



### Draft bill of Tax Reform Act I 2019/2020

Recently, the Austrian Ministry of Finance published a draft bill regarding the Tax Reform Act I 2019/2020. Furthermore, a discussion draft published by the government outlines further plans on changes to Austrian tax law.

Some of the major changes included in the draft bill are:

- Introduction of provisions against hybrids provided by the EU-directive 2017/952 (“ATAD 2”) into domestic law as from Jan 1, 2020
- Further possibilities for small businesses to calculate income tax on a lump-sum basis

Some of the changes announced by the government are (no draft bill available yet):

- Reduction of corporate tax rate from 25 % (now) to 23 % (2022) and 21 % (2023)
- Reduction of progressive income tax rates
- Issuance of a new Income Tax Act 2021
- Extension of r&d premiums
- Stamp duties other than on non-residential rents shall be abolished
- Introduction of the possibility to apply for a tax audit

Christoph Plott / Markus Vaishor

### Draft Tax Reform Act I 2019/20: Amendments Austrian VAT Act

The amendments to the Austrian VAT Act in the draft of the Tax Reform Act I 2019/20 include the implementation of the quick fixes, adjustment of the small business exemption, introduction of the reduced tax rate for electronic printing units and the input VAT deduction for electric cycles. The amendments are to enter into force as of 1<sup>st</sup> January 2020.

Esther Freitag / Draga Turic

## **Draft bill on introduction of „digital tax“ on online advertising services**

The EU could not agree to introduce a tax on digital advertising. However, the Austrian Ministry of Finance recently published a draft bill on the introduction of such “digital tax” which is comparable to the previously discussed EU-concept. The digital tax shall amount to 5% of the turnover from advertising services rendered in Austria provided that the service provider has a global turnover of at least MEUR 750 and a turnover in Austria (from online advertising services) of at least MEUR 25.

Werner Rosar

## **Draft Digital tax package: Amendments Austrian VAT Act**

The amendments to the VAT Act as part of the digital tax package include measures in the area of the "sharing economy" and the online distance selling, with measures from the EU e-commerce package being implemented. The amendments are to enter into force on 1 January 2021, with the exception of the provisions relating to recording obligations and the liability of electronic interfaces.

Esther Freitag / Draga Turic

## **Draft bill Tax Reform Act I 2019/2020: Implementation of ATAD 2**

The Tax Reform Act I 2019/2020 will implement the provisions against hybrids provided by the EU-directive 2017/952 (“ATAD 2”) into domestic law as from Jan 1, 2020.

Markus Vaishor

## **Reorganization of Austrian tax authorities**

The Austrian Ministry of Finance issued a draft bill regarding a law leading to a reorganization of the Austrian tax authorities. Previously, there were 40 tax offices and 9 customs offices (led by the Ministry of Finance) Going forward, however, there will only be five offices: the tax office Austria, the tax office for large business, the anti-fraud office, the customs office and the audit for wage-related taxes.

Andreas Kronawetter / Clemens Endfellner

## **Financial Criminal Act: cross-border VAT fraud, increase of penalties for offences concerning taxes and customs duties and further amendments**

The 2020 Act On Combating Tax Fraud transposes various EU directives (especially Directive 2017/1371/EU on the Fight Against Fraud to the Union’s Financial Interests by Means of Criminal Law) into the national Financial Criminal Act: The new offense of “Cross-border VAT fraud” is introduced and the level of penalties of the existing offenses is increased. Besides that new offenses are introduced concerning the infringement of the obligation to report certain cross-border arrangements and to report certain transactions under the 2020 Act on Digital Tax.

Friedrich Fraberger / Stefan Papst

## **Austrian draft legislation „EU-Meldepflichtgesetz“ for the implementation of EU Directive 2018/822/EU – DAC 6**

Local Austrian draft legislation for the implementation of EU Directive 2018/822/EU regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements has been presented for peer review.

The draft of the Austrian implementation law „EU-Meldepflichtgesetz – EU-MPfG“ largely adopts the language of the German translation of EU-Directive DAC 6.

Intermediaries are granted a waiver from filing information on a reportable cross-border arrangement in case the reporting obligation would breach the legal professional privilege of the intermediary under Austrian law. In such circumstances, Austrian legislation requires intermediaries exempt from filing to notify any other intermediary and the relevant taxpayer of their waiver, thus the reporting obligations may shift also to relevant taxpayers.

Information reporting on cross-border arrangements to the Austrian competent authority has to be submitted electronically using the E-Government portal “FinanzOnline” starting July 1, 2020. Moreover, information reporting on cross-border transactions the first step of which having been implemented between June 25, 2018 and June 30, 2020 must be filed latest until August 31, 2020.

The automatic exchange of information on cross-border arrangements will take place among Member States within one month of the end of the quarter in which the information was filed. The first information shall be communicated by October 31, 2020.

Stefan Haslinger / Christiane Edelhauser

## **Draft law amendment - Withholding tax obligation also for employers with no Austrian PE**

For periods starting with 01.01.2020, a wage tax withholding obligation shall be introduced for employers in respect of employees with unlimited tax liability in Austria, even if the (foreign) employer has no permanent establishment in Austria.

Christian Halwachs / Tatjana Schrefl / Katharina Daxkobler

## **Austrian draft legislation amending the national implementation law of the Common Reporting Standard (CRS), the Austrian “Gemeinsamer Meldestandard-Gesetz – GMSG” based on recommendations provided by the Global Forum on transparency and exchange of information for tax purposes of the OECD during Austria’s country review**

The draft amendments to the Austrian implementation of the Common Reporting Standard (CRS), the Gemeinsamer Meldestandard-Gesetz – GMSG, have been presented for peer review, scheduled to become effective for the most part as soon as the new law was enacted or on January 1, 2020 for the minor part. The most important amendments and clarifications of the suggested reform refer to:

Clarifications of requirements for the application of the „residence-address“ test - RAT.

Relief for the application of due diligence requirements after a change in circumstances by granting a deadline of at least 90 days after the CIC took place (or was detected) with respect to pre-existing and new entity accounts.

Specification of the legal term of an investment entity managed by another financial institution, so called “managed-by” test.

Clarifications and removal of financial accounts listed as „accounts excluded from CRS“ so far.

Introduction of a new “anti-abuse-provision” intended to prevent arrangements to be misused for circumventing reporting obligations under the CRS.

Introduction of new requirements for Reporting Financial Institutions to establish review and control measures by assessing their respective compliance framework as well as their reporting obligations under the CRS.

Philipp Rümmele, Christiane Edelhauser

### **Draft bill of Tax Reform Act I 2019/2020: Changes to automobile-related taxes**

According to the draft bill of the Austrian Tax Reform Act I 2019/2020, the taxation of automobiles is adjusted based on new emission standards and may lead to material cost increases of automobiles.

Christian Halwachs

### **Tax Internal Control System – tax risk protection for companies and persons in charge**

In December 2018 the Austrian Ministry of Finance issued a regulation regarding “Steuerkontrollsystem” (“Tax Internal Control System”) to specify the requirements regarding the documentation and certification of a Tax Internal Control System. Currently, the Austrian Chamber of tax advisors and public accountants drafts a standard to be applied when certifying the Tax Internal Control System. However, this standard will also comprise relevant input when documenting a Tax Internal Control System and will, thus, be relevant also for companies that do not want to participate in the Horizontal Monitoring but who want to benefit from risk reduction (fiscal criminal law and reputation) and administrative advantages (basis for automatization and digitalization).

Hans Zoechling / Andreas Helnwein

### **Austrian Federal Finance Court on the loss trafficking rules**

In general, an Austrian company’s tax loss carry-forwards can be carried forward indefinitely. However, according to the loss trafficking rules (“Mantelkauf”), tax loss carry-forwards may be disallowed, if there is a significant ( $\geq 75\%$ ) change in the direct shareholder structure followed by a change of the organizational and the economic structure of the company.

The Austrian Federal Finance Court recently decided in a case in which the before mentioned three criteria were obviously fulfilled. In the respective case the whole shareholder structure changed followed by a change of the directors. The latter was deemed as a change in the organizational structure as the recalled director was (factually) running the affairs of the company. The third requirement, a change of the economic structure was also fulfilled, as the company changed its business activities in connection with the other two structural changes. Thus, the court disallowed tax loss carry-forwards of the Austrian company. Please note that the chronology of fulfilling the three requirements is irrelevant, i.e. if a change of the shareholder structure follows the change of the economic structure in connection with a change of the organizational structure, tax loss trafficking rules may also apply. As a general rule the overall framework of the structural changes has to be considered. Regardless of the before mentioned rules, tax loss carry-forwards remain deductible if the changes were made in order to reorganize the company with the primary goal to save jobs. This requirement is only fulfilled, if a significant part of the jobs (25%) is saved not only for a short period.

Markus Vaishor / Katrin Postlmayr

## **Austrian Federal Finance Court confirms that a participation attributable to a foreign permanent establishment qualifies for the international participation exemption**

The Austrian Federal Finance Court confirmed that a 100%-participation held via a foreign permanent establishment (in a country whose double taxation treaty with Austria provides for the credit/imputation method) qualifies for the international participation exemption. According to the international participation exemption, the participation is tax-neutral (i.e. capital gains are not taxable and impairment or capital losses are tax non-deductible) unless the option to tax-liability is exercised at acquisition. Since the option to tax-liability had not been exercised in the case at hand, the impairment loss was tax non-deductible.

Markus Vaishor / Anja Kirisits

## **VAT, renting and changes in the law 2012**

Confirmed by Supreme Court: Universal succession cannot lead to a new rental contract. Those affected existing rental contracts can still be treated as subject to VAT.

Ernst Müller

## **Restriction of the VAT exemption for educational services**

The CJEU decided on March 14th, 2019, C-449/17, A & G Fahrschul Akademie, that the requirements for the exemption of school or university education within the meaning of Art 132(1)(i) and (j) EU VAT Directive 2006/112 must be interpreted narrowly, so that driving lessons are not covered from the exemption clause.

Ester Freitag / Alfred Mühlberger

## **The provision of data retrieval by a company when applying for customs permits by the customs authority is permissible**

In its ruling of 16 January 2019, Deutsche Post (C-496/17), the European Court of Justice ruled that taxpayers must notify the customs authorities of the tax identification numbers and competent tax offices of the members of advisory boards and supervisory boards, their key managers and the persons responsible for the organization of customs matters for the revaluation of customs authorizations.

Ester Freitag / Christina Maria Pollak

## **Austrian Federal Finance Court on the calculation of fictitious acquisition costs of real property in relation to non-business income**

Real property used for non-business income has to be depreciated over its useful life. Since land has unlimited useful life, land and buildings are dealt with separately for tax-purposes. If buildings used for non-business income were acquired or constructed before the realization of taxable income, the tax basis of depreciation has to be calculated based on the fictitious acquisition costs. The Austrian Federal Finance Court concluded (again), that the latter have to be primarily calculated based on a discounted cash flow calculation.

Markus Vaishor / Katrin Postlmayr

## **Austrian Federal Finance Court on the exemption of capital gains from the sale of real property**

Capital gains from the sale of real property derived by individuals as from April 1, 2012 are subject to tax at a flat tax rate of 25 % (April 1, 2012 – December 31, 2015) or 30 % (Jan 1, 2016 – present). However, such capital gains are exempted in cases of self-constructed real property if the respective property was not used for generating income (e.g. by leasing) during the last 10 years. The exemption also applies for capital gains from the sale of real property not constructed by the owner himself, but if the taxpayer (the owner) was the constructor from a legal perspective with unrestricted risk. The Austrian Federal Finance Court recently decided in two cases, where the respective properties have been sold by the legal successors due to earlier acquisitions without considerations (i.e. by way of heritage and donation). The court came to the conclusion, that the capital gains from the sale are not tax exempted, as the legal successors were not the constructors of the properties or cannot be qualified as the constructors with unrestricted risk from a legal perspective.

Markus Vaishor / Katrin Postlmayr

## **Austrian Federal Finance Court on the Real Estate Value for calculating the Real Estate Transfer Tax**

In general, if the legal (and/or beneficial) ownership in Austrian real property changes due to a sale of the property, real estate transfer tax is triggered. The general real estate transfer tax rate is 3.5 % (there is a reduced tax rate for real estate transactions among family members and for inheritances/gifts). The tax base in case of a straight sale is the (arm's length) purchase price. In Austria, not only the direct transfer of real property by way of an asset deal is subject to RETT. Furthermore, if 95% of the shares in a real estate owning company (or partnership) are transferred or unified in the hands of one shareholder or within members of the same Austrian tax group ("unification of shares"), RETT is triggered. If RETT from the unification of shares is triggered, it is levied at 0.5% of the real estate value as defined by the respective Austrian ordinance.

The real estate value can either be determined according to the real estate ordinance (Grundstückswert-Verordnung, referred to as "GrVV"). Furthermore, the real estate value can be documented with an appraisal of the fair market value of the property (requires an expert's opinion). The Austrian Federal Finance Court recently confirmed the wording of the law of the respective provision and stated, that in cases of a lower fair market value based on an expert's opinion as the tax base for Austrian RETT the higher real estate value according to the real estate ordinance has to be disclosed and documented by the taxpayer.

Markus Vaishor / Katrin Postlmayr

## **Austrian Federal Finance Court on self-disclosure made in stages: income tax and withholding taxes do not block each other**

According to the current Austrian financial criminal act, a self-disclosure can only be made once for each tax liability (one-shot-principle). Due to the former law, a surcharge had to be paid in case of self-disclosures made step by step for the same tax liability. The Austrian tax court now states that income tax and withholding tax (eg on employment income or capital income) must be regarded as different tax liabilities, even if they concern the same tax year. Therefore, self-disclosures made step by step for these tax liabilities neither trigger a surcharge (former law) nor the one-shot-principle is applied (current law).

Stefan Papst

## **Austrian tax court on tax evasion in case of omitted adjustments of input VAT – failed self-disclosure**

There is a criminal risk of tax evasion, if tax adjustments of input VAT are not made in the correct pre-notification periods. According to the case law of the Austrian Federal Finance Court, there is a justified suspicion, if the taxpayer demonstrably made use of tax advice but did not act accordingly. The intended correction of the misconduct in the form of a voluntary self-disclosure failed, because the subsequent payment could not be made on time.

Stefan Papst / Katharina Sophie Stur

## **Austrian draft legislation implementing the 5th AML-Directive (EU) 2018/843 by amending the Austrian Ultimate Beneficial Owner (UBO) Registry Law was issued**

Local Austrian draft legislation for the implementation of the 5th AML-Directive (EU) 2018/843 (amending Directive (EU) 2015/849) by amending the Austrian Ultimate Beneficial Owner (UBO) Registry Law (Wirtschaftliche Eigentümer Registergesetz – WiEReG) has been presented for peer review, scheduled to become effective on January 10, 2020.

The draft amendments to UBO-Registry-Law provide for a large number of significant changes, such as the introduction of public access to beneficial ownership information, annual reporting obligations for entities regarding their beneficial ownership following their mandatory annual UBO review, additional measures for improving data quality of registered data, enhanced reporting obligations for professional (legal and tax) counsels on behalf of their clients, expanded methods and functions for the analysis and evaluation of registered data conducted by the Austrian competent authority (MoF) and an considerable increase of elements and facts constituting criminal and administrative financial offences.

Moreover, starting November 10, 2020, a new data platform linked to the Austrian UBO-Registry shall be implemented, where all data and documentation relevant for determining and verifying ultimate beneficial ownership, the so called "Compliance-Package", shall be uploaded by professional counsels and stored on behalf of their clients (entities obliged to register their UBOs in Austria) on a voluntary basis, in order to provide access to up-to-date, valid and complete UBO documentation to all or only to specially assigned obliged entities.

Based on information and documentation gained from the new "Compliance-Package" mandatory review procedures for determining and verifying UBOs should be speeded up, become less cumbersome and less cost-intensive for all obliged entities involved.

Stefan Haslinger / Christiane Edelhauser / Dominik Pflug

## Restriction of energy tax refund to production companies compatible with EU-law?

If the ECJ follows the Opinion of the Advocate General in the case "Dilly's Wellnesshotel II" (C-585/17 from 14 February 2019), then the restriction of the energy tax refund to production companies made by the national legislator in 2011 (BBG 2011) should be in conformity with EU law. Consequently, contrary to the most recent case law of the Federal Finance Court (BFG), it could be finally clarified, that for periods from 1 February 2011 onwards no energy tax refund (ENAV) can be considered for service companies. The Advocate General argues with the retroactive applicability of the commission regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market (group exempt regulation 651/2014) and the resulting exemption from the notification obligation under state aid law. The final decision of the ECJ remains to be seen, though.

Sandra Minichmayr