



# ICLG

The International Comparative Legal Guide to:

## **Private Client 2013**

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A practical cross-border insight into private client work

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# Austria

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## 1 Pre-entry Tax Planning

### 1.1 In Austria, what pre-entry estate and gift tax planning can be undertaken?

Estate and gift tax were abolished in Austria in 2008.

### 1.2 In Austria, what pre-entry income tax planning can be undertaken?

Pre-entry income tax planning is generally not required in Austria.

It is worth noting in this respect that the Austrian income tax system grants a step up in basis of the fair value of the tax payer's assets held upon the point of entering Austrian tax residence, i.e., capital gains tax in the event of a disposal of an asset is calculated on the basis of the value of an asset upon entering Austrian residence.

It could, therefore, make sense to collect and file evidence of the fair value assets upon entry (i.e., prepare a valuation) in order to have a documented entry value to be used in the case of a future disposal.

In this respect, it should also be noted that leaving Austrian tax residence is treated as a disposal event (however, capital gains tax is deferred if the tax payer moves to another EU Member State).

### 1.3 In Austria, can pre-entry planning be undertaken for any other taxes?

No, it cannot.

## 2 Connection Factors

### 2.1 To what extent is domicile relevant in determining liability to taxation in Austria?

In Austrian tax law, the concept of residence is relevant for tax liability. However, the term domicile is used in the definition of residence; i.e., a person is deemed to be resident if they have either a domicile (home, house or apartment) or permanent abode available in Austria.

### 2.2 If domicile is relevant, how is it defined for taxation purposes?

Domicile is any home suitable for an individual to stay at on a permanent basis (such as a house, or an apartment owned or permanently rented).

### 2.3 To what extent is residence relevant in determining liability to taxation in Austria?

Austrian resident individuals are subject to national federal income tax on the basis of their worldwide income.

### 2.4 If residence is relevant, how is it defined for taxation purposes?

Any individual having a domicile or permanent abode available in Austria is deemed to be an Austrian resident. Exemptions apply to Austrian resident vacation homes which are not used for more than three months per year.

### 2.5 To what extent is nationality relevant in determining liability to taxation in Austria?

Generally, nationality is not relevant for Austrian tax liability.

### 2.6 If nationality is relevant, how is it defined for taxation purposes?

This is not applicable - see question 2.5 above.

## 3 General Taxation Regime

### 3.1 What gift or estate taxes apply that are relevant to persons becoming established in Austria?

Austria abolished inheritance and gift tax in 2008.

### 3.2 How and to what extent are persons who become established in Austria liable to income tax?

Resident taxpayers are taxable on their worldwide income, whether received in cash or in kind. The individual income tax law contains an exhaustive list of categories of taxable income. Income not falling under any of these categories is not taxable. For individuals these categories are:

- agriculture and forestry;
- professional and other independent services;
- trade and business;
- employment income;
- investment income;
- rents, lease payments and royalties; and

- other specified income such as certain annuities and capital gains upon the disposal of privately held assets.

Generally, the applicable tax rate is progressive, going up to 50 per cent. For most capital income, a special tax rate of 25 per cent applies.

### 3.3 What other direct taxes (if any) apply to persons who become established in Austria?

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 below 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 per cent of the historically assessed value; the municipal coefficients range up to 500 per cent.

### 3.4 What indirect taxes (sales taxes/VAT and customs & excise duties) apply to persons becoming established in Austria?

In Austria, generally, all goods and services provided by an entrepreneur are subject to VAT. Tax exemptions apply in certain cases. The regular tax rate is 20 per cent. For certain goods and services a reduced tax rate of 10 per cent applies.

For certain goods, excise duties are also levied. These include electricity, fuel, alcohol and tobacco.

### 3.5 Are there any anti-avoidance taxation provisions that apply to the offshore arrangements of persons who have become established in Austria?

Generally, in Austrian tax law the “substance over form” principle applies.

Also, it can be noted that certain foreign tax subjects may be treated as transparent for Austrian tax purposes if they are not comparable to Austrian corporations or foundations. In such cases the income of the foreign tax subject would be directly attributed to the Austrian resident tax payer irrespective of actual distributions.

Further to that, in case of holding company structures sec. 10 para. 4 of the Austrian Corporate Income Tax Act contains a special anti-abuse provision relating to the international participation exemption. This provision applies if all of the following conditions are definitely fulfilled or one of the following conditions is substantially exceeded and the other one is closely met:

1. a subsidiary of an Austrian corporation focuses on earning passive income (i.e. interest income, rental income, income from royalties and income from capital gains) as opposed to engaging in an active trade or business; and
2. the effective tax burden of the subsidiary is less than 15 per cent.

In this case, the international participation exemption is replaced by an indirect foreign tax credit system (“switch-over”). Thus, if a subsidiary of an Austrian corporation is a company in a low tax jurisdiction earning only (mainly) passive income, the anti-abuse provision would apply and dividends received by the parent company from the subsidiary would be taxable at a rate of 25 per cent, with the possibility of receiving a tax credit for foreign withholding taxes and taxes on underlying income of the subsidiary.

## 4 Taxation Issues on Inward Investment

### 4.1 What liabilities are there to direct taxes on the remittance of assets or funds into Austria?

This is not applicable in Austria.

### 4.2 What taxes are there on the importation of assets into Austria including excise taxes?

Import VAT and Customs duties in general apply to the import of goods from a non-EU country. However, exemptions apply to privately held assets imported for private use only.

### 4.3 Are there any particular tax issues in relation to the purchase of residential properties?

In relation to the purchase of residential properties land transfer tax is triggered. When buying land from a third party land transfer tax amounting to 3.5 per cent of the purchase price becomes due. In addition, the fees for the entry in the land register are 1.1 per cent of the same assessment base.

## 5 Succession Planning

### 5.1 What are the relevant private international law (conflict of law) rules on succession and wills, including tests of essential validity and formal validity in Austria?

Under Austrian conflict of law rules, succession is governed by the law of the state whose nationality the deceased possessed on the date of his death. However, foreigners may become subject to Austrian succession law, if the legal provisions of the country where they have citizenship refer back to Austrian law (*renvoi*). State treaties are of prior rank. A choice of law in succession matters is not possible.

A will is recognised as valid in Austria if the testator is capable of making a will and if it fulfils the formal requirements. The evaluation if these conditions are met is determined by the time the will was made or subsidiary the date of the deceased's death.

Austrian conflict of law rules relating to the form of Last Will follow the Hague Testamentary Dispositions Convention of 5 October 1961. Under this Convention a will is valid if it complies with the law of any of the following:

- the place where the will was made;
- the state the testator is a citizen of;
- the state where the testator is domiciled; or
- the law of the place where the real estate is situated.

According to Austrian law there are three different forms of making a valid will:

- the private will, which can either be handwritten and signed by the deceased himself or written by a third person, but signed by three witnesses and the deceased;
- the judicial will; and
- the notarial will.

The last two can either be written or oral.

### 5.2 Are there particular rules that apply to real estate held in Austria or elsewhere?

Immovables are always governed by the succession law of the

asset's location (*lex situs*), but a *renvoi* rule from another state to Austria is applicable. State treaties and bilateral agreements are not affected.

## 6 Trusts and Foundations

### 6.1 Are trusts recognised in Austria?

The concept of trusts is not provided under Austrian private or corporate law. Whether a foreign trust is recognised as a separate entity depends on whether the income of the trust can be directly attributed to the beneficiaries according to the general principles of Austrian income tax law.

The income derived from an income source is generally attributed to the person, who has the right to influence the generation of income by taking part in business life and shaping the use of the source of income according to his own intentions.

This includes, for example, making investment decisions, taking advantage of rights to draw upon existing income, or renouncing future income. Income is thus attributable only to the party which is able to exploit opportunities offered by the market, deciding either to take a specific action, such as distributing funds to the trust's beneficiaries, or abstain from doing so.

### 6.2 If trusts are recognised in Austria, how are they taxed in Austria?

If a trust is recognised, the income of the trust itself is not taxed. In such case only distributions of the trust to Austrian resident beneficiaries would be taxed at the applicable income tax rate.

### 6.3 If trusts are recognised, how are trusts affected by succession and forced heirship rules in Austria?

In general the Austrian Supreme Court supports the challenging of trusts for purposes of succession and forced heirship rules, in particular if the trust had received its assets from the settlor within a two-year period prior to his/her death. This two-year period could be prolonged to an indefinite period if the beneficiaries of the trust are themselves forced heirs of the settlor.

### 6.4 Are foundations recognised in Austria?

Foundations can be established under Austrian corporate law and are certainly recognised for Austrian legal and tax purposes. However, the Austrian Supreme Court allows the challenging of foundation for purposes of enforcing creditors' claims, in particular claims resulting from forced heirship or divorce law.

### 6.5 If foundations are recognised, how are they taxed in Austria?

#### Taxation of donations to the Private Foundation

In general, donations of the founder to the foundation are taxed at a tax rate of 2.5 per cent.

#### Corporate income tax

A private foundation is, in principle, subject to 25 per cent corporate income tax. However, full tax exemptions apply for various groups of income, such as dividend income.

#### Taxation of distributions

A private foundation, generally, has to withhold 25 per cent withholding tax upon distributions to beneficiaries. However, corporate income tax under certain conditions is allowable against this withholding tax. If the beneficiary is resident outside of Austria, in most cases (depending on the beneficiary's country of residence) the withholding tax is reduced to 0 per cent by the applicable tax treaty.

### 6.6 If foundations are recognised, how are foundations affected by succession and forced heirship rules in Austria?

See question 6.3 above.

## 7 Immigration Issues

### 7.1 What restrictions or qualifications does Austria impose for entry into the country?

Austrian immigration law is characterised by a distinction between visas on the one hand and residence-related permits on the other hand. For legal entry into Austria, third country nationals, i.e. persons who are not European Economic Area ("EEA") citizens, are required to hold a valid passport and visa, unless otherwise stated by intergovernmental agreements, EU law or international practice. A visa may entitle its holder to stay in Austria for up to 180 days. If a third country national intends to stay in Austria for a period exceeding 180 days, a residence-related permit under the Act on Residence and Sojourn ("ARS"), rather than an entry visa, is required.

Residence-related permits are issued as (i) residence permits (*Niederlassungsbewilligungen*) for applicants who envisage mid- to long-term residence in Austria (Red-White-Red Cards ["RWRCs"]) for the purposes "highly-skilled employee", "skilled employee in an understaffed profession", "other key employee" and "key employer", RWRCs plus for family members of RWRC holders as well as residence permits for the purposes "dependent" and "private" [excluding gainful employment], or as (ii) stay permits (*Aufenthaltsbewilligungen*) allowing for temporary stays for several specifically defined purposes (including "student", "special executive", "assignee", "artist", etc.). While some types of residence permits (e.g., residence permits for private purposes) are subject to quotas allocated to each Austrian province for different categories of residential purposes in the annual Residence Ordinance, no such restrictions exist for RWRCs and stay permits.

Only holders of residence permits (including RWRCs and RWRCs plus) are eligible for long-term resident status within the meaning of Directive 2003/109/EC after five years of continuous residence in Austria (provided that the applicant proves a command of German at B1 level within the meaning of the Common European Framework of Reference for Languages ["CEFR"]). EEA citizens (except for Romanian and Bulgarian nationals) and Swiss nationals are free to live and work in Austria. These immigrants merely have to obtain a registration certificate (*Anmeldebescheinigung*) within three months from having taken up residence in Austria if their overall stay in Austria exceeds three months.

### 7.2 Does Austria have any investor and other special categories for entry?

There is no special residence-related permit for investors, who may nevertheless obtain a RWRC for self-employed key persons if their

envisaged business activity (i) is of particular importance for the region or the relevant part of the labour market, (ii) directly or indirectly contributes to the creation of new jobs or helps avoid the loss of existing ones, and/or (iii) triggers a transfer of foreign investment capital to Austria. Upon the issuance of a favourable statement on the beneficial effects of the business activities under review by the regionally competent Labor Market Supervisory Authority, investors may be granted a RWRC for self-employed key persons.

The latest set of amendments to the ARS and the Aliens Employment Act (a) replaced the former general key employee concept by four schemes for skilled third country nationals ([i] RWRC for highly skilled employees, [ii] RWRC for professionals with a high school leaving certificate / undergraduate degree who intend to take up employment in industries suffering from a shortage of qualified labour [e.g., nurses, certain undergraduate engineers], [iii] RWRC for other skilled third country nationals, [iv] Blue Card for highly skilled professionals within the meaning of Council Directive 2009/50/EC), and (b) established an essentially merit-based points system *in lieu* of the former quota system. As a result, third country nationals may earn points for (i) academic achievements (Bachelor's degrees and higher, preferably in one of the so-called MINT subjects [mathematics, information sciences, natural sciences, technology]), (ii) professional experience in positions which reflect the applicant's previous education/training and/or managerial positions, (iii) knowledge of German and/or English, and (iv) age (below 35, 40 or 45).

### 7.3 What are the requirements in Austria in order to qualify for nationality?

In order to acquire Austrian citizenship by naturalisation, applicants have to fulfil several general requirements for naturalisation (e.g., absence of previous convictions or pending criminal proceedings, absence of residence bans, proof of sufficient financial means, positive attitude towards Austria, and absence of threat to public order and security). In addition, citizenship is, in general, only granted to applicants who can prove continuous legal residence in Austria for a period of at least ten years. From this overall time span, at least five years must be backed by residence permits in the strict sense (rather than just stay permits). Save for exceptional circumstances, applicants are required to renounce previous citizenship(s) in order to acquire Austrian citizenship. Applicants also have to adduce proof that they have a command of German at B1 level within the meaning of the CEFR and to pass a written multiple-choice naturalisation test on Austria's political system and history.

If an applicant meets the general requirements for the acquisition of citizenship, his/her spouse and/or children can be included in the naturalisation process but extension of citizenship is only possible in the event of the main applicant's naturalisation.

An applicant who has already made and is still expected to make extraordinary achievements in the fields of science, economy, arts or sports may be granted citizenship without having previously resided in Austria, renounced his/her current citizenship(s), mastered German at B1 level and passed a citizenship test, provided that the Federal Government confirms that the Republic of Austria has a particular interest in the applicant's naturalisation.

### 7.4 Are there any taxation implications in obtaining nationality in Austria?

No, there are not.

## 8 Taxation of Corporate Vehicles

### 8.1 What is the test for a corporation to be taxable in Austria?

A corporation is subject to Austrian corporate income tax on its worldwide income if its statutory seat or the place of management is in Austria. However, tax treaties usually provide for exemptions or credits for profits earned in non-Austrian branches.

### 8.2 How are branches of foreign corporations taxed in Austria?

Generally, if a foreign corporation operates a branch in Austria, this branch is subject to Austrian corporate income tax. 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 attributable to the Austrian permanent establishment.

## 9 Tax Treaties

### 9.1 Has Austria entered into income tax and capital gains tax treaties and, if so, what is their impact?

Currently, there are 90 tax treaties in force in Austria.

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.

### 9.2 Do the income tax and capital gains tax treaties 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.

### 9.3 Has Austria entered into estate and gift tax treaties and, if so, what is their impact?

This is not applicable - Austria abolished inheritance and gift tax in 2008.

### 9.4 Do the estate or gift tax treaties generally follow the OECD or another model?

This is not applicable - see question 9.3 above.

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