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Austria

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2012: THE YEAR IN REVIEW

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Austria made a number of amendments to the Income Tax Act in 2012.

Foreign Loss Utilization Capped

Under the old law, Austrian residents may deduct foreign losses from their taxable income, and Austrian group parents may even deduct losses of foreign group members from their tax base. In both cases a recapture takes place once the foreign losses are utilized abroad or, in case of a tax group, once the foreign company leaves the group or is dissolved.

Generally, foreign losses must be computed in accordance with the Austrian ITA. As a result, the taxable loss transferred from abroad could be higher than the loss as determined under foreign rules; there could even be an Austrian loss despite a foreign profit. The recapture takes place only to the extent that the loss is effectively utilized abroad (without applying the Austrian tax regime).

The law has been amended: While the foreign losses are still calculated according to Austrian tax law, they are capped with the loss of the respective year as determined under foreign tax law.

Reorganization Tax Act

The broad Austrian participation exemption applies to holdings of at least 10 percent in companies that are subject to tax of at least 15 percent or companies that pursue an active business. If both conditions are not fulfilled — if the company is passive and taxed below 15 percent — dividends as well as capital gains are not exempt from taxation. If such a foreign company is merged upstream into its Austrian parent company, the law deems the distributable profits to be taxable, a rule with the goal of avoiding the application of tax neutrality rules of the act. This rule has now been extended to side-stream mergers and applies for any merger in which the registration is filed after December 31, 2012.

New Real Estate Gains Taxation

Until March 31, 2012, capital gains of privately held real estate were only taxable if realized within the speculation period of 10 or 15 years after acquisition. In 2012 a flat tax of 25 percent on all such gains was introduced. According to the First Stabilization Act 2012, the alienation of real property is always taxable, regardless of the holding period, but only at a special flat rate of 25 percent.

Regarding immovable property for which the speculation period had already elapsed when the law entered into force, beneficial rules apply, generally leading to a 14 percent lump sum taxation based on the sales proceeds, unless higher acquisition cost (thus a lower gain) is proven; in effect 3.5 percent of the sales price is taxed. Alternatively, if the actual acquisition costs are elected to be deducted from the sales proceeds, an inflation discount of 2 percent per year from the 11th year of holding may be deducted. The law also provides for tax exemptions on principal residences, self-constructed buildings, and compensatory payments.

The new real estate income tax is assessed by way of self-assessment together with the real estate transfer tax; both taxes will be declared, withheld, and remitted by the party.

Land Registration/Real Estate Transfers

Under the Austrian Valuation Act, real estate is assessed at an officially determined artificial value, the "standard value" (*einheitswert*), which is used for tax purposes. The standard value was the taxable base under the Inheritance Tax Act that was abolished by the Austrian Constitutional Court effective July 31, 2008, because of the inequality of taxation due to considerable differences in taxable bases of different types of assets. While the standard value of real estate usually corresponds to only a fraction of the fair market value, other assets are generally assessed at their fair market value.

Following the abolishment of the inheritance and gift tax, a series of constitutional court examinations began regarding provisions on the standard value of real estate. On September 21, 2011, the provision on the land registration fee was suspended as of the end of 2012, while section 6 of the Real Estate Transfer Tax Act is still under scrutiny by the court. Therefore, a new regime of land registration fees that are levied at a rate of 1.1 percent of the property value has been introduced and is effective from 2013. The fee is now assessed on the fair market value of the immovable property; however, transactions among family members and reorganizations and transfers between shareholders and their company are now subject to a preferential tax base, which continues to be three times the standard value, but is now capped at 30 percent of the fair market value. It is expected that the Real Estate Transfer Tax Act will also be repealed because it refers to the standard value.

Austria-Switzerland Tax Agreement

The Austria-Switzerland tax cooperation agreement was signed on April 13, and will enter into force on January 1, 2013. It is estimated that up to €20 billion of untaxed Austrian funds are deposited into Swiss bank accounts, and the Austrian government expects to receive about €1 billion in compensation based on the agreement. The tax cooperation agreement is similar to the Switzerland-U.K. agreement.

The agreement provides for a one-off payment for tax-sheltered income derived in the past, which is computed by a complex formula at a rate between 15 and 30 percent (or 38 percent under exceptional conditions) based on the performance of the deposit accounts. With such payment, all taxes avoided in the past are deemed to be settled. Alternatively, any taxpayer is free to file a self-disclosure (that is, a complaint of one's own fiscal offense) with the Austrian tax authorities before any investigation has started, thereby (together with payment of the avoided taxes) preventing fiscal prosecution and punishment. It might be preferable for many Austrian resident taxpayers to repatriate the Swiss funds by notifying the tax authorities; however, this must be determined individually. Swiss banks now must withhold a 25 percent source tax on current interest or other earnings deriving from the funds on deposit and must remit such tax to Austria.

EU Administrative Cooperation Act

Austria has implemented EU Directive 2011/16/EU on administrative cooperation in the field of taxation by the enactment of the EU Administrative Cooperation Act (EU-Amtshilfegesetz), which takes effect on January 1, 2013 (2015 regarding the rules on automatic information exchange). The directive ensures that the OECD standard for the exchange of information on request is implemented throughout the EU. Under the new information exchange regime, the supply of information concerning a taxpayer of another member state may not be refused solely because the information is held by a bank. The new regime extends cooperation to direct taxes of any kind and establishes time limits for the provision of information on request.

In cases of information on request, some details must be specified in the request for information, namely the identity of the person under investigation and the tax purpose for which the information is sought. Information exchange will now be based on the use of standardized forms, formats, and channels of communication. The new law will also allow tax officials to participate in administrative inquiries in the territory of another member state. Information must be supplied even without request if there is suspicion of tax fraud or evasion. Automatic exchange of information is provided for five categories of income and capital effective in 2015. ◆

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