



Tax Internal Control System – draft bill on legal requirements

In recent years, tax compliance of companies came to the public's attention with the clear expectation to be fully compliant. Misconducts – e.g. filing of a wrong declaration or a formal self-disclosure to correct certain errors of the past (that may later be published in the newspapers) – may therefore have a negative impact on the company's reputation.

The board of directors is obliged to organize and manage the company in a way to safeguard compliance with the applicable laws. For this reason a Compliance Management System and Internal Control System is used. Often such systems do not cover the field of tax sufficiently. A Tax Compliance Management System aims to reduce

- Financial risks (e.g. payment of additional taxes and late payment penalties).
- Fiscal criminal risks and personal liabilities of the individuals in charge and the legal entity itself.
- Reputational risks.
- Business risks (e.g. exclusion from public tenders).

“Tax Compliance” and “Tax Internal Control System” are currently main topics in the “tax world” for the following reasons:

- Fiscal criminal law (relevant for all companies): An effective tax compliance management system as important indication against gross negligence or intent.
- Horizontal monitoring (relevant for certain interested companies): an audited Tax Internal Control System as precondition to participate in the Horizontal Monitoring.

On April 9, 2018 the Austrian tax authorities issued a draft bill to amend the Austrian General Fiscal Code (Art 153b sec 6 Bundesabgabenordnung “BAO”). This new paragraph will regulate for the first time in Austrian tax law which requirements a “state of the art” Tax Compliance Management System has to fulfill. In addition, the Austrian Ministry of Finance is preparing a more detailed ordinance on which concrete requirements have to be met.

Hans Zöchling, Andreas Helnwein

Stock options – tax deductible business expenses for employer?

The Austrian Federal Finance Court does not recognize business expenses for employee stock options if new shares were issued or own shares of the company were transferred to the employees.

Instead of issuing new shares it is also possible to make cash payments to the employees. According to Austrian literature in this case the expenses should be tax-deductible at the time the option is exercised. Furthermore, provisions for stock options should not be deductible for tax purposes according to German case law.

Ferdinand Kleemann, Maja Milekic

Austrian Administrative Supreme Court confirms that legal defense costs are deductible

Recently, the Austrian Administrative Supreme Court confirms the decision of the Austrian Federal Finance Court regarding the deductibility of legal defense costs. According to the Austrian tax law, legal defense costs are non-deductible, especially in the area of income tax, since these are to be classified as non-deductible private expenditures. However, if the company pursues business interests, legal defense costs qualifying as business expenses resulting from the legal proceedings or trials are deductible. Furthermore, the VAT incurred can be deducted as input tax.

In the case at hand, a company participating in a cartel was fined by the European Commission. Since the obvious purpose of the cartel was the maximization of sales/profit, the deed was business-related. According to the Austrian Income Tax Act and Austrian Corporate Income Tax Act penalties and fines imposed by courts, administrative authorities and the European Union institutions are tax non-deductible. However, based on the jurisdiction of the Austrian Administrative Supreme Court the non-deductibility of the fine does not predetermine the deductibility of related defense costs. If the deed was business-related, legal costs are tax-deductible.

Markus Vaishor, Lena Unterluggauer

Interest deduction on leveraged acquisition of participation in a group member

If an Austrian company finances the acquisition of a participation in another company with debt, the related interest expenses are in principle fully tax-deductible unless the participation was acquired from a related company.

The Austrian Administrative Supreme Court recently decided that interest is non-deductible, if a participation in a group member is acquired from a related party.

Ferdinand Kleemann, Anja Kirisits

Initial Ultimate Beneficial Owner Registration in Austria until June 1, 2018

According to Austrian Ultimate-Beneficial-Owner-Registry-Act (Wirtschaftliche Eigentümer Registergesetz – WiEReG) almost all corporate and other legal entities incorporated or managed in Austria are obligated to register their ultimate beneficial owners (UBOs) with the newly established Austrian UBO-Registry no later than June 1, 2018.

All entities listed in Art 1 sec 2 WiEReG, including foundations, trust and trustlike arrangements, are required to obtain and to hold adequate, accurate and current information on their beneficial ownership including the details of the beneficial interests held. They are obligated to analyze and to comprehend ownership and control structures throughout all ownership levels of corporate groups in order to gain firm opinion and understanding of their ultimate beneficial owners. Moreover, these entities are required to review and update annually all registered data of their beneficial owners. They are also obliged to disclose their ultimate beneficial owners and to provide conclusive documentation to “obliged parties”, as laid down in Art 9 sec 1 WiEReG (eg financial institutions, legal and tax counsels) whose customers they are.

The initial registration of UBOs in Austria is due no later than June 1, 2018. Newly established corporations are obliged to register their UBOs within four weeks of incorporation. If changes occur regarding registered data, entities are obliged to amend their UBO-Registration accordingly within four weeks of first notice.

Entities required to register their UBOs with the new Austrian UBO-Registry may do so by using the electronic USP on-line portal on their own or represented by an authorized attorney, notary or a tax advisor. Professional advisors are eligible to register UBOs on behalf of their clients no earlier than May 2, 2018.

In case registration obligations are deliberately or negligently violated legal representatives of “obliged entities” as well as entities themselves face harsh penalties, according to Art 15 WiEReG:

- In case of non-compliance with registration duties as of June 1, 2018 the Austrian tax authorities will automatically impose administrative penalties up to EUR 5.000 by default, regardless of culpability. Due to technical difficulties, the authorities delayed the start of these automatic penalties until August 16, 2018. These administrative penalties may be imposed multiple times as long as registration duties are not met.
- For deliberate violations of WiEReG requirements penal sentences may range up to EUR 200.000.
- In case of gross negligence sentences up to EUR 100.000 may be imposed.

These penalties are primarily addressing entity representatives, yet entities themselves may also be punished under certain circumstances (if requirements of Austrian Verbandsverantwortlichkeitsgesetz, VbVG, are met).

Last but not least, also UBOs may face legal prosecution in case of intentional non-compliance with their duties to collaborate laid down in Art 4 WiEReG.

KPMG Austria is happy to advise and to support you regarding UBO-Registration for your entity.

Stefan Haslinger, Claudia Edelhauser, Dominik Pflug

Does cloud mining give rise to a permanent establishment?

The Austrian Ministry of Finance recently published its opinion (in the course of the reply to a question raised via the EAS - Express Answering Service) on whether cloud mining could give rise to permanent establishment issues. Depending on the facts of the case, a Swiss joint stock company participating in an Austrian cloud-mining project may establish a permanent establishment in Austria and thus would be subject to tax in Austria.

Florian Rosenberger, Markus Schröger, Felix Pischel

Austrian Federal Finance Court on consideration of originally not anticipated sale of property for forecasts substantiating that a rental does not qualify as a hobby activity for tax purposes

Losses from the rental of real property may be disregarded for Austrian tax purposes if the whole activity is qualified as a "hobby activity" (Liebhaberei) for tax purposes. This is in particular the case if the rental of the property is not expected to break even (for tax purposes) within 20-23 years ("small" rental of single flats or residential houses) or 25-28 years (larger buildings). The respective tax payer needs to substantiate that a positive result is expected within the respective time frame with a forecast/prognosis calculation.

In a recent case, the tax office took the view that the sale of the property should not be considered in the forecast since it was originally not planned to sell the property within the respective time frame. The Austrian Federal Finance Court confirmed the tax office's opinion.

Markus Vaishor, Julia Beringer

Austrian Federal Finance Court: Revision proceedings inequitable, if facts were already examined in a previous tax audit

Revision proceedings are permissible, if facts or evidences emerge for the first time. Pursuant to the settled case law of the Austrian Administrative Supreme Court, the tax authorities' state of knowledge in connection with the specific proceeding is decisive only. Thus, in a later proceeding concerning a specific year of assessment, the tax authorities may not take facts into account which have already become known in a previous proceeding concerning a different year of assessment. However, if specific facts were already examined in a previous tax audit and confirmed, revision proceedings due to a later tax audit would be inequitable and therefore not allowed.

Stefan Papst

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