

IBA – International Bar Association

*RECENT DEVELOPMENTS IN
INTERNATIONAL TAXATION*

National Report
Austria

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May 2018

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1. Interpretation of Austrian loss-trafficking rules

Basically, tax loss carryforwards can be used by Austrian corporations indefinitely, but they are limited to 75% of the profit for the respective financial year. However, the loss carryforward is forfeited if the "identity" of the corporation changes (e.g. after an acquisition). The criteria indicating such a change of identity are:

- a significant change in the company's organisational structure (i.e. approx. 75% of the managing directors),
- a significant change in the company's economic structure (i.e. change of activities), and
- a significant change in the company's shareholder structure (approx. 75%).

If all of these criteria are met, the company's "identity" is deemed to have changed.

The Austrian Federal Tax Court recently ruled (4 December 2017, RV/7104666/2017) that only the persons who actually manage a company's business are relevant for determining whether a company's organisational structure has changed substantially. In the case at hand, even though formally all criteria indicating a change of the company's identity would have been met, tax loss carryforwards were not forfeited because from an economic perspective, the actual managing director had not changed. The de facto managing director ran the business because the official managing director was not available. Whenever an authorised signature was needed, the de facto managing director consulted a lawyer holding a power of attorney issued by the official managing director. The documentation clearly showed that business decisions were not taken by the official managing director but by a different person. Therefore, in this case even the appointment of a different official sole managing director did not result in a significant change in the company's organisational structure.

2. Annual Tax Act 2018

a. Overview

On 9 April 2018, the Austrian Federal Ministry of Finance published the draft bill for the so-called Annual Tax Act 2018 (*JStG 2018 – Jahressteuergesetz 2018*), which includes substantial changes to Austria's international tax law rules. The draft bill is currently under review.

b. New CFC regime

In the light of European law rules aimed at preventing international tax avoidance practices, the introduction of CFC taxation on low-taxed passive income of foreign corporations is envisaged. Thus, the draft bill

includes a new CFC-regime as a first step in implementing Articles 7 and 8 of the EU Anti-Tax Avoidance Directive (“**ATAD**”) (EU) 2016/1164 in order to meet the deadline of 1 January 2019 as set by the Directive.

Under the current regime, low-taxed passive income is subject to Austrian taxation on the basis of a so-called “switch over-clause”. In principle profit distributions received by an Austrian company are tax exempt for corporate income tax purposes. In cases where the distributing company’s (subsidiary) actual tax burden abroad does not exceed 12.5%, the tax exemption is replaced by a tax credit.

The general concept of the draft Austrian CFC-Regime is the inclusion of income in the Austrian tax base of an Austrian corporate shareholder that holds directly or indirectly a controlling participation in a foreign entity if that entity generates low taxed passive income. The new CFC-regime is subject to the prerequisite that the controlling entity, alone or jointly with its affiliates, directly or indirectly holds more than 50% of the voting rights or the share capital, or is entitled to more than 50% of the profits, of the foreign corporation. The relevant passive income includes e.g. interest, licensing fees, dividends, income from insurance and banking business, and income from billing business. Specific exemptions are envisaged in respect of insurance companies and banks. Passive income is considered to be low-taxed if the actual tax load abroad does not exceed 12.5%.

The CFC-Regime shall be introduced into the Austrian Corporate Income Tax Act (*KStG - Körperschaftsteuergesetz*) as new § 10a KStG.

c. Scope of binding rulings

The scope of the provisions in § 118 of the Austrian Federal Fiscal Code (*BAO – Bundesabgabenordnung*) regarding advance rulings (i.e. binding decisions by the tax authorities in reply to a taxpayer’s concrete legal question for a future fact pattern) is currently limited to legal questions concerning corporate reorganizations, tax groups, and transfer pricing. It is envisaged that in future, binding rulings will also be available for questions concerning international tax law, VAT, and “tax abuse”.

d. Horizontal monitoring

It is envisaged to introduce voluntary horizontal monitoring as an alternative to traditional (retrospective) audits, for companies whose sales proceeds exceed 40 million euros per year.

The subsequent audit is to be replaced by an internal tax monitoring system developed by the company, and audited by a tax consultant or an auditor, in combination with additional disclosure requirements and regular contact with the tax authority.

e. Other important changes

Other tax law changes that are important from an international perspective are changes to the provisions concerning the international participation

exemption and the exemption of dividends derived from portfolio investments, the shortening of the period allowed for instalment payments in connection with exit taxation from seven to five years, and amendments to the Austrian general anti-avoidance rule in the light of Article 6 of the ATAD.