



ICLG

The International Comparative Legal Guide to:

Corporate Tax 2013

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A practical cross-border insight into corporate tax work

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General Chapters:

1	A GAAR is born - William Watson, Slaughter and May	1
2	Tax Planning in Light of Impending Corporate Tax Reform - Stuart L. Rosow & Amanda H. Nussbaum, Proskauer Rose LLP	7

Country Question and Answer Chapters:

3	Albania	Boga & Associates: Alketa Uruçi & Andi Pacani	11
4	Andorra	Arqués Ribert Junyer Advocats: Daniel Arqués i Tomàs & Mireia Ribó i Bregolat	15
5	Argentina	Teijeiro & Ballone Abogados: Guillermo O. Teijeiro & Ana Lucía Ferreyra	21
6	Australia	Greenwoods & Freehills: Adrian O'Shannessy & Andrew Mills	29
7	Austria	Dorda Brugger Jordis: Paul Doralt & Martina Znidaric	35
8	Belgium	Vanhaute Attorneys: Patrick Vanhaute	41
9	Brazil	Machado Meyer Sendacz e Opice Advogados: Daniella Zagari & Marco Antônio Behrmdt	49
10	Bulgaria	Georgiev, Todorov & Co.: Georgi Kostolov	55
11	Canada	Thorsteinssons LLP: Michael Colborne & Michael McLaren	60
12	China	Hendersen Taxand: Dennis Xu & Eddie Wang	65
13	Cyprus	Dr. K. Chrysostomides & Co LLC: Dr. Kypros Chrysostomides & George Ioannou	71
14	Denmark	Gorrissen Federspiel: Jakob Skaadstrup Andersen & Lars Fogh	75
15	Estonia	Aivar Pilv Law Office: Jaak Siim & Ilmar-Erik Aavakivi	82
16	France	Bredin Prat: Yves Rutschmann & Marion Meresse	91
17	Germany	P+P Pöllath + Partners: Richard Engl & Gerhard Specker	98
18	Ghana	Bentsi-Enchill, Letsa & Ankomah: Seth Asante & Frank Nimako Akowuah	104
19	Greece	KGDI Law Firm: Elisabeth Eleftheriades & Panagiotis Pothos	109
20	Iceland	LOGOS legal service: Bjarnfredur Olafsson	117
21	Ireland	Mason Hayes & Curran: John Gulliver & Robert Henson	121
22	Israel	Shenhav & Co., Advocates and Notary: Ayal Shenhav & Oren Biran	127
23	Italy	Legance Studio Legale Associato: Marco Graziani & Claudia Gregori	132
24	Japan	Nagashima Ohno & Tsunematsu: Yuko Miyazaki	140
25	Kosovo	Boga & Associates: Alketa Uruçi & Andi Pacani	148
26	Liechtenstein	Advokaturbüro Dr Dr Batliner & Dr Gasser: Christian Presoly & Benedikt Koenig	152
27	Lithuania	Juridicon Law Firm: Laimonas Marcinkevičius & Ingrida Steponavičienė	158
28	Luxembourg	Elvinger, Hoss & Prussen: Jean-Luc Fisch & Dirk Richter	166
29	Macedonia	Debarliev, Dameski and Kelesoska: Dragan Dameski & Elena Nikodinovska	173
30	Malta	Avanzia Taxand Limited: Walter Cutajar & Mary Anne Inguanez	178
31	Mexico	Calderón, González y Carvajal, S.C.: Alejandro Calderón Aguilera & Arturo Carvajal Trillo	185

Continued Overleaf ➔

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32	Nigeria	Ikeyi & Arifayan: Nduka Ikeyi & Jude Odinkonigbo	191
33	Norway	Advokatfirmaet Thommessen AS: Ståle R. Kristiansen & Finn Backer-Grøndahl	197
34	Poland	Gide Loyrette Nouel Warsaw Office: Ewa Opalińska & Maciej Grela	203
35	Romania	Pachiu & Associates: Vlad Radoi & Laurentiu Pachiu	209
36	Slovenia	Law firm Blaž Pate Ltd.: Blaž Pate & Jure Mercina	216
37	South Africa	Glyn Marais Incorporated: Richard Glyn & Pride Jani	221
38	Sri Lanka	Nithya Partners : Naomal Goonewardena & Sheranka Madanayake	227
39	Sweden	Kilpatrick Townsend & Stockton Advokat KB: David Björne	233
40	Switzerland	Lenz & Staehelin: Heini Rüdüsühli & Jean-Blaise Eckert	240
41	Turkey	Pekin & Pekin: Fırat Yalçın & Sinan Abra	248
42	Ukraine	B.C. Toms & Co: Bate C. Toms & Mykhailo Razuvaiev	256
43	United Kingdom	Slaughter and May: William Watson & Zoe Andrews	264
44	USA	Proskauer Rose LLP: Stuart L. Rosow & Amanda H. Nussbaum	271
45	Vietnam	Gide Loyrette Nouel A.A.R.P.I.: Samantha Campbell & Nguyen Thi Tinh Tam	279

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1 Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in Austria?

Currently, there are 93 tax treaties in force in Austria.

1.2 Do they generally follow the OECD or another model?

Generally, they follow the OECD model, although some of the older treaties significantly deviate from the OECD model. Important examples of treaties which do not follow the OECD model in essential points are those with Brazil, France and Japan.

1.3 Do treaties have to be incorporated into domestic law before they take effect?

Treaties become effective upon their ratification by the two governments or representative houses of the two parties to the treaty. Formal incorporation into Austrian legislation is not required.

1.4 Do they generally incorporate anti-treaty shopping rules (or "limitation on benefits" articles)?

Generally, Austrian tax treaties do not incorporate anti-treaty shopping rules. The most notable exemption from this principle is the tax treaty with the United States, which has a strict "limitation of benefits" article.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

In principle, tax treaties are considered to be international law and as such should be protected from being overridden by national Austrian tax law. Nevertheless, in practice, the Austrian tax authorities often deny treaty benefits to entities resident within treaty jurisdictions if these entities have a low degree of substance. Technically, the denial of treaty benefits in such situations is achieved by applying the general anti-abuse rule of Section 22 of the General Austrian Tax Code (*Bundesabgabenordnung* – BAO).

1.6 What is the test in domestic law for determining corporate residence?

Corporate residence is determined by either the statutory seat in

Austria or the actual place of management in Austria.

2 Transaction Taxes

2.1 Are there any documentary taxes in Austria?

The most significant documentary tax is provided for in the rather formalistic and old-fashioned Austrian Stamp Duty Act (*Gebührengesetz* – GebG). According to Section 33 of the Austrian Stamp Duty Act, stamp duties are levied on certain types of transactions if these transactions are documented in writing. Generally, all parties entering into the agreement which triggers stamp duty are jointly and severally liable for these stamp duties.

In practice, the most important transactions which are subject to stamp duty under the Stamp Duty Act in the context of international business transactions are:

Lease and Rental Agreements

Lease and rental agreements are subject to stamp duty if a written rental or lease agreement is made. The stamp duty amounts to 1% of the annual sum of the rental payments multiplied by the duration of the contract (1% of 18 annual payments at the maximum). If there is no definite lease period, the stamp duty amounts to 1% of three times the annual value of the contract.

Agreements on the Assignment of Rights and Receivables

The assignment of rights and receivables is generally subject to stamp duty if a written agreement is made. The stamp duty amounts to 0.8% of the purchase price or of the fair value of the assigned receivables. Exemptions apply for assignments of receivables to special purpose securitisation vehicles.

Technique for avoiding stamp duties

Generally, Austrian stamp duty law is very formalistic and follows a rather old-fashioned "form over substance" approach. The law provides that, in general, all stamp duties arise upon either of the two following alternatives:

- i) the agreement subject to stamp duty is concluded in writing on Austrian territory, or the written agreement (or a certified copy of it) is brought into Austrian territory at any later stage; or
- ii) the contract is entered into abroad (and not brought to Austria), but the parties to the contract are Austrian residents and the legal obligations/transactions (payments) resulting from this contract are to be fulfilled in Austria.

On the basis of this legal environment, Austrian stamp duty in the context of international business transactions (with one party not being Austrian resident) can therefore be avoided using offshore

signing schemes. If both parties to the agreement are Austrian residents, the stamp duty can only be avoided if no written document is signed by both parties.

2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

Austria has a VAT system which follows the 6th EC VAT Directive. The generally applicable VAT rate is 20%. Lower rates apply to a few selected goods and services of public interest in the food, health and cultural sectors.

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

In principle, the supply of goods and services in any transaction is subject to VAT.

In the context of international business transactions, in practice, the most relevant VAT exemptions are the following:

Share Deals

The transfer of shares in a corporation is always exempt from VAT. Please note that in contrast to the treatment of shares in corporations, the transfer of partnership interests is treated for VAT purposes as an asset deal, i.e. VAT applies to the supply of all goods owned by the transferred partnership.

Financing

As in most other countries, the supply of financing services by banks and finance institutions is exempt from Austrian VAT. As a consequence of this exemption, banks are not entitled to claim input VAT refunds in Austria.

Real Estate Transactions

In the case of the transfer of real estate property, the seller has an optional right to treat the sale as being subject to or exempt from VAT. Generally, in business transactions, the option to subject the sale to VAT is elected in order to not retroactively lose input VAT refunds claimed by the seller prior to the sale. If the sale is subject to VAT, the buyer can claim an immediate VAT refund if he is an entrepreneur for VAT purposes.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

There are certain business sectors, most notably the banking sector, where the services are exempt from VAT and which are accordingly not entitled to recover VAT under the input VAT system. Other examples, besides the banking and finance sectors, are holding companies (with no other activities except holding participations) or medical services.

2.5 Are there any other transaction taxes?

The transfer of Austrian real estate property in an asset deal, or the transfer of all of the shares in an Austrian corporation which owns real estate property, triggers a real estate transfer tax of 3.5%. The real estate transfer tax in the case of a share deal may be avoided if not 100%, but only 99% of the shares in the company holding the real estate are transferred.

2.6 Are there any other indirect taxes of which we should be aware?

In the context of business transactions, the capital duty (1% levied on equity contributions to corporate entities) is of high practical relevance.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

Under Austrian national tax law, dividends are subject to a 25% dividend withholding tax. This withholding tax is reduced by most tax treaties. In addition, no withholding tax will be imposed at source on intra-group dividends to EU-resident parent corporations, in compliance with the EC Parent Subsidiary Directive, if the following requirements are met:

- the parent company directly and continuously holds at least 10% (in some countries 25% is required under the principle of reciprocity) in the distributing Austrian company for a period of one year;
- the Austrian company is in the legal form of an AG or a GmbH, i.e. a corporation;
- the parent company is a corporation as listed in Art. 2 of Directive 90/435/EC;
- the parent corporation provides a residency certificate issued by the foreign tax authorities which is issued within one year before or after the dividend is paid; and
- the parent company provides confirmation to its subsidiary that it has active business income, employees and its own office premises.

If any of these requirements are not met, withholding tax has to be withheld and the foreign parent can apply for a refund. During the course of this refund procedure, the Austrian tax authorities will verify whether the foreign parent is entitled to the withholding tax reduction or whether the structure is abusive. Pure holding companies, as foreign shareholders, will only be able to rely on the withholding tax reduction at source if it is clear that the structure was not set up purely for tax-avoidance reasons.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Royalties paid by an Austrian corporation to a non-resident are subject to a 20% withholding tax. However, under most of the tax treaties in force, this withholding tax is reduced to a rate of between 0% and 15%.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Austria does not levy any withholding tax on interest paid to a foreign or domestic corporate party. Treaty relief is not required. However, if debt is reclassified as hidden equity and, in consequence, interest payments are regarded as hidden dividends, the withholding tax rates for dividends may apply to interest payments.

3.4 Would relief for interest so paid be restricted by reference to “thin capitalisation” rules?

Austria does not have statutory thin capitalisation rules or safe harbour debt/equity ratios. However, depending on the economic situation of a company, the tax authorities may reclassify parts or all of a company’s debt into equity on a case-by-case basis. From a practical point of view, it is thus definitely advisable to adhere to industry standards.

3.5 If so, is there a “safe harbour” by reference to which tax relief is assured?

There is no statutory safe harbour. However, generally speaking, a debt/equity ratio of 70:30 should usually be acceptable to the Austrian tax authorities. The debt/equity ratio is always measured on a consolidated basis. In the case of a leveraged acquisition, this usually means that the debt incurred by the acquisition vehicle has to be consolidated with the already-existing debt of the target.

Besides thin capitalisation, in order to avoid a reclassification of debt into hidden equity for tax purposes, the Supreme Administrative Court and the Ministry of Finance stress the importance of relatively formal issues, such as written loan agreements with arm’s length terms regarding interest payments and repayment of loan principals.

3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

Yes, these informal thin capitalisation rules also extend to debt guaranteed by a related party.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

In general, expenses are not deductible if they are directly related to tax-exempt income. Exemptions from this principle may apply.

3.8 Does Austria have transfer pricing rules?

Austria does not have statutory transfer pricing rules. Nevertheless, transactions between related parties have to comply with the arm’s length principle. In enforcing the arm’s length principle, the Austrian tax authorities in 2010 published transfer pricing guidelines which use the OECD transfer pricing guidelines as a reference.

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

Austria has a flat corporate tax rate of 25%.

4.2 When is that tax generally payable?

The tax is, in general, payable within one month after receipt of the tax assessment, which is usually issued a few weeks after the filing of the tax return. A corporation generally has to file its corporate income tax return within four months after the end of the fiscal year. If the corporation is represented by a certified tax adviser, the filing date may be routinely extended by up to another year. Apart from the final tax payment, the corporation is subject to quarterly

prepayments of corporate income tax on the basis of preliminary estimates issued by the tax authorities. Final tax payments made later than nine months after the end of the fiscal year are subject to interest. Interest is levied for the period starting on 1 October for the final tax payments of the previous fiscal year.

4.3 Is the tax base accounting profit subject to adjustments, or something else?

In principle, the tax base for corporate income tax is the corporation’s annual profit on the basis of the statutory commercial accounts. However, significant deviations and adjustments from the commercial accounts are required, according to the Austrian tax accounting rules.

4.4 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

Differences between the profits shown in the commercial accounts and the tax accounts are based on tax accounting rules as provided in the General Income Tax Act (*Einkommensteuergesetz* – EStG) and the Corporate Income Tax Act (*Körperschaftsteuergesetz* – KStG).

The most significant of these adjustments are:

- the treatment of provisions (in the case of most provisions, deductibility for tax purposes is limited to 80% of the provision);
- the treatment of depreciation periods (for tax purposes, only straight line depreciation is accepted; goodwill has a standard tax depreciation period of 15 years); and
- the treatment of national or international dividend income (national dividend income is always tax-exempt on a corporate level; international dividend income is exempt if the requirements of the international participation exemptions are met).

4.5 Are there any tax grouping rules? Do these allow for relief in Austria for losses of overseas subsidiaries?

In 2005, Austria introduced a modern group taxation regime. The group taxation regime allows the integration of non-Austrian corporations into an Austrian tax group, which allows the cross-border of losses within the group.

The requirements for an Austrian tax group are the following:

- the group parent must be either an Austrian corporation or an Austrian registered branch of an EU resident corporation. Several companies may jointly act as a group parent, provided that at least one company holds at least 40% and the other companies hold at least 15% in the prospective group member;
- **Austrian or foreign companies** which are in a legal form, comparable to an Austrian corporation, may participate as group members. **Foreign companies** can only be a member of the group if they are directly held by the Austrian group parent or if they are a member of an Austrian group;
- to qualify as a tax group, the group parent has to hold a direct or indirect participation of more than 50% in the share capital, as well as a majority of the voting rights of the Austrian or the foreign subsidiary (“financial integration”). The requirement of financial integration must be met during the entire business year of the participating subsidiary;
- the group parent and the group members must file a written application for group taxation with the revenue office. The application is binding for at least three years; and

- group taxation is optional. The option can be exercised separately by each company that is a potential group member.

Under the new rules, all taxable profits and losses of the Austrian group members are attributed to the group parent, whereas in the case of foreign group members, only losses and no profits will be attributed to the group parent. If – in the years to follow – the foreign group member in its jurisdiction obtains a credit for the loss which is carried forward, the loss previously used in Austria must be recaptured at the level of the Austrian group parent in order to avoid the double use of losses. Should the foreign member cease to be a member of the tax group for any reason, but insolvency, losses previously used in the Austrian tax group are to be recaptured as well.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

No, there is no such differentiation in corporate tax law. The model exists, however, in the field of small-sized one-person businesses and small-sized partnerships with a profit of less than EUR 100,000.

4.7 Are companies subject to any other national taxes (excluding those dealt with in “Transaction Taxes”) - e.g. tax on the occupation of property?

Real estate property located in Austria is subject to property tax. The tax base for property tax is the historically-assessed standard value of the respective property, which is generally substantially lower than its actual fair value. The property tax is levied at a basic federal rate multiplied by a municipal coefficient. The basic federal rate is 0.2% of the historically assessed standard value; the municipal coefficients range up to 500%.

4.8 Are there any local taxes not dealt with in answers to other questions?

No, all taxes on corporate (as opposed to individual) taxpayers are levied at a federal level.

5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

There is a special set of rules regarding capital gains and losses incurred with international participations in non-Austrian corporations exceeding a minimum shareholding of 10%.

Capital gains or capital losses realised upon both the sale of such participations, as well as depreciations of the participation are, in principle, not tax-effective. In the past (i.e. up to 2004), such capital gains were tax-exempt, whereas capital losses were deductible. Due to EU pressure, both capital gains and capital losses are now tax-neutral (i.e. gains are exempt and losses are not deductible).

Only losses realised upon the liquidation or insolvency of a foreign subsidiary are still tax-deductible to the extent that they exceed tax free dividends received in the five years before the liquidation or insolvency.

As an alternative to the “tax-neutral statutes” of international participations, an option model is available, as follows:

Any corporate holder of a foreign participation can opt out of the

tax neutrality of foreign participations. If such opt-out is chosen, capital losses and write-downs are fully tax deductible (however, they have to be depreciated over a fixed period of seven years), and on the other hand, capital gains will be fully taxable. Dividends, however, are not covered by this option and remain tax-exempt under the participation exemption.

It is possible to choose one of the two aforementioned options for each international participation. However, once the choice is made, it cannot be revoked.

5.2 If so, is the rate of tax imposed upon capital gains different from the rate imposed upon business profits?

No, the corporate tax rate imposed on capital gains is not different from the regular corporate tax rate of 25%.

5.3 Is there a participation exemption for capital gains?

As already indicated, there is an international participation exemption which applies to dividends and capital gains received from foreign subsidiaries, as opposed to the national participation exemption which only applies to dividends.

According to the Austrian international participation exemption, dividends received by an Austrian holding company from a subsidiary, or capital gains incurred by an Austrian company upon the sale of a foreign subsidiary, are not subject to corporate income tax in Austria if the following requirements are met:

- the Austrian company must hold at least 10% of its foreign subsidiary (in the case of EU jurisdiction, the 10% threshold is not required for dividends any more);
- the foreign subsidiary must be comparable to an Austrian AG or GmbH (i.e. it must be a corporation); and
- the participation in the foreign company must be held for at least one year (the holding period).

The international participation exemption is subject to a set of specific “anti-abuse of law” rules. Under these anti-abuse rules, the Austrian participation exemption does not apply if:

- The subsidiary is located in a low-tax jurisdiction. A jurisdiction is deemed to be a low-tax jurisdiction if the effectively applicable tax rate under Austrian tax accounting rules amounts to less than 15%.
- The subsidiary generates primarily passive income. A foreign subsidiary is considered to earn mainly passive income if the passive part of its operations constitutes more than 50% of its total activity (calculated on the basis of assets, employees and profits). The passive part is defined as activities in connection with interest income, income from licences or leasing, or the sale of participations, etc.

5.4 Is there any special relief for reinvestment?

There is no such relief for corporations. A relief for reinvestment exists only for individuals and private foundations.

5.5 Does Austria impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

If the custody account (*depotführende Stelle*) is in Austria, withholding tax is levied upon sales of a direct interest in local shares. The tax rate is 25%.

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

The formation of a subsidiary triggers a capital duty of 1% on the basis of the contributed equity (nominal capital plus share premium).

6.2 Are there any other significant taxes or fees that would be incurred by a locally formed subsidiary but not by a branch of a non-resident company?

The transfer of equity to the Austrian branch of a non-Austrian parent company in principle also triggers the 1% capital duty. However, this capital duty does not apply if the parent company is resident in an EU Member State.

6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

In principle, Austrian branches are not treated differently from Austrian resident subsidiaries. They are subject to Austrian tax accounting rules even though the statutory accounting is prepared at the level of the foreign parent company. The debt-equity ratio of a branch is measured on a stand-alone basis, i.e. the strong or weak equity position of the parent company is not relevant to the Austrian tax position.

6.4 Would such a branch be subject to a branch profits tax (or other tax limited to branches of non-resident companies)?

Austria does not have the concept of a branch profits tax (such as, for instance, the United States). Branches are subject to Austrian corporate income tax on the basis of the assumption that the branch constitutes a permanent establishment in Austria of its non-Austrian parent. Thus the non-Austrian parent company becomes subject to Austrian corporate income tax on all profits that can be allocated to the Austrian permanent establishment.

6.5 Would a branch benefit from double tax relief in its jurisdiction?

In principle, a branch is transparent for tax treaty purposes and is thus not entitled to treaty benefits, such as reductions of withholding tax on dividends, interest or royalties. From a tax treaty perspective, a branch generally is to be treated as a permanent establishment, whose income is either exempt or credited in the jurisdiction of the parent company depending on the relief method article of the respective tax treaty.

6.6 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

No, there is no withholding tax levied on the remittance of profits from a branch to its parent.

7 Overseas Profits

7.1 Does Austria tax profits earned in overseas branches?

Generally, Austria levies corporate income tax on worldwide

profits. However, profits earned in overseas branches usually – according to double tax treaties – are either exempt from Austrian tax or foreign taxes are credited in Austria.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

As already indicated, there is an international participation exemption which applies to dividends and capital gains received from foreign subsidiaries, as opposed to the national participation exemption which only applies to dividends (see question 5.3 above).

According to the Austrian international participation exemption, dividends received by an Austrian holding company from a subsidiary, or capital gains incurred by an Austrian company upon the sale of a foreign subsidiary, are not subject to corporate income tax in Austria if the following requirements are met:

- the Austrian company must hold at least 10% of its foreign subsidiary (in the case of EU jurisdiction, the 10% threshold is not required for dividends any more);
- the foreign subsidiary must be comparable to an Austrian AG or GmbH (i.e. it must be a corporation); and
- the participation in the foreign company must be held for at least one year (the holding period).

The international participation exemption is subject to a set of specific “anti-abuse of law” rules. Under these anti-abuse rules, the Austrian participation exemption does not apply if:

- i) The subsidiary is located in a low-tax jurisdiction.

A jurisdiction is deemed to be a low-tax jurisdiction if the effectively applicable tax rate under Austrian tax accounting rules amounts to less than 15%.

- ii) The subsidiary generates primarily passive income.

A foreign subsidiary is considered to earn mainly passive income if the passive part of its operations constitutes more than 50% of its total activity (calculated on the basis of assets, employees and profits). The passive part is defined as activities in connection with interest income, income from licences or leasing, or the sale of participations, etc.

7.3 Does Austria have “controlled foreign company” rules and, if so, when do these apply?

Austria does not have “controlled foreign company” rules. This applies with the exception of the look through approach for investments in non-registered foreign investment funds.

8 Anti-avoidance

8.1 Does Austria have a general anti-avoidance or anti-abuse rule?

The Austrian General Fiscal Code (*Bundesabgabenordnung* - BAO) contains a general anti-abuse provision. The provision – Art 22 – incorporates the substance-over-form principle into Austrian tax law and generally allows the tax authorities to disregard transactions or structures which have been chosen solely for the purpose of avoiding or reducing.

Apart from this general provision, several more specific anti-abuse provisions can be found in a variety of Austrian tax laws. Examples are the principle of “actual place of management” in the field of corporate taxation, anti-abuse rules in the participation exemption, which take away the benefit of the participation exemption from

dividends received from passive tax haven companies, or CFC legislation for offshore investment funds, etc.

Avoidance schemes are usually challenged by the tax inspectors in the course of tax audits.

8.2 Is there a requirement to make special disclosure of avoidance schemes?

There are no specific disclosure rules for avoidance schemes.



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