International Bar Association Annual Conference 2019

Seoul, South Korea

Recent Developments in International Taxation

Austria

Eva Stadler

WOLF THEISS

eva.stadler@wolftheiss.com

1. Annual Tax Act of 2018

1.1. Introduction

The most significant developments in Austrian international tax law regarding the past year are contained in the Annual Tax Act of 2018. It aims at transposing into Austrian domestic law the BEPS measures imposed in the so-called Anti-Tax Avoidance Directive ("**ATAD**"; *Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market*). Further, it provides, *inter alia,* for new types of formal tax rulings.

1.2. CFC Rules

Austria did not have any controlled foreign company ("**CFC**") legislation in the past. In line with the ATAD, CFC rules were introduced and have been applicable since 1 January 2019. Pursuant thereto, non-distributed passive income of a CFC (wherever resident) is to be included in the tax base of the controlling corporation if:

- the CFC is low-taxed, *i.e.,* its effective foreign tax rate is not more than 12.5%;
- the passive income of the CFC exceeds a third of its total income;
- the direct participations held in the CFC by the controlling corporation and its associated enterprises result in an entitlement to more than 50% of the voting rights or the capital or the profits of the CFC; and
- the CFC does not carry out a substantive economic activity supported by staff, equipment, assets and premises.

In the absence of CFC rules, the Austrian tax system previously prevented taxpayers from transferring excess liquidity to low-taxed foreign subsidiaries and from repatriating the resulting income in a tax free manner through the so-called switch-over provision: Dividends and capital gains from low-taxed passive income earning subsidiaries do not benefit from the international participation exemption, but are taxable, with a credit for the underlying taxes being granted (thus, there is a switch from the exemption to the credit method). This switch-over provision is still applicable to some types of low-taxed, passive income earning foreign participations not falling within the scope of the CFC rules.

Recently, the Austrian Minister of Finance issued an ordinance giving further guidance on how to apply the CFC and switch-over rules.

1.3. Exit Taxation

The ATAD obliges Member States to implement exit taxation rules regarding corporations. Austria had already amended its exit tax provisions some time before the adoption of the ATAD and had largely complied with the requirements of the ATAD. Thus, the Annual Tax Act of 2018 only contained minor technical changes in that respect.

1.4. Anti-Abuse Rule

In the past, Austrian law contained a general anti-abuse provision, pursuant to which a tax liability cannot be avoided or reduced by abusing the legal forms or methods available under civil law, but no definition of "abuse of law".

The Annual Tax Act of 2018 for the first time incorporated a definition of "abuse of law" into statutory law. Pursuant thereto, abuse of law is deemed to exist in case a legal structure that may involve one or more steps or a sequence of legal structuring is inappropriate in light of its economic purpose. The term "inappropriate" refers to structures that appear no longer meaningful without the related tax saving effect, because the essential purpose or one of the essential purposes is to obtain a tax advantage which is contrary to the aim or purpose of applicable tax legislation. However, a legal structure is not abusive if there are valid economic reasons that reflect economic reality.

1.5. (Non-)Implementation of the Interest Limitation Rule

The ATAD required EU Member States to implement an interest limitation rule into their domestic laws by 31 December 2018. However, by way of derogation, Member States which as of 8 August 2016 have national targeted rules for preventing base erosion and profit shifting that are equally effective to the interest limitation rule set out in the ATAD, may delay the implementation of the interest limitation rule until 1 January 2024 at the latest.

In the wake of the OECD's first steps against BEPS, Austria implemented a non-deductibility provision for interest paid to related companies if such interest is subject to low or no taxation. The Austrian Ministry of Finance considers this existing provision as equally effective to the interest limitation rule under the ATAD, and thus as a justification to delay implementation of the ATAD in that respect. It seems that the European Commission does not share that view: in its published list of Member States which qualify for the delayed implementation, Austria was not mentioned. This implies that, in the European Commission's view, Austria has incorrectly not implemented the ATAD's interest limitation rule.

1.6. New types of formal tax rulings

Previously, legally binding tax rulings could only be obtained in Austria for reorganisations, group taxation and transfer pricing. The Annual Tax Act of 2018 provides for an extension of the scope of obtainable rulings to the following areas:

- international tax law (*i.e.,* transfer pricing, tax treaties, but not domestic law provisions; as of 1 January 2019);
- the existence of abuse of law in an envisaged structuring (as of 1 January 2019); and
- value added taxation (as of 1 January 2020).

2. Draft Bills

In the area of international tax law, *inter alia,* the following draft bills have been published:

- draft bill of an Act on Tax Dispute Resolution Mechanisms in the European Union (which transposes into domestic law *Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union*);

- draft bill of a Digital Tax Act 2020, which provides for a digital tax of 5% of the consideration received by an online advertiser in case of online advertising (such as banner advertising or advertising on search engines) rendered in Austria, but only if the online advertiser (or the group of companies to which the online advertiser belongs) has (i) worldwide revenues of at least EUR 750m and (ii) revenues from the rendering of online advertising in Austria of at least EUR 25m in a given financial year;

- draft bill of an Anti-Tax Fraud Act, which, *inter alia*, provides for:

    - the mandatory reporting of cross-border arrangements (thus transposing into domestic law *Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements*); and

    - the obligation of employers not having an Austrian permanent establishment for wage tax purposes to withhold Austrian tax from wages paid to Austrian tax resident employees; and

- draft bill of a Tax Reform Act I 2019/20, which, *inter alia,* provides for:

    - rules transposing into Austrian domestic law *Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries* (commonly known as "ATAD II"); and

    - rules transposing into Austrian domestic law *Council Directive (EU) 2018/1910 of 4 December 2018 amending Directive 2006/112/EC as regards the harmonisation and simplification of certain rules in the value added tax system for the taxation of trade between Member States*, which provides for changes in the value added tax rules regarding, *inter alia,* call-off stock arrangements and chain transactions.

3. Tax Treaties

Since May 2018, income tax treaties concluded by Austria with Japan (effective as of 2019), Kosovo (effective as of 2019) and the United Kingdom of Great Britain and Northern Ireland (effective as of 2020) have entered into force.

In August 2018, the competent authorities of the United States of America and the Republic of Austria concluded an arrangement on the exchange of country-by-country reports, pursuant to which country-by-country reports shall be exchanged automatically.