



Austrian Ministry of Finance publishes the decree on capital repayment and internal financing

Distributions of an Austrian company can either be qualified as a repayment of capital or a dividend from a tax perspective. A repayment of capital is not subject to withholding tax but reduces the tax book value of the participation on shareholder level whereas a dividend – in principle – triggers withholding tax. According to new rules introduced in the course of the tax reform 2015/2016, an Austrian company needs to provide evidence accounts regarding contributions of capital and accumulated profits/losses (“internal financing”) for tax purposes. On Sept 27 2017, the Austrian Ministry of Finance has published the decree on capital repayment and internal financing ([BMF-010203/0309-IV/6/2017](#)), which deals with the requirements for capital repayment and distribution of profits. For the first time a distinction between available and unavailable subaccounts of capital contributions and internal financing is made. Compared to the draft version, the decree simplifies the requirements for small and medium-sized limited liability companies (GmbH). In the course of the tax return 2016, it should further be possible to adjust the calculation of the internal financing (once) if this calculation was done for the first time before the publication of the decree.

Florian Brugger / Kasper Dziurdz

Austrian Administrative Supreme Court confirms point in time of recognition of final losses resulting from an international participation in case of a liquidation

According to Austrian tax law, companies may recognize final losses resulting from a participation if the respective subsidiary is liquidated or insolvent. The Austrian Administrative Supreme Court confirmed that the losses may only be recognized in the financial year of the Austrian parent company in which the insolvency or liquidation process of the respective (foreign) subsidiary is completed (e.g. registration in the foreign companies’ register).

Markus Vaishor / Florian Popl

Tax treatment of disproportional loss allocation

Profits and losses can be attributed to shareholders of a partnership differing from the shareholder’s nominal capital participation. Based on recent jurisdiction by the Austrian Administrative Supreme Court such disproportional distributions are valid for tax reasons only, if they are stipulated in the company’s articles of association and sound economic reasons apply.

Lukas Andreaus / Christian Josef Mahringer

Abolishment of untaxed reserves in the Austrian Commercial Code: Documentation is required in order to mitigate taxation

For financial years starting after Dec 31 2015, the provisions on untaxed reserves (§ 205 of the Austrian Commercial Code) have been abolished. They are now part of the retained earnings (or, where appropriate, also lead to deferred taxes) and, thus, not separately disclosed. In order to avoid an immediate taxation of untaxed reserves, the reserves must be properly documented in the tax returns.

Florian Brugger / Kasper Dziurdz

Exemption of capital gains taxation real property derived by individuals: Administrative Supreme Court on the requirement for applying the exemption

Capital gains from the sale of real property derived by individuals as from April 1, 2012 are subject to tax with a flat tax rate of 25 % (April 1, 2012 – Dec 31, 2015) or 30 % (Jan 1, 2016 – present) respectively. However, there are two important tax exemptions. An exemption applies, if the property had been the seller's principal home two years from the acquisition/construction and prior to the sale or for at least five years during the last 10 years. In addition, the seller's principal home has to be abandoned. The idea behind this exemption is that capital gains are typically used to finance the seller's new home, so the capital gains should not be reduced by a tax. According to the Austrian Tax Authorities the exemption only applies if there is a maximum time period of one year between the time of sale and the time of giving up the seller's principal home. The Austrian Administrative Supreme Court, however, recently decided that this period could also be longer, if the seller has already intended to change his principal home at the time of sale (i.e. this is in general the time of signing the contract of sale). There must be an appropriate time period between the time of sale and giving up the principal home, which has to be decided on a case by case basis and could also be longer than one year.

Markus Vaishor / Katrin Postlmayr

Austrian Administrative Supreme Court on contribution in kind of a business if real property is retained

Individuals may transfer a business to a company (in exchange for shares) by way of a tax-neutral contribution in kind within the meaning of Art III Austrian Reorganization Tax Act ("RTA"). The RTA provides for the possibility that the contributor may retain individual assets. In practice, often real property is retained and in many cases the building is transferred to the absorbing company whereas the land is retained by the contributor. From a civil law perspective, the separation of land and building needs to be done, e.g. by way of registration of a development right incorporating the building ("Baurecht"). Previously according to the Austrian RTA Guidelines, it was sufficient to conclude such contract at the time of the contribution in kind agreement. However, since the development right becomes effective at the time of the registration in the cadaster, the Austrian Administrative Supreme Court recently decided that the development right already has to be registered before the contribution in kind agreement is signed. This decision contradicts the long lasting practice and is in particular problematic since a registration of a development right for the owner of a real property is legally impossible. Thus, similar transactions require more thorough planning going forward.

Markus Vaishor / Katrin Postlmayr

Update OECD-Model Convention 2017 – The most important changes at a glance

On July 11, 2017, the CFA (Committee on Fiscal Affairs) of the OECD published a draft update of the OECD model tax convention and the related commentary. Important parts of the update have already been adopted as part of the BEPS project. The final version of the OECD-update is expected to be published in 2017.

Florian Rosenberger / Nicolas Mitteregger

Final version of German provision regarding the documentation of profit allocations (“Gewinnabgrenzungsaufzeichnungsverordnung”) published

Recently, Germany adopted the three-tier transfer pricing approach as proposed by the OECD in the course of its BEPS project. Details regarding the exact documentation requirements (content of Master File and Local File) have – in the meantime - been stipulated in the final version of the German “Gewinnabgrenzungsaufzeichnungsverordnung”, which will be valid for tax years starting after the Dec 12, 2016. As the German ministry of finance has already published a discussion draft in this context earlier this year, the following article intends to provide a brief overview on potential differences between the discussion draft and the final version, tries to highlight existing differences compared to the Austrian documentation requirements and elaborate on general impacts of the newly enacted provision for German taxpayers belonging to a multinational group.

Florian Rosenberger / Thomas Hahn / Nicolas Mitteregger

Deduction of input VAT for costs related to the sale of a participation

According to Austrian tax law, the sale of a participation is exempt from VAT whereby any related input VAT is non-deductible. The Austrian Administrative Supreme Court recently dealt with the question, if input VAT on consulting services which arose in the context of a tax-exempt sale of shares are deductible.

The Austrian Administrative Supreme Court referred to the case law of the ECJ and stated that the existence of a direct and immediate connection between a particular input transaction and a particular output transaction is necessary. In the case at hand, the court confirmed that there was indeed a direct and immediate connection due to the description of the service in the invoice of the consulting services and due to the fact that the consulting services were necessary for the sale of the shares. Consequently the right to deduct the input VAT in regard to the consulting services was correctly denied.

Esther Freitag

ECJ case Toridas on chain transactions

In the judgment Toridas C 386/16 from July 26, 2017 the ECJ has dealt with the VAT-treatment of a chain transaction. The key question was the determination of the supply of goods with transport in the course of the chain transaction. As a result, the ECJ ruled that in this case the first supply of goods is qualified as a supply without transport, taxable in the country of dispatch. Consequently, the second supply is treated as a supply of goods with transport. Although the judgement is of high importance for the VAT qualification, the ECJ did not elaborate on the reasons for its decision. It is still necessary to qualify each case separately, as no general rule is established.

Esther Freitag / Christine Schellander

Switzerland – VAT: As of Jan 01, 2018, the standard VAT tax rate will be reduced from 8.0 to 7.7 %

Switzerland will decrease its VAT rates as from Jan 01, 2018. The standard VAT tax rate will be 7.7 %, the special rate for accommodation 3.7 % and the reduced rate still 2.5 %. Contracts, calculations and the accounting have to be adapted accordingly. The tax rate is determined by the date when the services are rendered and not by the billing date. If the supply of goods is performed in 2018, then the new rate applies irrespective of the invoicing date.

Clemens Endfellner / Esther Freitag

Austrian Constitutional Supreme Court examines time limit for revision proceedings

After the expiration of the limitation period, revision proceedings must neither be initiated ex officio any more nor upon application by the taxpayer. The Austrian Constitutional Supreme Court currently examines if this provision is in line with the constitution. The preliminary constitutional concerns arise from the short limitation period of either 3 or 5 years: If a relevant preliminary question is answered differently in appeal procedures, in practice revision proceedings will be precluded in most cases, as the limitation period is too short compared to the long duration of appeal procedures.

Stefan Papst