

Austrian Taxation of the Income of a Foreign Citizen

ÖSTERREICHISCHE BESTEUERUNG DES EINKOMMENS EINES AUSLÄNDISCHEN STAATSBÜRGERS

Bei internationalen Steuerfällen muss genau zwischen innerstaatlichem (Außen-)Steuerrecht und DBA-Recht unterschieden werden. Die Autoren behandeln zunächst exemplarisch einen in der Praxis häufig vorkommenden Fall eines ausländischen Staatsbürgers mit steuerlichen Anknüpfungspunkten in Österreich. Der nachfolgende Aufsatz gibt eine praktische Anleitung für die abgabenrechtliche Würdigung.

1. Assumed Facts

1.1. Alternative A

A Russian citizen („A“) lives with his family in Russia. He comes to Vienna only from time to time and resides in various hotels. He is a shareholder of an Austrian limited liability company („GmbH“) and has a residence permit for Austria. A is also a shareholder of Russian companies and he derives additional income from services rendered in Russia on a (self-)employed basis.

1.2. Alternative B

A and his family live half of the time in Austria and half of the time in Russia. He maintains a home in both Russia and Austria. A derives income from the sources as specified in Alternative A.

2. Unlimited Tax Liability in Austria

Individuals resident in Austria are subject to Austrian income tax on their worldwide income („unlimited tax liability“). A person is regarded as a resident of Austria if he has a permanent home („*Wohnsitz*“) available to him or if he has his habitual abode („*gewöhnlicher Aufenthalt*“) in Austria (section 1 of the Austrian Income Tax Code - „*EStG*“). A residence permit is not considered a relevant criterion but merely an indication of the existence of a permanent home or a habitual abode.¹⁾

A permanent home of an individual for purposes of tax law is defined as premises which such an individual uses under circumstances that imply that he will use and maintain the premises on an ongoing basis (section 26 paragraph 2 of the Austrian Federal Fiscal Code - „*BAO*“). „*Using*“ means that someone has the residence readily available for use to satisfy his housing requirements. Not only does one's own home qualify as a permanent home under the BAO but also „derivative“ homes such as the secured option to use the premises of other persons (e. g., derivate permanent home of children at the premises of their parents).²⁾ The legal form of use is irrelevant (lease, sublease, sole or joint ownership, etc.).³⁾ Using and maintaining premises not only for a short period creates a permanent home for tax purposes. According to cases formerly decided by the Austrian Administrative Court, as an example, a room in a hotel is deemed to establish a permanent home pursuant to the BAO if the stay is not only temporarily or the individual always uses the same premises and the circumstances imply that the individual will use and maintain such premises not only for a short period.⁴⁾

An Austrian habitual abode for tax purposes is established where an individual stays in Austria and all circumstances of the situation imply that such stay is not merely temporarily.⁵⁾ In any case, an habitual abode is established by means of a permanent stay of six months in Austria (section 26 paragraph 2 second sentence BAO). An habitual abode may also be fulfilled prior to the end of a six months' stay if a longer period of stay is planned based on all circumstances of the situation.⁶⁾ Establishment of a permanent abode requires a permanent or uninterrupted stay.

In the practical handling by the Austrian tax authorities, they regularly revert to only the „six-months-period“. ⁷⁾ Therefore, if the physical presence does not exceed a period of six months

habitual abode is regularly not deemed established. The registration or the notice of departure with the local police department (*polizeiliche Meldung*) is only an indication for habitual abode in Austria. Therefore, the dates of registration and notice of departure are not sufficient to determine the term of a stay in Austria or the establishment of habitual abode. According to the Austrian Administrative Court, habitual abode requires more than only the physical presence during the working hours⁸. Thus persons who stay in Austria for working purposes during the week only (and afterwards return abroad) do not have a permanent abode in Austria.⁹

3. Alternative A

a) Austrian Domestic Tax Law

Using rooms in various hotels does not create a permanent home and habitual abode requires a longer physical presence than visits from time to time. The facts set out thus do not appear sufficient to create unlimited tax exposure under Austrian tax law (no permanent home and no habitual abode).

Non-residents are only subject to limited Austrian tax liability on income derived from specific Austrian sources. According to assumed facts, A is a shareholder of an Austrian GmbH. Income derived by a non-resident from dependent or independent personal services (rendered in Austria) are subject to Austrian income tax according to section 98 no. 2 and 4 EStG. Also dividends distributed by the Austrian GmbH are subject to capital yields withholding tax („KESt“) of 25 % in Austria.

This is only an intermediate result based on domestic Austrian tax law. Additional income of A derived from non-Austrian sources is not subject to income taxation in Austria.

b) Treaty on the Avoidance of Double Taxation between the Soviet Union and Austria (Federal Gazette 1982/411) ("DTT SU")

Pursuant to the diplomatic protocol Federal Gazette 1994/257, the DTT SU is applicable also in relation to today's Republics of Russia and Tajikistan. According to the practice of the Austrian tax authorities¹⁰, the DTT SU is also applied in relation to other successor states of the former Soviet Union.

A is resident in Russia for purposes of the DTT SU as the centre of his life interests (residence of family)¹¹ is in Russia.

Dividends distributed by an Austrian GmbH to a Russian resident (pursuant to the DTT SU) must not be taxed in Austria (Art. 8 DTT SU). Dividends means income from shares as well as income from other shareholder rights which are treated similar to income from shares by the laws of the state in which the company making the distribution is resident. Therefore, double taxation law eliminates the Austrian (limited) taxation right¹² of the dividends distributed by an Austrian GmbH (section 98 EStG). If the Austrian GmbH withholds the 25 % capital yields withholding tax („KESt“) such tax is to be refunded on application of the taxpayer.¹³

Employment income from dependent or independent personal services performed in Russia is (regularly) taxable in Russia; in such a case Russia is the state of residence as well as the other state where the services were rendered. Dividends distributed by a Russian limited liability company are taxable in Russia only (if and to the extent as provided for under domestic Russian tax law).

c) Summary Alternative A

A has neither a permanent home nor habitual abode in Austria. Therefore, A is subject to limited tax liability in Austria in respect of dividends distributed by an Austrian GmbH (step I).

A is resident in Russia for purposes of the DTT SU as the centre of his life interests (residence of family) is in Russia.

While dividends distributed by an Austrian GmbH are, as an intermediary result, subject to Austrian income tax, the right of the Republic of Austria to levy income tax on such income is excluded by the DTT

SU. As a result, after application of the DTT SU there is no taxation right of Austria. If capital yields withholding tax (*KES*) has been withheld nevertheless, such tax is to be refunded upon application of A.

If and to what extent the Austrian dividends are taxable in Russia is a question of the domestic Russian income tax law.

4. Alternative B

a) Austrian Domestic Tax Law

According to the assumed facts, A has a permanent home in Austria. As a consequence, he is subject to unlimited tax liability in Austria (section 1 para. 2 EStG). Such unlimited tax liability is independent of whether or not A also has a permanent home in Russia.

A is thus basically subject to Austrian income tax on his worldwide income (dividends from the Austrian GmbH, dividends from Russian companies, Russian employment income).

b) DTT SU If A has a permanent home available to him in both Austria and Russia, it is to be analysed in which country he is deemed resident for purposes of the DTT SU. The DTT SU allocates the taxation right on the worldwide income to the "State of Residence" while the "other State" only has the taxation right on parts of the income specified by the treaty.

According to Art. 1 no. 3 DTT SU, a person is a resident in the state in which he has a permanent home. If he has a permanent home available to him in both states he shall be deemed a resident of the state with which his personal and business relations are closer (centre of life interests). If the state in which he has his centre of life interests cannot be determined, or if he has no permanent home available to him in either state, he shall be deemed to be a resident of the state in which he has habitual abode. If he has habitual abode in both states or in neither of them, he shall be deemed a resident of the state of which he is a citizen. Citizenship is a subsidiary criterion, if it is impossible to determine the centre of life interests or the habitual abode.

According to the facts above, A has a permanent home in both Austria and Russia; he and his family live half of the time in Austria and half of the time in Russia. On the basis of the assumed facts, Russian citizenship is likely to be the decisive criterion since neither the centre of life interests nor the habitual abode can be determined.

Citizenship is the criterion of last resort if the centre of the personal and business interests as well as the habitual abode cannot be determined. In an individual matter, the Austrian tax authorities will examine periods of the physical presence in Austria and the elements determining the centre of business (e. g. ratio of income, personal presence or the place from which property is administered) and personal interests (e. g. school attendance by children, residency of family, family and social relations, political, cultural or other activities). Generally, the Austrian tax authorities investigate on the occasion of a tax audit the particular set of facts and require air tickets, documents of school certificates and other receipts to be submitted. The circumstances must be examined as a whole, but according to the opinion of the OECD tax committee and the Austrian Administrative Court the personal interest prevail over the business interests in case of doubt.¹⁴⁾

c) Summary Alternative B

If A is resident in Austria according to the DTT SU the worldwide-income of the Russian citizen (including dividends distributed by a Russian limited liability company) is taxable in Austria. Income derived from Russian sources described in the DTT SU is excluded from Austrian taxation (e. g. employment income from services rendered in Russia or income derived by a Russian representative office). In such a case, however, the Russian source income is to be taken into consideration when determining the applicable Austrian tax rate („*Progressionsvorbehalt*“).

If A is resident in Russia according to the DTT SU the results are in conformity with the tax consequences of Alternative A.

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¹⁾ VwGH 12. 3. 1974, 1947/73; 23. 5. 1990, 89/13/0015; 20. 6. 1990, 89/16/0020; 26. 11. 1991, 91/14/ 0041; 24. 2. 1996, 95/13/0150; first RFH 17. 11. 1938, RStBl. 1938, 1122; compare *Lechner* in *Gassner/Lang* (ed.), *Besteuerung und Bilanzierung international tätiger Unternehmen* 258.

²⁾ VwGH 15. 6. 1976, 2305/75; 14. 1. 1988, 87/16/0127.

³⁾ *Stoll*, BAO-Kommentar I 334; *Lechner* in *Gassner/Lang* (ed.), *Besteuerung und Bilanzierung international tätiger Unternehmen* 254: The lease or sublease of the own home excludes such a home from establishing a „permanent home" of the lessor provided the lessor has not the secured possibility to use such a home.

⁴⁾ VwGH 23. 5. 1990, 89/13/0015.

⁵⁾ *Stoll*, BAO-Kommentar I 336.

⁶⁾ For instance: BFH 3. 8. 1978, BStBl. 1978 II 118.

⁷⁾ *Stoll*, BAO-Kommentar I 337: He criticises the practices of the Austrian authorities as also a shorter stay may create habitual abode.

⁸⁾ VwGH 25. 10. 1972, 401/72.

⁹⁾ VwGH 14. 4. 1972, 475/71; 25. 10. 1972, 401/72; BFH 6. 2. 1985, BStBl. 1985 II 331; *Doralt*, EStG⁴ § 1 Tz. 21 ff.

¹⁰⁾ See Decree BMF 16. 7. 1999, AÖFV Nr. 178/1999.

¹¹⁾ See *Lechner* in *Gassner/Lang* (ed.), *Besteuerung und Bilanzierung international tätiger Unternehmen* 260.

¹²⁾ See *Lang*, *Auslegung von Doppelbesteuerungsabkommen* 129; *Loukota*, *Besteuerung und Bilanzierung international tätiger Unternehmen* 271: Double Taxation Treaties only have limiting effects („Schrankenwirkung").

¹³⁾ Application on refund according to § 240 (3) BAO; see in detail *Stoll*, BAO-Kommentar III, 599; BMF AÖFV Nr. 179/1980.

¹⁴⁾ See Commentary of OECD Model Tax Convention, Art. 4 note 15; *Huemer*, *Die unbeschränkte Steuerpflicht natürlicher Personen* 143; VwGH 22. 3. 1991, 90/13/0073; *Loukota/Jirousek*, *Leitfaden zum revidierten österreichisch-deutschen Doppelbesteuerungsabkommen* 247 note 452; *Lechner* in *Gassner/ Lang* (ed.), *Besteuerung und Bilanzierung international tätiger Unternehmen* 262.