Austria

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Acquisitions (from the buyer's perspective)

1 Tax treatment of different acquisitions

What are the differences in tax treatment between an acquisition of stock in a company and the acquisition of business assets and liabilities?

The acquisition of shares (share deal) in exchange for cash or shares does not generally affect the target company itself (there are certain exceptions such as net loss carry-forwards, which may cease to exist, or recapture rules under the Austrian group taxation regime). The company continues to record its assets at book values. At the shareholder level, if shares are sold for cash, the selling shareholder realises a capital gain or loss equal to the difference between the sales price and the value of the shares in his or her books. A share for share exchange is generally also taxable, but may qualify for roll-over treatment under the Austrian Reorganization Tax Act.

When acquiring shares in an Austrian corporation, the acquirer has to capitalise the shares at their acquisition cost. In the case of a future disposal of the shares, a capital gain is subject to corporate income tax at a rate of 25 per cent and at the special income tax rate of 27.5 per cent if the seller is an individual. A capital gain is computed by deducting the book value of the shares at the time of disposal from the proceeds from sale and the costs of disposal.

In the course of the acquisition of business assets and liabilities (asset deal), the price has to be attributed to the transferred assets (ie, such transaction is treated as if the purchaser has bought the various assets separately) according to the going concern values of the individual assets of the business in order to determine the acquisition costs of the assets (ie, a step-up that allows for depreciation takes place). The remaining acquisition costs that are not allocable to the transferred assets have to be reported as goodwill. The acquiring company is not entitled to utilise any tax losses available to the selling company in respect of the transferred business. If interests in a partnership are acquired, this is generally treated in the same way as described above for the asset deal, that is as a pro-rate purchase of the assets and liabilities of a partnership. Besides the purchase for a cash consideration, business assets and liabilities (if they constitute a business unit) or partnership interests can also be contributed against the issuance of shares, and such transactions may also qualify for roll-over treatment under the Austrian Reorganization Tax Act.

Any capital gain resulting from the disposal of assets or a business is subject to corporate income tax at the standard rate of 25 per cent if the seller is a corporation and up to 55 per cent if the seller is an individual. In principle, there is no difference between the taxation of capital gains resulting from the disposal of assets and capital gains resulting from the disposal of a business (some allowances may apply under very narrow circumstances).

2 Step-up in basis

In what circumstances does a purchaser get a step-up in basis in the business assets of the target company? Can goodwill and other intangibles be depreciated for tax purposes in the event of the purchase of those assets, and the purchase of stock in a company owning those assets?

In the course of an asset deal (or purchase of partnership interests) a step-up in basis in the business assets is achievable. Generally, the acquired assets have to be reported at their acquisition costs in the book of the acquiring company. Subsequently, the acquired assets may be depreciated over their expected useful lives. The differences between the price actually paid for a business and the acquisition costs of the individual assets has to be reported as goodwill. For Austrian tax purposes, the goodwill has to be depreciated over a period of 15 years on a straight-line basis.

There is no goodwill deduction in the case of the purchase of stock in a company acquired after 28 February 2014. For shares acquired before that date in an Austrian target that became a member in an Austrian tax group, a goodwill amortisation over a period of 15 years (capped at 50 per cent of the purchase price) was available. Goodwill amortisations from transactions before that date can be continued, given that the goodwill amortisation influenced the purchase price of the shares. In this context it should also be noted that the restriction of this goodwill amortisation to domestic targets violated EU law, according to case law.

3 Domicile of acquisition company

Is it preferable for an acquisition to be executed by an acquisition company established in or out of your jurisdiction?

In a leveraged transaction, a purchaser will usually seek to implement a tax offset structure that is aimed at offsetting interest expense at the acquisition company (AcquiCo) level with profit generated at the target company level. In principle, there are two methods for achieving this.

The first method is to establish a tax group between the AcquiCo and the target company. In such tax group, the fiscal result of the AcquiCo and the target company is consolidated at AcquiCo level, and thus the fiscal results of the AcquiCo and the target are offset. If the aggregated fiscal result of the AcquiCo and the target company is negative, the loss can be carried forward by the AcquiCo to future periods. The formation of such tax group requires a tax allocation agreement and an application to the tax office. The required minimum period of a tax group is fulfilled when three full fiscal years have expired. If the tax group is collapsed prior to the lapse of the three-year period, the group members are retroactively taxed on a standalone basis.

A second method, which is sometimes discussed but rarely ever implemented because of the significant implementation risk it involves, is an upstream merger of the target company into the AcquiCo. Based on past decisions of the Austrian Supreme Court, it is pretty clear that where the AcquiCo carries the acquisition debt for the purchase of the shares of the target company, a downstream merger of the AcquiCo into the target company will not be registered. In certain exceptional cases, an upstream merger of the target company into the AcquiCo may, however, be feasible. The result of such upstream merger would be that the shares in the target company pass to the AcquiCo parent, interest expense on the acquisition debt can be offset against profit, and guarantees and security interests granted by the merged entity (holding the cash-generating assets) are not subject to the limitations under the Austrian capital maintenance rules and thus will be of greater commercial value to the financing banks. In particular, the last point is often of great interest to the financing banks, which is why this route is sometimes explored when a particular case supports the necessary arguments.

Regarding a future exit, it should be taken into account that double taxation treaties usually assign the right to tax capital gains to the state of residence of the shareholder. For that reason, a foreign seller will usually not be taxed on the capital gains in Austria. If, however, the seller is an Austrian tax resident, capital gains taxation applies (ie, no participation exemption is available for Austrian tax residents in relation to Austrian targets). Avoidance of withholding taxes on dividends is usually less of an issue, since pre-exit distributions are very rare. Still, to address that issue, EU entities are usually preferred over non-EU entities and, among the latter, entities from countries with which Austria has concluded a double taxation treaty. Accordingly, if a transaction is not leveraged, a foreign AcquiCo will usually be the preferred structure for a foreign purchaser. In case of a domestic purchaser, the interposition of a foreign AcquiCo would be under high scrutiny by the tax authorities.

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

Company mergers or share exchanges as a form of acquisition are not as common between unrelated parties as in other jurisdictions such as the UK or the US. Accordingly, the transaction currency will usually be cash instead. However, when the parties aim to enjoy a roll-over treatment, merger or share for share exchanges can be an attractive option.

Under Austrian tax law, mergers within the scope of the Austrian Reorganization Tax Act are tax-neutral provided that the possibility to tax unrealised gains at the level of the legal successor (receiving company) is not restricted. In the case of a restriction, a merger into a receiving company in the sense of article 3 of the EU Merger Directive in its current version or if the receiving company is resident in an EU member state or an EEA country with which Austria has concluded a comprehensive exchange of information and enforcement agreement, the merger is taxable but the respective tax payment is deferred up to seven annual instalments upon request of the transferring company. If the receiving company does not meet the aforementioned requirements, the merger triggers immediate taxation. Towards EU or EEA entities this is a new and less favourable regime that applies to mergers resolved as of 1 January 2016, where mergers before that date could apply for a deferral of taxation until capital gains had actually been realised, and such taxation had been time-barred after ten years. Accordingly, whereas under the past regime an exit taxation often had been avoided, this is no longer possible under the new regime. If capital gains were deferred under the old regime, the tax in such cases is also divided in seven instalments if so requested by the taxpayer.

5 Tax benefits in issuing stock

Is there a tax benefit to the acquirer in issuing stock as consideration rather than cash?

Beside the possibility of the tax-neutral reorganisation under the Austrian Reorganization Tax Act there are no further tax benefits to the acquirer in issuing stock as consideration rather than cash. However, in order to benefit from such tax-neutral reorganisation, it should be noted that the stock granted in consideration for the received assets does not necessarily have to be newly issued stock, but may also be existing stock (eg, transferred from other shareholders).

6 Transaction taxes

Are documentary taxes payable on the acquisition of stock or business assets and, if so, what are the rates and who is accountable? Are any other transaction taxes payable?

There are no transfer taxes as such levied on the sale of shares in a corporation or on the sale of assets in Austria. Note that (minor) court fees for registration in the Commercial Register have to be paid.

Additionally, Austria levies stamp duties on a wide range of legal transactions, including:

- lease agreements (rate of 1 per cent);
- assignment agreements (rate of 0.8 per cent);
- agreements regarding easements (rate of 2 per cent);
- agreements regarding sureties (rate of 1 per cent); and
- pledge agreements regarding real estate (rate of 1 per cent).

Stamp duties are triggered whenever a written deed evidencing the transaction is signed in Austria or, in cases where the deed is signed outside of Austria, if certain criteria being considered as substitute documentation are fulfilled (note that it is not the transaction as such that triggers the stamp duty but rather the written deed). Stamp duties can thus be legally avoided if no written deed at all is set up by carefully carried out strategies. Debtors of the stamp duties are basically all parties of the agreements.

The sale of shares in a corporation is VAT exempt without the right to deduct Value Added Input Tax. The sale of assets is subject to VAT at a rate of 20 per cent. In this case, however, the exemptions set out in the Austrian Value Added Tax Act (eg, for real estate or shares) remain applicable. The sale of a business as a going concern is treated as the sale of the underlying individual assets (ie, there is no VAT-exemption for the sale of a business in its entirety). Therefore, the price of the business has to be divided according to the going concern values of the underlying assets. Tax rates and exemptions are applicable according to regular VAT law.

Real estate transfer tax (3.5 per cent) is levied on every acquisition of domestic real estate and in some cases also if shares in corporations or interests in partnerships that directly own real estate are transferred. In particular, the transfer of buildings and land, building rights and buildings on third party land falls within the scope of the Austrian real estate transfer tax; the transfer of machinery and plants is not subject to real estate transfer tax. Tax base of the real estate transfer tax is the amount of consideration for the transfer (fair market value), at least the value of the real estate.

According to a recent tax reform (applicable to transactions effected after 31 December 2015), real estate transfer tax is triggered if 95 per cent (before the reform: 100 per cent) of the shares of a company that directly holds Austrian real estate are consolidated in the hands of one shareholder or a group of shareholders within the meaning of the Austrian group taxation regime. Furthermore, the tax reform also adds a new taxable event: if within a period of five years 95 per cent or more of the partnership interests of a partnership that directly holds real estate are transferred, this triggers real estate transfer tax (under the scope of this new rule this can include several transactions with different purchasers). In each case the real estate transfer tax amounts to 0.5 per cent of the fair market value of the real estate. The changed law now states that shares held by trustees are to be attributed to the trustor for the purpose of calculating the 95 per cent threshold. If Austrian real estate is transferred in the course of a reorganisation under the Reorganization Tax Act, the real estate transfer tax will likewise be 0.5 per cent of the fair market value of the real estate. The taxation based on the fair market value – in absence of a consideration that otherwise would be the tax base – was also introduced by the recent tax reform. Before that, taxation in such cases was based on an assessed value of real estate for tax purposes that usually was much lower than the fair market value.

In addition to real estate transfer tax, a registration duty for the land register at a rate of 1.1 per cent, also based on the purchase price, is levied if a new owner is registered (ie, not if shares are transferred, as the owner of the real estate does not change in such case).

7 Net operating losses, other tax attributes and insolvency proceedings

Are net operating losses, tax credits or other types of deferred tax asset subject to any limitations after a change of control of the target or in any other circumstances? If not, are there techniques for preserving them? Are acquisitions or reorganisations of bankrupt or insolvent companies subject to any special rules or tax regimes?

Insofar as losses are not deductible in one year they can be carried forward (there is no carry-backward available) to the next years for corporate income tax purposes. Pursuant section 8, paragraph 4, No. 2 of the Austrian Corporate Income Tax Act a deduction of loss carry-forwards up to the amount of 75 per cent (with certain exceptions that allow a deduction of 100 per cent, like in the course of a liquidation or if a business unit is sold) of operating income is possible.

According to section 8, paragraph 4, No. 2, letter c of the Austrian Corporate Income Tax Act, loss carry-forwards expire if the 'economic identity' of the taxpayer has changed in a significant way. The law stipulates a three-part test to establish if such change has occurred. There has to be:

- a substantial change in the organisational structure;
- a substantial change in the economic structure; and
- a substantial change in the shareholder structure that has been made against consideration.

Generally, all three requirements have to be cumulatively met to consider that the 'economic identity' of the taxpayer has changed significantly. Despite the foregoing, some may be less pronounced, as the assessment depends on an overall view of relevant requirements, taking into account all facts and circumstances. While the objective of the shell company acquisition regime is to deny the possibility to buy a company just to benefit from existing tax loss carry-forwards, there is no 'motive test' that would provide for an exemption from the regime if the taxpayer can clearly demonstrate that the transactions was not tax-driven. Even clear business reasons for the transactions do not hinder the application of the regime. In general, the law does not provide for a certain time period in which the three criteria have to be fulfilled cumulatively. The fulfilment of all three criteria within a short time frame is a strong indication that a shell company acquisition took place. However, the relevant observation period may cover several years as long as the single steps can be considered to be parts of a larger plan to effect the relevant changes leading to the loss of the 'economic identity'.

Even if the conditions are fulfilled, the loss carry-forwards do not expire if the changes are made for purposes of a restructuring of the corporation with the goal of saving a substantial number of existing jobs and its trade or business (that is an 'escape clause'). A substantial number of jobs is generally given if 25 per cent of the employees are retained. Such exemption will thus usually not be met if a holding entity or a similar vehicle is restructured.

Given that loss carry-forwards do expire as a result of the loss of the 'economic identity', section 8, paragraph 4, No. 2, letter c of the Austrian Corporate Income Tax Act, stipulates a very important exemption: any taxable income arising from the substantial economic change (eg, sale of assets or business premises) in the year of loss of the 'economic identity' can be offset with the loss carry-forwards before they expire.

Acquisitions or restructurings of bankrupt or insolvent companies are not subject to any special rules or tax regimes in Austria, although cancellation of debt, which generally is taxable in Austria, may enjoy a reduced taxation if certain requirements are met.

8 Interest relief

Does an acquisition company get interest relief for borrowings to acquire the target? Are there restrictions on deductibility where the lender is foreign, a related party, or both? Can withholding taxes on interest payments be easily avoided? Is debt pushdown easily achieved? In particular, are there capitalisation rules that prevent the pushdown of excessive debt?

Pursuant to section 11 of the Austrian Corporate Income Tax Act, interest – in a narrow sense – on funds used to finance the acquisition of shares is tax deductible for corporate income tax purposes.

Expenses related to the payment of interest to foreign recipients are in general deductible from the corporate income tax base. However, the deductibility of interest payments is limited in the case of loans between related parties. Accordingly, expenses with interest are not deductible from the tax base of an Austrian corporation as long as, cumulatively:

- the interest is paid to an Austrian company or a foreign company that is comparable to an Austrian company;
- the interest is paid to a company that is directly or indirectly part of the same group of companies or is influenced directly or indirectly by the same shareholder; and
- the interest payments in the state of residence of the receiving company are not subject to tax because of a personal or objective exemption;
  - subject to tax at a rate lower than 10 per cent; or
  - subject to an effective tax at a rate lower than 10 per cent due to any available tax-reduction.

It is not relevant whether taxation at a rate lower than 10 per cent is based on the domestic law of the state of residence of the receiving company or the applicable Double Taxation Treaty concluded between Austria and the respective state of residence. If the receiving entity is not the beneficial owner, the respective conditions have to be investigated at the level of the beneficial owner (eg, in certain back-to-back refinancing scenarios). Although not limited to cross-border payments in other jurisdictions, one should note that Austria, as of today, has no interest barrier rule. Accordingly, interest payments made to third (ie, unrelated) parties are always tax-deductible. However, as a result of the OECD BEPS project, it is notable that recently adopted EU legislation provides for such interest barrier rule to be implemented by the EU member states before and applied as of 1 January 2019.

Despite the fact that there are no Austrian statutory rules on thin capitalisation, as a matter of administrative practice and under the case law, loans from related parties to an Austrian company may be considered to be 'hidden' equity and not debt if the Austrian corporation is considered to be thinly capitalised. A shareholder loan may be re-qualified as deemed equity in the following scenarios:

- lack of sufficient equity in relation to the long-term funding requirements of the business;
- excessive debt financing (debt to equity ratios far below the market standard);
- inability of the borrower to obtain a loan at comparable terms from third parties; or
- the loan agreement grants rights to the lender similar to those of shareholders.

In such case, the interest is reclassified as dividends for Austrian tax purposes, but these deemed dividends may not, in some cases, benefit from treaty or directive reductions. While there is no official 'safe harbour' rule, the Austrian tax authorities generally accept debt-to-equity ratios of around 4:1 to 3:1. However, this can only serve as guidance and the adequate debt-to-equity ratio has to be analysed on a case-by-case basis. Having said that, higher debt-to-equity ratios have also been accepted.

For debt pushdown, see question 3.

9 Protections for acquisitions

What forms of protection are generally sought for stock and business asset acquisitions? How are they documented? How are any payments made following a claim under a warranty or indemnity treated from a tax perspective? Are they subject to withholding taxes or taxable in the hands of the recipient?

Tax risks are usually covered by warranties or indemnities. Tax warranties typically foresee a time limitation around seven years. No liability is usually agreed for mere timing differences (eg, if tax authorities request longer tax depreciation periods) or if the tax risks had already been accounted for (eg, through provisions). Warranties are usually qualified by matters that have been disclosed (in a certain manner) or are deemed disclosed by operation of the provisions of the acquisition agreement or the disclosure letter. Indemnities are generally not qualified by disclosure or knowledge. The tax indemnity is usually only subject to a specific tax conduct provision, a direct loss limitation and the overall cap. In some cases additional protection is obtained by warranty and indemnity insurances. If a tax warranty or indemnity is triggered, the seller will usually have the right to pursue tax litigation at his or her own risk and expenses to mitigate a potential liability. Payments under tax warranties or indemnities result in a retroactive change as regards the profit or loss generated by the seller and the acquisition costs recorded by the purchaser and thus have only indirect tax consequences, rather than being taxable as such. If, however, additional payments such as liquidated damages are agreed upon, such would be subject to tax by the recipient. There is generally no withholding tax on such payments.

Post-acquisition planning

10 Restructuring

What post-acquisition restructuring, if any, is typically carried out and why?

Typical post-acquisition restructurings are the merger of the acquisition company with the target company or the establishment of an Austrian tax group (see question 3). Due to corporate limitations, the implementation of such a merger is often not feasible. Accordingly, the following paragraphs focus on the establishment of an Austrian tax group.

Austrian companies have the possibility to establish a tax group with subsidiaries by jointly filing a group taxation application before the Austrian tax authorities. The advantages of a tax group are the offsetting of profits and losses within the group (including the losses of foreign group members) and earlier usage of tax loss carry-forwards and the deduction of interest expenses from operational income.

According to the Austrian group taxation regime, a group parent company can form a tax group with a subsidiary if the parent exercises financial control over the subsidiary (ie, the parent owns more than 50 per cent of the capital and voting power in the subsidiary). Group members can include resident companies and non-resident companies if they are resident in an EU member state or in a third state with which Austria has concluded a comprehensive administrative assistance agreement regarding the exchange of information.

With regard to Austrian group members, 100 per cent of the profit or loss of the company is taxed at the level of the parent company (irrespective of the participation held), while losses of non-resident group members are only attributed to the parent to the extent of the direct participation of the parent (profits are not attributed at all). Losses attributed to the Austrian parent company in the past have to be recovered in Austria if the non-resident group member offsets the losses with its own income in subsequent years or if the non-resident group member leaves the group. The foreign losses have to be calculated based on Austrian tax law but they can only be offset to the extent a loss exists, according to foreign tax law. Special rules for the recovery of losses apply in case of the liquidation of a non-resident group member. Additionally, foreign losses shall be deductible only to the extent of 75 per cent of the total profit generated by all domestic group members and the parent company.

In general, write-offs with regard to participations in group members are not tax deductible. For shares acquired in a new Austrian group member, there was the option to record a goodwill element from the acquisition and amortise this asset over 15 years, leading to an additional tax deduction. For shares acquired after 28 February 2014, this option is no longer available. Goodwill amortisations from transactions before that date can be continued, given that the goodwill amortisation influenced the purchase price of the shares.

Other potential post-acquisition reorganisations could be, for example, the change of the legal form (typically a conversion) or the combination of a part of the existing business with the purchased business, which usually would be implemented by a carve-out of the existing one and a combination with the purchased one, which could be implemented either through a straight spin-off by acquisition, or through a spin-off followed by a merger. Sometimes, post-acquisition reorganisations are also aimed at simplifying the structure, for example if two multinational companies are combined by merging the various local entities. In the cross-border context, another possible post-acquisition reorganisation is the conversion of a local subsidiary into a branch, which usually is implemented by cross-border mergers.

11 Spin-offs

Can tax neutral spin-offs of businesses be executed and, if so, can the net operating losses of the spun-off business be preserved? Is it possible to achieve a spin-off without triggering transfer taxes?

Within the scope of article VI of the Austrian Reorganization Tax Act a spin-off of companies can be effected tax-neutral (ie, a roll-over treatment is available). The spin-off qualifies only if it relates to:

- a business unit;
- a division of a business unit, a partnership interest with an active trade or business; or
- a qualifying interest in a corporation (at least 25 per cent of the share capital).

In a spin-off qualifying assets would be transferred from one company to one or more companies, while the transferring company continues to exist. In a split-off the transferring company dissolves without formal liquidation and ceases to exist. The property can be transferred to a newly established company (split-off by formation) or to an existing company (split-off by acquisition).

In general, the rules set forth in section 8, paragraph 4, No. 2, letter c of the Austrian Corporate Income Tax Act (as mentioned in question 7) also apply to any changes of the structure of a corporation in the course of a reorganisation, such as spin-offs. However, the Austrian Reorganization Tax Act contains some special provisions supplementing the general rules. Basically, the net operating losses of the spun-off business are transferred to the receiving company as long as the assets that caused the transferred losses are also transferred and the scope of the assets is comparable to the scope of the assets in the point in time when the losses occurred.

Under the provisions of the Austrian Reorganization Tax Act an exemption from VAT applies. Stamp duties will usually not be triggered since the transfer of assets and liabilities is implemented by operation of law according to the principle of universal legal succession. Depending on the assets transferred, real estate transfer tax and registration duties may be triggered. There is no capital duty in Austria anymore.

12 Migration of residence

Is it possible to migrate the residence of the acquisition company or target company from your jurisdiction without tax consequences?

There are no explicit statutory rules or administrative guidelines that deal with the migration of an Austrian corporation. At the level of the migrating corporation, the following alternatives have been discussed. Some scholars argued in the older literature that the corporation is treated as if it were liquidated. According to section 19 of the Austrian Corporate Income Tax Act the liquidation surplus at the level of the company would be calculated as the difference between the net assets at the beginning of the liquidation period and the net assets at the end of the liquidation period according to the normal tax and accounting principles. Losses carried forward can be offset against the liquidation surplus without limitation. The distribution of the liquidation surplus and retained earnings of earlier years constitutes taxable income for

Update and trends

Most notable were several recent changes to the law outlined below.

Until recently, the equity was typically channelled down to Austria by way of indirect grandparent capital contributions to avoid capital duty (which would have been triggered in the case of a direct parent capital contribution). Capital duty on direct capital contributions was, however, abolished, effective as of 1 January 2016, which means acquisition structures will become simpler as interim holding companies, previously needed for capital duty reasons, will no longer be required. Since 2014 goodwill amortisation is no longer available on share deals (which required the establishment of a tax group). The latter will likely lead to more foreign acquisition companies, unless offsetting interest expenses incurred in financing the acquisition from the profits of the target is a major concern.

Tax rulings are becoming more common, after a new ruling regime providing for binding tax rulings in the areas of reorganisations, the group taxation regime, and transfer pricing was introduced a few years ago. On the buy side, tax rulings are less common. However, we increasingly see rulings, for example, in relation to pre-exit reorganisations, such as a carve out of a certain division that shall be sold separately.

By the Tax Amendment Act 2014, the deductibility of interest expenses paid abroad is limited if the interest is paid to a related party and not taxed at a minimum of 10 per cent. Since that amendment of the law, we have seen fewer shareholder loans from tax havens than in the past.

The parties should also consider recent changes in relation to real estate transfer tax (that is, a lower share consolidation threshold (now, 95 per cent compared to 100 per cent previously) and full attribution of shares held in trust to the trustor) whenever real estate is involved in a transaction.

Substantial changes can of course follow from international developments such as BEPS, which among others lead to increased scrutiny of the tax authorities in relation to transactional tax structures.

the shareholders and is taxed at their level depending upon whether it is a company or an individual, resident in Austria or not. In the meantime, however, the prevailing opinion is of the view that no liquidation taxation is triggered. Based on income taxation rules, it then needs to be analysed whether assets are actually transferred in the course of the migration, in which case exit taxation would be triggered, and/or whether as a consequence of the migration certain assets are no longer taxable in Austria (eg, a goodwill that will ususally be attributed to the place of effective management) and likewise would be subject to exit taxation. In case of migration to an EU or EEA member state with a comprehensive administrative assistance, the tax can – upon request of the taxpayer – be paid in seven annual instalments (or two annual instalments as regards the current assets).

13 Interest and dividend payments

Are interest and dividend payments made out of your jurisdiction subject to withholding taxes and, if so, at what rates? Are there domestic exemptions from these withholdings or are they treaty-dependent?

Interest payments to non-Austrian corporations are not subject to limited tax liability in Austria and, therefore, are exempt from withholding tax. Interest payments to non-Austrian individuals may be subject to Austrian withholding tax at a rate of 27.5 per cent (or 25 per cent in case of interest payment from bank deposits and certain non-secured receivables against credit institutions) if paid by an Austrian paying agent (eg, an Austrian issuer of securities, Austrian credit institution or Austrian branch of a non-Austrian credit institution). However, if the debtor has neither its seat nor its place of business within Austria, interest payments are exempt from limited tax liability and withholding tax, even if paid by an Austrian paying agent. Relief from withholding tax may be granted under applicable tax treaties. With respect to interest payments made before 1 January 2017, it is notable that individuals being resident in another EU member state may, as an alternative to the above described domestic withholding tax, be subject to EU withholding tax at a rate of 35 per cent unless they provide proper documentation issued by the tax office of their state of residence in order to avoid such withholding. EU withholding tax will be abolished as of 1 January 2017.

As of 1 January 2016, dividends paid to a non resident are subject to a withholding tax of 27.5 per cent (previously 25 per cent). A reduction or relief from withholding tax might be available based on a tax treaty or the EU Parent-Subsidiary Directive. According to the Austrian implementation of the Directive, there is no withholding tax on dividends if:

- the parent company has a form listed in the Directive;
- the parent company owns directly or indirectly at least 10 per cent of the capital in the subsidiary; and
- the shareholding has been held continuously for at least one year.

Given that certain documentation requirements are met, a reduction or relief can be granted at source. There is no relief at source in cases of potential tax avoidance through holding companies (ie, if the recipient is a company that does not have an active trade or business, employees and business premises). Companies can apply for a refund in that case. In the course of the refund procedure, the company has to provide evidence that the interposition of the company does not constitute an abusive arrangement. As a further option, a refund of withholding tax on dividends can be claimed by a foreign corporation to the extent that the Austrian payer is not relieved from its withholding obligation, so long as the tax withheld is not creditable in the recipient's home state under a double taxation treaty.

14 Tax-efficient extraction of profits

What other tax-efficient means are adopted for extracting profits from your jurisdiction?

According to Austrian generally accepted accounting principles (GAAP), the balance sheet profit of a company can be sourced by the release of capital reserves paid in by the shareholder or by operating profits obtained by the company itself. Austrian tax law provides a different treatment for distributions of such balance sheet profits, whether they are made in the form of repayment of capital or as dividends. Repayments of capital are tax-neutral and do not trigger withholding tax. At the level of the company, such repayment of capital does not trigger any tax consequences under Austrian tax law. At the level of the shareholder a repayment of capital is treated as a reduction of the acquisition costs or book value of the participation. Such reduction leads to a taxable capital gain if the repaid amounts exceed the acquisition costs or book value for tax purposes of the participation.

To document the amount of capital contributions for tax purposes (which can be different from the capital according to Austrian GAAP), taxpayers have to record all capital contributions in a special tax account. As long as the contributions recorded in this account cover the amount of a planned profit distribution, the management of a company has the right to decide whether a distribution to all shareholders of the company shall be treated as a taxable dividend or a tax-neutral repayment of capital.

Disposals (from the seller's perspective)

15 Disposals

How are disposals most commonly carried out – a disposal of the business assets, the stock in the local company or stock in the foreign holding company?

The most common form of transaction relating to corporations clearly is the share deal, due to reasons that go way beyond the tax implications. In general, a purchaser usually wishes to acquire only the target, rather than the foreign holding entity as well. The purchase of partnership interests is treated as the purchase of the pro rata amount of the assets and liabilities of the partnership (ie, as an asset deal). Either form generally trigger taxation.

16 Disposals of stock

Where the disposal is of stock in the local company by a non-resident company, will gains on disposal be exempt from tax? Are there special rules dealing with the disposal of stock in real property, energy and natural resource companies?

The disposal of stock in an Austrian company by a non-resident company is subject to tax if the participation amounts to at least 1 per cent at any time within the preceding five years. Accordingly, such disposals will usually be taxable in Austria (by contrast capital gains realised by Austrian companies arising from the disposal of stock in foreign corporations will usually be exempt from taxation in Austria). Corporate income tax is assessed on such gains at the normal rate of 25 per cent. Taxation is eliminated, however, in most cases under an applicable double tax treaty. Some of the double tax treaties concluded with Austria include a special provision in connection with companies owning real estate located in Austria, and assign Austria the right to tax such capital gains.

17 Avoiding and deferring tax

If a gain is taxable on the disposal either of the shares in the local company or of the business assets by the local company, are there any methods for deferring or avoiding the tax?

It is possible to transfer the shares in an Austrian company or of the business assets by the Austrian company in a tax-neutral way under the Austrian Reorganization Tax Act. Therefore, if the requirements are met (among others the consideration that the shares or assets transferred must generally be shares in the acquiring company), roll-over treatment is available. If the seller of a local corporation is an Austrian private foundation, taxation of capital gains in a sale transaction can be avoided if within twelve months an alternative investment is made and the realised capital gains (hidden reserves) of the sold participation are transferred to this new investment (by reducing the acquisition costs in such new participation) and thereby remain taxable.

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