 10 years to 5 years **from 2017 onwards** (see draft of Tax Amendment Act 2016 – AbgÄG 2016) in order to attract scientists and researchers to return to Austria.

The tax benefit under point 1. may also be obtained by sportspersons and artists.

The two tax benefits for scientists and researchers are applicable for professors, university teachers working in Austrian universities or other institutes offering bachelor courses subject to Austrian law if they are teaching on their dissertation subject. However, it will also be applicable for researchers working more than 50% of their time on research projects in Austria if the research would also qualify for the Austrian research premium. Therefore researchers in pharmaceutical industry, software industry, mechatronics, etc. may also be entitled when coming or returning to Austria and meeting all the other conditions.

Wolfgang Schneider

Austrian Ministry of Finance publishes clarifications regarding the obligation to disclose donations

According to Art 121a of the General Administrative Fiscal Code ("BAO") donations inter vivos must be notified to the tax authorities within 3 months, if certain assets are received (cash; capital claims; shares in a corporation; interests in a (silent) partnership; businesses and qualified parts of a business generating business income; movable tangible assets; intangible assets) and the recipient or the donor has an Austrian residence, habitual place of abode, or seat or place of effective management. An exemption from the notification obligation applies if the donation does not exceed a threshold of a fair market value of EUR 50,000 in the case of transfers between related persons within the meaning of Art 25 BAO and a threshold of EUR 15,000 in case of transfers between all other persons. In a recently published information the Austrian Ministry of Finance clarifies the applicability of the notification obligation in specific cases. Notably the information contains clarifications regarding the term "donation" and the applicability of the above mentioned exemptions.

Thomas Peter Leitner