



Austrian group taxation and attribution of tax results of domestic group members to group parent with different balance sheet dates

Under the Austrian group taxation regime, in general, tax results of the respective group members are pooled on group level. Thus, the taxable results of domestic group members are attributed to the group parent. If the group member's balance sheet date is different to the group parent's one, the tax results of the group member will be attributed and taxed in that parent's fiscal year in which the group member's balance sheet date falls into. This may lead to a timing gap: the tax result of a group member of a fiscal year may be added to the parent's result of another fiscal year. The Austrian Administrative Supreme Court recently decided that in cases where the tax result of a group member "reaches" the group parent at a point in time (caused by different balance sheet dates), where the parent has already left the group or became a group member of a new group, the respective tax result of the group member cannot be allocated to the "old" group parent. The group member has to be taxed on a stand-alone-basis for the respective fiscal year.

Markus Vaishor / Katrin Postlmayr

Austrian Administrative Supreme Court on reorganizing a group member into a newly founded partnership under the Austrian group taxation regime

Under the Austrian group taxation regime a partnership (in the legal form of an OG, KG) can not be a group member of an Austrian tax group. However, partnerships are tax-transparent for (corporate) income tax purposes, i.e. the income is allocated to the shareholders of the respective partnership for (corporate) income tax purposes. The minimum holding period in Art 9 Sec 10 Corporate Income Tax Act stipulates that if a group member leaves the tax group within three years after entering the group, it has to be taxed on a stand-alone-basis with retrospective effect, i.e. it will be taxed in a way, as it had never been in the group. The Austrian Administrative Supreme Court recently decided that in cases where a group member (a corporation) is converted into a newly founded partnership before satisfying the three year-threshold of being a group member of the respective tax group, the corporation has not to be taxed on a stand-alone-basis with retrospective effect when the tax group is continued with other group members.

Ferdinand Kleemann / Katrin Postlmayr

Current developments concerning Country-by-Country Reporting (CbCR)

Large MNE groups with a consolidated group revenue of at least EUR 750 million must produce and submit a country-by-country report according to the law of many countries. In Austria, this obligation exists for business years beginning on or after the 1. January 2016. Therefore the first notification requirements (form VPDG 1) had to be met by the end of 2016. Other countries are lagging behind in their implementation, so that similar notification requirements abroad must be carried out later on. Furthermore, a few open questions about CbCR were recently clarified by the OECD.

Florian Rosenberger / Werner Rosar / Nicolas Mitteregger

Current topics from the OECD in a nutshell

Over the last few weeks, the OECD has published several documents which may be relevant for cross-border businesses and MNE groups.

Florian Rosenberger / Nicolas Mitteregger

Allocation of acquisition costs of real estate for non-business income

Land and buildings are dealt with separately for tax purposes, since land has unlimited useful life and is therefore not depreciable. For non-business income, the Austrian Income Tax Act stipulates a 40 % allocation of the acquisition costs to the land unless the tax payer substantiates another ratio (e.g. by way of an expert's opinion). Since the 40%-ratio is not appropriate in many cases, the Austrian Ministry of Finance issued an ordinance on how to calculate the ratio depending on certain criteria such as location, usual market price of undeveloped land, number of inhabitants and size of the building. According to the ordinance, either 20 %, 30 % or 40 % of the acquisition costs are attributable to the land depending on these criteria.

Recently, the Austrian Ministry of Finance published an information according to which the ratio can also be determined by use of the ordinance on how to calculate the real estate value ("Grundstückswert"). The real estate value is the tax basis for different types of transactions triggering real estate transfer tax (such as e.g. the pooling of shares in a real estate company or company reorganizations such as mergers or demergers) and can be determined according to a lump sum calculation formula resulting in a value for land and the building depending on numerous criteria. KPMG Austria offers to calculate the real estate value. The real estate value ratio can also be used for the allocation of the acquisition costs according to this recently published information.

For business income, the allocation of the acquisition costs needs to follow the fair market values. However, if the fair market values are not available or cannot be substantiated, the tax authorities may very well apply the above-described ordinances.

Markus Vaishor / Lena Unterluggauer

Administrative Supreme Court defines “beginning of constructions” and “major refurbishments” for VAT purposes

Regarding the VAT treatment of rented immovable property it must be distinguished between renting for business and residential purposes from an Austrian VAT perspective. Rentals for residential purposes are always taxed at a reduced rate of 10 %. Therefore, any input VAT directly connected is, in principle, deductible. In general, rentals for business purposes are exempt from VAT according to Art 6 sec 1 subsec 16 VAT Act and any input VAT directly connected is not deductible. However, Art 6 sec 2 VAT Act provides for the possibility to exercise an option to tax. In this case rentals for business purposes are taxed at the standard VAT-rate of 20 % and any input VAT related is deductible. Regarding this option to tax it has to be considered, that based on a relatively new regulation introduced in 2012, the lessor can only exercise the option, if the lessee uses the immovable property nearly exclusively for generating taxable revenues (i.e. is entitled to deduct input-VAT). The Austrian Tax Authority determines “nearly exclusively” as a minimum rate of 95 % based on the lessee’s whole revenues generated from the business activity in the respective property. This prerequisite needs to be substantiated through documentation (e.g. a lessee’s confirmation). The new regulation applies for rentals starting after August 31st, 2012 unless the lessor started constructing the building prior to September 1st, 2012. According to the Austrian Tax Authorities an overall refurbishment is equal to constructing properties. The Austrian Administrative Supreme Court recently decided that demolition work in connection with an overall refurbishment of immovable properties can be qualified as the starting point of the construction. This means, if the starting point is before September 1st, 2012, the lessor can opt to tax-liability without considering the new regulation regarding the lessee’s entitlement of input-VAT deduction.

The sale of real property is exempted from VAT. However, Art 6 sec 2 provides for an option to tax. If the option to tax is not exercised, input VAT relating to acquisition costs or major refurbishments/repairs needs to be clawed back on a year-by-year basis according to Art 12 sec 10 VAT Act. This provision generally applies, if the activity leads to a change regarding the VAT-treatment whereby a 10- or 20-year correction period applies (depending on when the property was acquired/constructed). E.g. if input VAT relating to acquisition costs or major refurbishments/repairs was deducted and the respective asset is sold without VAT or the rental changed from taxable to non-taxable during the correction period, input VAT would be clawed back (i.e. would have to be repaid to the tax office on a year-by-year basis). The Austrian Supreme Court recently determined the term “major refurbishments” for VAT purposes. The term comprises costs, which have not to be capitalized as cost, are not incurring regularly and are “material”. There is naturally a grey area in practice.

Markus Vaishor / Katrin Postlmayr

Austrian Constitutional Supreme Court confirms that different depreciation rates for buildings do not violate the constitution

The Austrian Constitutional Supreme Court rejected a complaint regarding different depreciation rates for buildings. According to the Austrian Income Tax Act buildings used for residential purposes can be depreciated with a 1.5 %-rate p.a. whereas all other buildings can be depreciated with a 2.5 %-rate. For non-business income, a 1.5 %-rate applies for all

buildings. The Austrian Constitutional Supreme Court confirmed that these different depreciation rates do not violate the constitution as different rates for business and non-business income can be justified and furthermore according to the law, every taxpayer can substantiate a different depreciation rate with an expert's opinion. However, it should be noted that the depreciation rate can only be substantiated by the taxpayer at the time the building is put to its intended use.

Ferdinand Kleemann / Armin Lunzer

Income tax deduction and offsetting-restrictions in case of sale of real estate in conformity with the Austrian constitution?

The Austrian Constitutional Supreme Court questions if the following rules in respect of capital gains taxation of real estate (derived by individuals) are in conformity with the Austrian constitution: Firstly, losses from the sale of real estate may only be offset with certain types of income. As the income does not always result from real estate, it is questionable if this restriction is in conformity with the Austrian constitution. Secondly, expenses may not be deducted from capital gains resulting from a sale of real estate as there is a reduced tax rate applicable. As ancillary costs occurring in the course of the acquisition, which are – from an economic point of view – comparable, by contrast are tax-deductible, valid reasons for the different treatment are required (VfGH 14.06.2017, E 1156/2016).

Bettina Matzka / Nicole Skala

The proposal for a Council Directive amending as regards to the possibility of a reduced VAT rate for E-Books was accepted by the European Parliament.

Currently, e-books have to be taxed at least 15 % with the EU's standardized minimum rate, while the Member States are free to apply a reduced rate of at least 5 %, and in some cases no VAT, for print publications.

In the Commission's VAT Action Plan of 2016, it has already been explained that the current VAT rules do not fully take into account the technological and economic developments in e-books and electronic newspapers. The modernization of VAT for the digital economy is also an objective of the Commission's strategy for a digital single market. The adoption of the proposal for a Directive now provides for Member States to have the possibility to apply the same VAT rates to electronic publications currently applied by the Member States to print publications.

Esther Freitag

Austrian Administrative Supreme Court: In Case of "Subjective Accuracy" an incorrect balance sheet need not be corrected at source

If an item of the balance sheet is incorrect, in general not only the balance sheet of the current year needs to be corrected, but also all balance sheets before. However, the balance sheets for the years before the error was discovered need not be corrected, if at the time of the preparation of the balance sheet the entrepreneur could assume that the balance sheet was correct.

Stefan Papst

Federal Fiscal Court on Revision Proceedings: Tax Authority's State of Knowledge to Be Considered for Several Years of Assessment

Revision Proceedings are permissible, if facts or evidences materialize for the first time. Pursuant to the settled case law of the Austrian Administrative Supreme Court, the tax authority's state of knowledge in connection with the specific proceeding is decisive only. On the contrary, according to recent case law of the Austrian Federal Fiscal Court facts, which have been pleaded in an appeal proceeding in connection with a previous year of assessment, can enhance the tax authority's state of knowledge in the proceedings in connection with a later year of assessment: In a later proceeding the tax authority has to take into account facts, which have become known in a previous appeal proceeding concerning a different year of assessment. Thus, the Austrian Tax Court takes a step towards a "procedure-overlapping" evaluation of the tax authority's state of knowledge.

Stefan Papst

Beneficial Owner Register

Austria is introducing a new Beneficial Owner Register, which is based on the EU-Directive against money laundering. This register will include any individual person, who ultimately owns or controls an entity and in case of a trust or foundation the settlor, the trustee and the beneficiaries. The Beneficial owners have to be reported by the entity itself or a professional representative. An entity is entitled to access the register concerning its own data.

Michael Petritz / Cordula Horkel-Wytrzens

Financial Investments of Private Individuals: Non-Deductibility of ancillary costs incurred in the course of the acquisition is in Conformity with the Austrian Constitution

Ancillary costs incurred in the course of the acquisition of financial instruments do not reduce taxable capital gains resulting from a sale of such instrument. The Austrian Federal Fiscal Court had challenged the conformity of that restriction with the constitution, however, the Austrian Constitutional Supreme Court has now decided that the non-deductibility is justified ([VfGH 14.06.2017, G336/2016](#)).

Bettina Matzka / Nicole Skala

Amendment of the Austrian Chamber of Commerce Law (Wirtschaftskammergesetz, WKG) 1998 – WKG amendment 2017

On June 19, 2017 the Federal Law that amends the Austrian Chamber of Commerce Law 1998 (WKG amendment 2017) was promulgated in the Federal Law Gazette (BGBl I 2017/73). This law provides for various changes in connection with the mandatory membership fees and also for amendments relating to various functions of the chambers. In principle, this law entered into force the day following its promulgation in the Federal Law Gazette. As an exception, the rules relating to the changes of the chamber membership fee regime will only enter into force on January 1, 2019.

The WKG amendment 2017 introduces a new calculation method for the membership fees that leads to a relief for members who currently pay large amounts of membership fees and also increases the flexibility as the extended executive committee of the Federal Chamber of Commerce may decide on two thresholds the lower of which must not be lower than EUR 2 million. The basis for the membership fee is, in general, the input VAT incurred. In the first bracket the membership fee is 0.13 % for the Federal Chamber of Commerce and 0.19 % for the Regional Chambers of Commerce. In the second bracket these percentage rates are reduced by 5 %, in the third bracket these percentage rates are reduced by 12 %. The same system is provided for credit and insurance institutions, the lower threshold in this case must, however, not be lower than EUR 16 million.

Furthermore, the WKG-amendment 2017 provides for a reduced assessment base in case of investments in fixed assets (which have to be determined according to income tax rules). The input VAT resulting from these investments is deducted from the assessment base irrespective of whether the acquired fixed assets are new or were already utilized. VAT exempt acquisitions have no impact.

In order to promote start-ups the WKG-amendment 2017 stipulates an exemption from the base chamber membership fee for newly established memberships in the Chamber of Commerce organization for the calendar year that follows the foundation. This exemption is not applicable to the transfer of memberships as a consequence of reorganizations or changes of the legal form.

Currently, a member of the Chamber of Commerce organization has to pay the base chamber membership fee for each permit (eg trade license) that triggers the membership in the Chamber of Commerce organization which may lead to multiple base chamber fees. This rule is changed in order that in such cases the base chamber fee is only payable once.

Further provisions of the WKG-amendment 2017 relate to outsourced operations of territorial authorities, to the right of the Chamber of Commerce organization to give up-front expert opinions on proposed amendments of the legal acts and introduce the combat against bunglers as legally recognized function of the Chambers of Commerce. Finally, the wording of the rules on arbitral tribunals is changed.

Wolfgang Hornich