

CHAPTER 15

Austrian Tax Law*

Michael Lang & Erich Schaffer

§15.01 THE LEGAL FRAMEWORK IN AUSTRIAN TAX LAW

Austria is a federal country composed of the *federal state* ('*Bund*') and nine *provinces* ('*Länder*'). Moreover, the Federal Constitution grants a certain degree of financial autonomy to the *local communities* ('*Gemeinden*'). The right to levy taxes is allocated among these three territorial authorities. Other entities under public law are not entitled to levy taxes; therefore, for example social security contributions are not considered taxes in a legal sense. The constitutional basis of the financial equalisation between the different territorial authorities can be found in the Fiscal Constitution Act of 1948 (*Finanz-Verfassungsgesetz 1948*, 'FVG 1948'). The regulation of the details is subject to the Finance Equalization Act (*Finanzausgleichsgesetz*, 'FAG'). The F-VG 1948 regulates two different types of taxes: First, *exclusive taxes* levied for the benefit of only one territorial authority (federal state, provinces or local communities) and second, *shared taxes*, whose revenues are distributed among the different territorial authorities.

Among the three territorial authorities the *predominant position is exercised by the federal state*. It is for the federal legislature to decide, whether a specific tax is an *exclusive* or a *shared* tax. In the latter case, the *federal legislature* also determines each territorial authority's proportion of the tax revenue. In addition, the predominance of the federal state in Austria's tax matters is also highlighted by the fact that the most important taxes, especially the individual income tax, the corporate income tax, and the value added tax (VAT) are regulated by the federal state. Municipal taxes are usually levied on basis of the laws passed by the legislators of the provinces. However,

* This Chapter was finalised as on 10 Mar. 2015. Changes in the law after that date are not taken into account.

regarding certain municipal taxes, federal legislature has retained its rights for standardised regulation, in order to prevent harmful tax competition. In this framework, the provinces have the legal competence to regulate the exclusive taxes allocated to them by the federal legislation and the exclusive taxes of the local communities. Additionally, according to case law of the Constitutional Court, the provinces also have the right to create new taxes, as long as the new tax is not similar to an existing federal tax. However, as federal law (FAG) regulates almost all important taxes on income and property, in practice there are only few ways for provinces to exercise the power to create new taxes.

The system of tax distribution among the territorial authorities is supplemented by financial transfer mechanisms. The federal government not only allocates the rights to levy taxes and tax revenues, but also general grants and grants for special purposes to the territorial authorities. Thus, Austria's fiscal system is often described as a tax sharing system.

§15.02 INCOME TAXATION

[A] Individual Income Tax Act (*Einkommensteuergesetz*, 'EStG')

[1] *Personal Scope: Unlimited and Limited Tax Liability*

Under Austrian legislation only individuals are subject to *individual income tax*. Corporations are subject to the *Corporate Income Tax Act*. However, *partnerships* are not treated as taxable entities. They are deemed to be *fiscally transparent* which means that income of partnerships is taxed *in the hands of the partners*. Consequently, corporate partners are subject to corporate income tax, individual partners are subject to individual income tax.

A person is subject to *unlimited taxation*, if he/she has either *residence or habitual abode* in Austria. In that case these persons are taxed on the basis of their *worldwide income*. A residence is constituted, if a person has a home possessed under circumstances that indicate that it will be maintained and not only used on a temporary basis. A home is considered to be possessed by a person, if this person actually uses it or has the right to use it for dwelling purposes. A residence in Austria in general is constituted, if the person, from the beginning of the stay in Austria, intends to maintain this place for more than six months. The habitual abode is the place, where a person is present under circumstances indicating that he/she will stay at that place not just temporarily. However, physical presence in Austria in excess of six months in any case establishes the habitual abode. This habitual abode is deemed to be established already in the beginning of the six-month period. The habitual abode ends at the time the person leaves Austria not just temporarily, also in this respect the six-month criterion is relevant.

EU and EEA citizens who obtain at least 90% of their income in Austria and whose total amount of income generated abroad is not higher than EUR 11,000 may exercise an *option for being subject to unlimited taxation*. The benefit of this option is

that certain tax benefits, which are normally only granted to residents, now are also extended to non-residents (e.g., individual tax deductions such as the sole-earner deduction).

According to a regulation on *inland secondary residence* (BGBl II 2003/528) special rules apply if a taxpayer has his/her centre of vital interest outside Austria for more than five years. In this case, maintaining an Austrian secondary residence only triggers unlimited tax liability in Austria in these years, in which the taxpayer has used his secondary residence for more than seventy days. Otherwise the person is only subject to limited tax liability. The taxpayer has to keep records of the days, where the Austrian secondary residence has been used.

Limited liability applies to taxpayers who have neither a residence nor their place of habitual abode in Austria. They are subject to tax only on the part of their income from Austrian sources (see also section §15.02[A][7])

[2] *Income Types*

According to § 2 paragraph 2 EStG taxable income is defined as the total amount of income aggregated from all seven categories of income, after utilisation of losses derived from the several categories and after deduction of special expenses (§ 18 EStG) and extraordinary charges (§§ 34 and 35 EStG) and after consideration of allowable deductions from §§ 104, 105 and 106a EStG.

§ 2 paragraph 3 EStG lists the following seven categories of income:

Business income	{	1. Income from agriculture and forestry (§ 21) 2. Income from independent personal services (§ 22) 3. Income from commercial activities (§ 23)	}	Main categories of income
Non-business income	{	4. Income from employment (§ 25) 5. Income from capital investment (§ 27) 6. Income from rental, leasing and royalties (§ 28) 7. Other specific income (§ 29)	}	Ancillary categories of income

The distinction between *business income* and *non-business income* is of high relevance for the computation of the basis for taxation. Another distinction is made with regard to subsidiarity; the three *ancillary categories of income* are subsidiary to the four *main categories of income*.

The seven categories of income are further defined in the following way:

- (1) *Income from agriculture and forestry* (§ 21 EStG): This category particularly consists of income earned by farmers, market-gardeners, winegrowers, stock-breeders, freshwater fishers as well as income from hunting in context with agriculture and forestry.

- (2) *Income from independent personal services* (§ 22 EStG): This category comprises:
- income from scientific, artistic, literary, teaching or educational activities.
 - professional activities from doctors, lawyers, tax advisors, notaries, architects, journalists, or interpreters.
 - income from the administration of property.
 - income as a member of the supervisory board of directors.
 - salaries or other forms of compensation of any kind granted to a company to substantial shareholder (a substantial shareholder is a person whose share amounts to more than 25% of the share capital of the company; see also income from employment).
- (3) *Income from commercial activities* (§ 23 EStG): Income from commercial activities is defined as income from trade or business which is not considered as agricultural or forestry activity or as income from professional services.
- (4) *Income from employment* (§§ 25 and 26 EStG): This category includes:
- Any remuneration in cash or in kind derived by an employed person.
 - Pension income received by a retiree from social Security, from a pension fund or from the employer himself.
 - Salaries or other forms of compensation of any kind granted to a company to others than substantial shareholder (a shareholder which is not substantial is a person whose share amounts to less than or equal to 25% of the share capital of the company; see also income from independent personal services).
- (5) *Income from capital investments* (§ 27 EStG): This category of income particularly comprises:
- Income from dividends, as well as other distributions of profits by legal entities subject to corporate tax, as well as interest from all kind of obligations, whether or not guaranteed (paragraph 2).
 - Income from capital gains of investments, including capital gains of assets generating capital gains from investments (paragraph 3).
 - Income from derivative activities (paragraph 4).
- (6) *Income from rental, leasing and royalties* (§ 28 EStG): This category consists of:
- Income from renting or leasing out real estate.
 - Income from renting or leasing out conglomerations of assets, such as those of an enterprise.
 - Royalties from the license of the right to use works protected by the Austrian Federal Copyright Act, as well as royalties from the assignment of industrial property rights, patents and know-how.
- (7) *Other specific income* (§§ 29 et seq. EStG): Other specific income exhaustively includes:
- Recurring earnings (§ 29 No. 1 EStG).
 - Income from private alienation of real estate (§ 30 EStG) and from speculative gains (§ 31 EStG).

- Income from occasional services (§ 29 No. 3 EStG).
- Special office payments (§ 29 No. 4 EStG).

The seven categories of income are numbered *exhaustively* in § 2 paragraph 3 EStG. Within the seven categories the applicable types of income are again defined exhaustively. As a consequence of this, income which is not applicable to one of the seven categories of income is not subject to income taxation (e.g., income from lottery winnings, awards or compensation payments which are not paid in the form of annuities).

[3] *Tax Exemptions*

Pursuant to § 3 paragraph 1 EStG exempt income particularly includes:

- Certain social distributions such as unemployment compensations, maternity allowances, parental-leave benefits, parental-leave assistance and child-care benefits.
- Payments received from foundations or public funds for the promotion of arts, science or research.
- Scholarships and grants for school children.
- Income from Austrian officials on duty in a foreign country.

[4] *Determination of the Assessment Base for Taxation*

[a] *Dualism in the Computation of Taxable Income*

Depending on the relevant category of income, the computation of income has to be done according to different provisions. The first three categories of income are seen as *profit income*. Here, the income is determined as the profit arising from the commercial activities. The remaining four categories are seen as *surplus income* implying that income is determined as the excess of receipts over expenditure. The differentiation between profit income and surplus income leads to a *dualism in the computation of taxable income*. For profit income, the taxable income is computed by the *net equity comparison method*. Profit is the difference of net equity of the company at the end of the business year and the preceding business year. This also includes profits from the write-up of assets and the alienation of assets or even the alienation of operating units or the whole enterprise (§ 4 paragraph 1 EStG). Regarding surplus income, receipts and expenditure (§ 15 EStG) are compared by using the *cash method*. Changes in value or profits from the alienation of assets – apart from alienations of shareholdings or speculative gains – are not considered for tax reasons. The results of profit income as well as surplus income generally are net values. This means that not only the operating profits or receipts are taken into account, but also from these results operating

expenses or expenditure have to be deducted. The result of this calculation – positive or negative – is the income which finally serves as assessment base for taxation.

[b] *Different Methods for the Calculation of Income*

There are three different ways for calculating business income:

- (1) Pursuant § 4 paragraph 1 EStG, profit is the *difference between net equity* of the business at the end of the business year and the last preceding business year, increased by the value of withdrawals from capital and reduced by the value of contributions to capital during the business year. In short, taxable income is computed according to the general accounting principles. The determination of profit for tax purposes is similar to the determination of profits according to the Code of Enterprises (*Unternehmensgesetzbuch*, 'UGB'). Therefore, for tax purposes, for each fiscal year annual financial statements comprising balance sheet as well as profit and loss statement have to be presented.
- (2) For taxpayers who are under the obligation to keep books and who derive income from commercial activities, the determination of income pursuant § 4 paragraph 1 is modified by the rule of § 5 paragraph 1 EStG. Here, the valuation for commercial law purposes is also binding for tax purposes ('*Maßgeblichkeitsprinzip*').
- (3) The third method is the simplified determination of business income according to § 4 paragraph 3 EStG. If the taxpayer is not legally obliged to keep books, and does not keep them on a voluntary basis either, the cash method can be applied by determining the *surplus of business profits over expenses*.

In all these cases income is assessed separately for each *tax year* which usually equals the calendar year. However, taxpayers who are subject to the provision of § 5 paragraph 1 EStG are allowed to have a business year (= financial year) which deviates from the calendar year. In such a case taxable income from the business is computed for the calendar year, in which the financial year ends (§ 2 paragraph 5 EStG). Still, in any case the financial year must not exceed twelve months. It may only be shorter in case of the opening and termination of business, or in the period where the change from calendar year to the deviating calendar year actually takes place (§ 2 paragraph 6 EStG)

[c] *Operating Expenses and Expenditure*

Operating expenses are defined as expenses which occur in the conduct of a trade or business (§ 4 paragraph 4 EStG). In comparison to that, *expenditure* is defined as costs or expenses for the reasons of generation, protection or preservation of the receipts (§ 16 EStG). The different wording may imply that the extent of these two notions for the deduction of expenses may be different. However, according to the prevailing

opinion in Austria, the criteria for the deductibility of expenses are the same for both, operational expenses and expenditure. This result stems from the fact that first and foremost the distinction has to be made whether expenses are made for the *realisation of income* or whether they constitute *usage of income*. Consequently, operating expenses have to be distinguished from expenses which are made for private reasons and therefore not tax deductible.

[d] *Special Expenses and Extraordinary Burdens*

With allowing certain expenses to be deducted as *special expenses*, the legislator has followed social, cultural or economic goals. These expenses are in essence private expenses; however, the legislator has attributed to them an *income-reducing effect*. Section 18 EStG enumerates the special expenses and comprises, for example:

- Contributions to certain insurance funds.
- Expenses for construction and renovation of real estate and housing.
- Mandatory contributions to specific religious communities.
- Donations to entities that pursue charitable purposes, carry out development aid or disaster relief, or work in the field of animal protection.
- *Loss carry forward*: The possibility to carry forward losses attenuates the strictness of the *periodic principle*. It has to be distinguished from the notion *loss compensation*. While loss compensation balances positive and negative results within one tax period, loss carry forward works as compensation between subsequent tax periods. Basically, a loss carry forward is possible, if the losses are incurred in a *previous year*, but have not already been considered through loss compensation or loss carry forward in prior periods. Furthermore, the losses must stem from a source of business income, for non-business income a general possibility to carry forward losses does not exist (although certain extraordinary expenses from rentals, leasing and royalties can be spread over ten years pursuant to § 28 paragraph 2 EStG).

In addition to the deductibility of special expenses the legislator also allows taxpayers to deduct *extraordinary burdens*. § 34 EStG defines extraordinary burdens as expenditure accruing in an exceptional and unavoidable manner and significantly affecting the economic capacity of the taxpayer. These are for example catastrophic losses or medical expenses, if they are not covered by insurance.

[5] *Calculation of Tax Burden: Tax Rates*

Taxable income is the total amount of income from all categories after setting of losses and after deducting special allowances and extraordinary burdens. If no final withholding tax regime is applicable the tax burden of a taxpayer is calculated by using the following formulas:

<i>Income (EUR)</i>	<i>Formula pursuant to § 33 EStG</i>	<i>Marginal Tax Rate in %</i>
Up to 11,000.00	0.00	0.00
> 11,000.00 to 25,000.00	$(\text{income}-11,000) * (5,110/14,000)$	36.50
> 25,000.00 to 60,000.00	$(\text{income}-25,000) * (15,125/35,000) + 5,110$	43.21
> 60,000.00	$(\text{income}-60,000) * 0.5 + 20,235$	50.00

In general, the progressive tax rate affects the total income of a taxpayer and is thus applicable independent of the type of income. However, there are several exceptions to this rule:

- *Beneficial tax rates regarding income from employment for the salary of a 13th and 14th month* (§ 67 EStG): This benefit continuously has been subject to political controversies. This stems from the fact that the special tax rate for top income earners is even more beneficial than for low income earners, whose average tax rate was low to begin with. Thus, in the last years this provision has been subject to several amendments, in order to avoid inappropriate benefits for the top income earners.
- *Taxation at half the average rate* (§ 37 paragraph 1 EStG): This rate especially can be applied regarding capital gains derived by an individual on the sale or liquidation of a business, if a seven years period has elapsed and the taxpayer has died, becomes unable to carry on his business or is at least 60 years old and has gone out of business. Furthermore, also income from the exploitation of patent-protected inventions is subject to the preferential tax rate.
- *Spreading of specific income over three or five years* (§ 37 paragraphs 2 and 3): Also this preferential tax regime primarily can be applied upon request regarding the sale or liquidation of a business. Without this preferential regime gains accrued in the course of several years would all suddenly have to be taxed in one tax period. Especially with regard to the progressive tax rate this would lead to an inappropriately high tax burden. Therefore, the possibility of spreading income over several years – as well as taxation at half the average rate – aims at protecting the taxpayer from such exceptional burden.

Moreover, two important sources of income are totally excluded from calculation of the progressive tax rate as described above. Income from *capital gains* as well as income from *private alienation of real estate* is generally subject to a *flat tax rate of 25%* (§§ 27a and 30a EStG). Still, upon request the normal progressive tax rate instead of the special flat tax of 25% can be applied.

[6] *Methods of Levying*

[a] *Assessment*

Income tax is generally levied by way of an *assessment procedure*. This means that the taxpayer is obliged to fill out a tax return after the end of the tax year. The tax authorities will then issue a tax assessment stating the amount of tax to pay. If the taxpayer assumes that the tax authorities have not computed the income correctly, or another error occurred during the assessment of the tax, the taxpayer may file an appeal. As the tax authorities would like to dispose of the tax as soon as possible, a taxpayer needs to pay *quarterly advance payments* during the calendar year. These payments correspond to the estimated amount of income or to the latest assessed income. The difference between the income tax as assessed by the tax authorities and the advance payments then leads to either a final payment or a repayment (§ 46 EStG). If no mandatory assessment is required, a voluntary assessment may be requested within a period of five years, in order to enjoy a lower progressive tax rate and to deduct expenses where applicable.

[b] *Wage Tax*

Taxes on income from employment are usually levied in the form of *wage withholding taxes*. One requirement is that the employer has a permanent establishment in Austria (§ 47 EStG). The wage tax generally corresponds with the income tax, especially regarding allowances and tax rates, which are adapted to the payment periods of wages. The wage tax does, however, have a series of special provisions, especially those regarding fringe benefits and other extra pay.

[c] *Capital Yields Tax*

Income tax on certain income from capital investment is levied by way of *withholding*. The debtor of the capital is obliged to withhold a tax of 25%. Such income from capital investment is subject to capital yields tax without the opportunity of any deductions. Capital yields tax is in particular levied on (§ 93 EStG):

- Domestic *dividends* from shares in a stock company, a limited liability company and shares in commercial cooperatives.
- Domestic *interest* from capital receivables with a credit institution.
- Capital gains from domestic bonds.
- Income from realised *increases in value* of assets generating investment income.
- Income from derivatives.

One speaks of domestic income from capital investment if the paying agent is *established in Austria* or if the debtor has his domicile, place of management or legal seat in Austria. With income from realised increases in value of capital and income

from derivatives, the decisive question is whether the paying or depository office is *located in Austria*.

In many areas, the withholding tax has become an independent tax instead of merely a method of levying personal income tax. With certain types of income subject to capital yields tax, the levying of personal income tax is *finalised* by the deduction of 25% tax. Result of this effect is that this income does not have to be included in the tax return.

[7] *Limited Liability*

Individuals who neither have their residence nor place of habitual abode in Austria are subject to *limited tax liability* in Austria. These individuals are only subject to Austrian income tax in respect of *income from domestic sources*. The relevant category of income has to be determined exclusively from an Austrian tax perspective, only the Austrian facts and circumstances have to be considered (isolation theory). The scope of the limited tax liability in Austria is determined by § 98 EStG. However, the scope to define a 'domestic source' of income is rather different, depending on the category of income in question. For example regarding income from commercial activities not all activities which are actually performed in Austria are deemed to be Austrian income. Apart from a few exceptions (i.e., income from technical advisory services, income from leasing of personnel and income as a sportsman or artist), non-resident individuals are only subject to taxation from income from commercial activities if:

- A permanent establishment is maintained in Austria for such trade or business.
- A permanent agent is appointed in Austria.
- Immovable property is situated in Austria.

Whereas, regarding income from independent personal services and income from employment not only the inland exercise of such activities, but also the sole *exploitation* of these activities already constitutes an Austrian income source.

In general, non-residents' Austrian source income is taxed at the 'normal' rates; with the peculiarity that in the computation of the income tax liability an amount of EUR 9,000 must be added to the income of the non-resident taxpayer. However, for certain domestic income the legislator wants to assure the collection of taxes by introducing a *special withholding tax* at a flat rate of 20% which is levied on a gross basis. Persons resident in the EU or EEA may choose that the withholding tax is calculated on a net basis with a higher flat rate of 35%. Income subject to the special withholding tax particularly comprises (§ 99 EStG):

- Income from independent personal services as *author, lecturer, entertainer, architect, sportsman, artist or participant in an entertainment performance* if the activities are performed or exploited in Austria.
- Profits from a cross-border multi-tiered transparent partnership, if the recipients of the income are not disclosed.

- Royalties and fees for the use of know-how.
- Directors' fees.
- Income from commercial or technical consultancy activities.
- Income from cross-border hiring out of labour.
- Distributions or deemed distributions of real estate funds, if the real estate is located in Austria under the condition of public-placement.

[B] Corporate Income Tax Act (*Körperschaftsteuergesetz*, 'KStG')

[1] Scope

The Corporate Income Tax Act applies to the following taxable persons (§ 1 paragraph 1 KStG):

- Legal entities organised under private law (e.g., stock companies, limited liability companies, foundations, associations and cooperatives) and comparable foreign entities.
- Corporations under public law and businesses carried on by corporations under public law.
- Institutions and funds without independent legal existence and accumulations of property for a specific purpose.

Companies are subject to *unlimited taxation* (§ 1 paragraph 2 KStG), if they are *resident* in Austria. A company is resident in Austria, if it has its *legal seat or place of management* in Austria. The legal seat is defined as the place which is designated as such in the articles of association or other basic documents. The place of management is defined as the centre from which the activities of the company are effectively directed.

Companies are *subject to limited taxation* in Austria (§ 1 paragraph 3 KStG), if they neither have their seat nor their place of management in Austria. In such cases, similar to the principles in the EStG, they are only subject to tax on their income from domestic sources. However, a different tax regime applies for corporations under public law and tax exempt legal entities (e.g., charitable companies): They are only taxable with their income subject to withholding tax (capital yields tax) or comparable foreign income.

[2] Taxable Income

[a] Income Calculation According to the Rules of the EStG

The Corporate Income Tax Act refers to the definition of taxable income as contained in the Income Tax Act (EStG). Consequently, in principal a company may derive income from all seven categories of income as defined pursuant to the EStG. However, § 7 paragraph 3 KStG explicitly determines that all income of legal companies, whose

financial accounting has to be based on the double bookkeeping under commercial law only can fall under *one category of income*, namely *income from commercial activities*.

Also the computation of taxable income follows the rules of the EStG, if not otherwise determined by the KStG. The profit or loss of the company is defined by using the *net worth comparison method*. The profit or loss is the difference between the company's net assets at the beginning and the end of the tax year adjusted by contributions or withdrawals.

[b] *Contributions and Withdrawals*

According to § 8 paragraph 1 KStG a *contribution* made to the capital of a company is not taken into account for determining the company's income. Conversely, this principle applies in the same way if a person withdraws capital from a company. This rule applies regardless of whether the person receives any shares or other membership rights in return for the contribution. A contribution can be made in cash or in kind. If a contribution occurs by way of transaction qualifying as capital contributions under general corporate law (e.g., formal capital increase), a contribution is deemed to be 'open', otherwise a contribution is deemed to be 'hidden'. A hidden contribution occurs if a shareholder provides a benefit to the company either for no consideration or for consideration that is below the price that would have been paid to an *independent third person* in an *arm's length transaction*. For tax purposes, a hidden contribution shall be treated the same way as on open contribution. For example, if a shareholder sells an asset to the company below the market value, the company has to increase its tax basis in the assets to their market value and account for the difference between purchase price and market value as hidden contribution.

[c] *Profit Distributions*

Also the *distribution of profits* to the shareholders is deemed to be a tax neutral event on company level. In this respect, it is irrelevant, whether the profit distribution is performed by way of an *open dividend* or *hidden dividend* (§ 8 paragraph 2 EStG). An open dividend occurs if it is based on a formal shareholder's resolution of the distributing company. However, if a company grants a benefit to its shareholders, which would not have been granted to an independent third person, this transaction occurs '*causa societatis*' and therefore is treated as hidden dividend. This for example is the case, if a company pays a price above the market price for services of a shareholder. In such a case, only the arm's length part of the payment is tax deductible, the exceeding part is deemed to be a hidden distribution and thus tax neutral on company level.

[d] *Deductions and Special Expenses*

In general, all *expenses* caused by the conduct of the business are *tax deductible* (§ 11 KStG for deductible expenses and § 12 KStG for non-deductible expenses). As

regards *special expenses*, only the following may be taken into account (§ 8 paragraph 4 KStG with reference to the EStG):

- Annuities and permanent charges.
- Expenses for certified tax advisors.
- Special donations.
- Loss carry forwards.

[3] **Group Taxation**

[a] *General Information and Requirements*

Companies by law are separate and independent legal entities. However, within a group of companies, they can be *economically dependent and linked to each other*. Thus, in the year 2005 the Austrian legislator has introduced a new regime for group taxation by replacing the provisions of the old '*Organschaft*' regime. The '*Organschaft*' only remains relevant for VAT purposes (VAT grouping).

The relevant provisions for group taxation can be found in § 9 KStG. Under certain conditions this new group taxation regime allows the *formation of a group*, where certain profits and losses can be transferred from a subsidiary to the parent:

- The *parent company* is a domestic company (stock company, limited liability company, cooperative, insurance company or bank) or a foreign company that is either comparable to a domestic company or listed in the annex of the EU Parent Subsidiary Directive. Additionally, a foreign company needs to have a permanent establishment in Austria, to which the participations are attributed.
- The *group subsidiaries* may be domestic or comparable foreign companies. However, only first-tier foreign members may be included into the group.
- Group taxation requires a group-member *participation* (directly or indirectly) *of more than 50%* in the statutory capital and the voting rights of a group subsidiary.
- A *formal application* must be filed with the tax authorities. Moreover, a minimum group taxation *period of three years* is required. If the group breaks up within the three-year period, all tax effects resulting from the group are retroactively neutralised.

[b] *Consolidation of Income*

The main consequences of the formation of the group can be described as follows:

- *Total profits or losses* of a domestic group subsidiary are *attributed to the parent*. For this attribution the participation degree is irrelevant. Even if the participation is less than 100%, the total profits or losses are attributed to the parent.

- In case of *foreign group members* profits are not attributed to the parent. Only *losses* are attributed to the parent according to the *percentage of the participation*. However, a *recapture* of taxes in Austria takes place, if the losses may be set off against profits abroad in the subsequent years. Also the exit of foreign group-members triggers the recapture of losses, unless the exit is due to liquidation or insolvency of the foreign member.
- *Write-offs* in respect of participations in group-members are *not deductible*, as by means of income consolidation the parent makes direct use of the subsidiary's losses.

[4] **Participation Exemption**

[a] *General Information and National Participation Exemption*

The *participation exemption* in § 10 KStG in a national as well as in an international context is one of the key features of the Austrian Corporate Income Tax Act. Its aim is the prevention of double taxation resulting from a profit distribution by a subsidiary to its parent. Such *economic double* or even *multiple taxation* would arise because of the taxation of profits on the level of the subsidiary and the taxation on the level of the receiving parent company, whenever this profit is distributed further up.

Under the *national participation exemption* any dividends from a participation received by a resident company from another resident company or cooperative is exempt from corporate taxation. This exemption also applies to similar participation rights or participation capital. There is no minimum participation requirement or minimum holding requirement. However, gains from the alienation of domestic shares are tax effective.

[b] *International Participation Exemption (Participation of 10% or More)*

Dividends from a participation in a foreign company of *10% or more* are exempt from corporation tax under the following conditions:

- The parent company is legally required to keep books and records according to the Austrian Commercial Code or the parent company is a foreign company that qualifies as a resident of Austria for corporation tax purposes.
- The participation is held for at least a *one-year period* incessantly.
- The foreign subsidiary has a legal form listed in the Parent Subsidiary Directive or is comparable to a domestic company.

Capital gains and losses from such participations in foreign companies are deemed to be *tax neutral* as well. However, the taxpayer may opt to treat potential capital gains as taxable income; conversely, occurring losses are tax deductible. This

option has to be exercised in the year of the acquisition of the participation and is irrevocable.

A *switch-over from the exemption to the credit method* takes place if:

- Foreign-source income is subject to taxation which is *not comparable to the Austrian corporation tax* (if the foreign tax does not exceed 15%).
- The *main aim* of the business of the foreign company is to directly or indirectly derive interest, income from leasing of movable or intangible assets or the alienation of participations (passive income).

[c] *International Exemption for Minor Shareholdings (Share of Less than 10%)*

Dividends from a share in a foreign company of *less than 10%* are exempt from corporation tax under the following conditions:

- The foreign subsidiary has to have a legal form which is listed in the Parent Subsidiary Directive (90/435/CEE).
- The foreign subsidiary has to be a company of an EEA Member State, it has to be comparable to a domestic company and there has to be an extensive exchange of information and administrative assistance in the recovery of taxes with the foreign country in which the company is a resident.

In order to avoid non-taxation or under-taxation a *switch-over from the exemption to the credit method* takes place if one of the following requirements is met:

- The foreign company is actually not subject to a tax which is *comparable to the Austrian corporation tax*, neither directly or indirectly.
- The profits of the foreign company are subject to a tax which is comparable to the Austrian corporation tax, but the rate applicable is less than 15%.
- The foreign company benefits from an *extensive exemption* from tax (except exemptions for domestic dividends).

§15.03 AVOIDANCE OF DOUBLE TAXATION AND TAX TREATY POLICY

[A] Unilateral Measures

Unilateral relief is granted either by an exemption or a foreign tax credit. The main purpose of this relief regulated in § 48 *Federal Fiscal Code (Bundesabgabenordnung, 'BAO')* is to achieve a balance between the domestic and the foreign tax liability or to provide a tax treatment in accordance with the principle of reciprocity. Tax exemption is granted under the condition that the income is subject to an average tax burden of at

least 15% in the source state. The *exemption* only concerns positive income, foreign losses can be included into the Austrian tax base, provided that no double utilisation of losses occurs in the succeeding years. Basically, the following categories of income may be tax exempt:

- Income from immovable property located abroad.
- Business profits derived by a foreign permanent establishment.
- Income from a foreign building site or construction project.

In case that the average tax burden of these categories of income is below 15%, double taxation is avoided by a *foreign tax credit*. A credit is also granted with respect to other categories of income as mentioned above (e.g., dividends, capital gains, interest and royalties). In all cases unilateral relief is subject to several documentary requirements; the taxpayer for example is obliged to keep records providing information about the source state, the category of income, as well as the amount of income and the effective tax rate in the source state.

[B] Tax Treaties

Austria has concluded more than ninety conventions to *avoid double taxation* (*Double Taxation Conventions*, 'DTCs'). These treaties cover individual income tax, corporate income tax and in certain cases also net worth tax and business tax. However, business tax and net worth tax have been abolished effective the year 1993. According to a DTC, the resident state of the taxpayer is defined and the taxing rights are allocated to the two contracting states. If the *allocation rule* still leaves taxation rights for both states, finally the *method article* defines the method of avoiding double taxation (exemption or credit method). At the end of a DTC, non-discrimination provisions, provisions on the exchange of information, on the collection of taxes and on arbitration are included.

The aim of the *Austrian tax treaty policy* is to go beyond merely avoiding double taxation. When Austria enters into treaty negotiations, the treaty is expected to meet three requirements: (i) *promotion of economic development*, (ii) *prevention of international tax avoidance* and (iii) *guarantee of legal certainty*. By taking into account these basic principles the fair sharing of profits and losses between two countries should be ensured with a focus on the reciprocity principle. Under most of the Austrian treaties, double taxation is eliminated by using the *exemption method*. However, as a general rule, double taxation of dividends, interest and royalties is eliminated by using the *credit method*. To a large extent, the Austrian model follows the *OECD Model Tax Convention*. Some of the highlights of the Austrian tax treaty policy explicitly can be described as follows:

- No withholding taxes on interest, royalties and inter-company dividends.
- Application of the Commentary to the OECD Model Convention for interpretation purposes.
- Avoidance of discriminatory treatment with regard to other EU Member States.

§15.04 OTHER TAXES¹

[A] Value Added Tax (VAT)

After Austria's accession to the European Union on 1 January 1995, the VAT system had to be amended to be in conformity with the EU law provisions. A completely new VAT Act (*Umsatzsteuergesetz*, 'UStG') was enacted together with a Single Market Regulation. Consequently, as within the EU indirect taxation is widely harmonised, the Austrian UStG – which was implemented on basis of the 'VAT Directive' (2006/112/EC) and the former '6th VAT Directive' (77/388/EEC) – is rather similar to the VAT systems in other countries.

VAT is levied at all levels of the supply of goods and services. The entrepreneur deducts the VAT he paid on purchases and services (input VAT deduction) during the taxable period against the VAT he charged on the supply of goods or services during the same period. Thus, he pays VAT only on the value added by him, i.e., the increment in price. The number of transactions through which a product passes on its way to the consumer is normally irrelevant, and the total tax burden passed on at the retail stage is always the same, namely the statutory rates which apply to the retail price before tax. VAT is not an element of cost for the entrepreneur (except in certain cases of non-deductibility). For VAT purposes, it is decisive that the transaction needs to be carried out in Austria. However, it is not relevant whether the entrepreneur is a national or resident of Austria or has its legal seat, place of management or a permanent establishment inland.

[B] Real Estate Transfer Tax (*Gründerwerbsteuergesetz*, 'GrEStG')

The *transfer of the title to immovable property* located in Austria is subject to real estate transfer tax. The term immovable property includes land and buildings. It does not include machinery and equipment forming part of an industrial plant or industrial or commercial franchises. The GrEStG also provides for a number of supplementary and substitutive rules to prevent taxpayers from circumventing the tax liability by choosing legal forms which are not covered by the GrEStG but have the same economic result (e.g., in case that all shares of a company owning immovable property are united). The taxable base normally is the *value of the consideration* given to the transfer. The tax rate is 3.5%. If the property is transferred between husband and wife or parents or children, the tax rate only amounts to 2%.

[C] Transaction Duties

The Act on Transaction Duties (*Gebührengesetz*, 'GebG') stipulates duties for certain *written authenticated transactions* (§§ 15 et seq. GebG). Duties become due if they are

1. This section gives an exemplary overview about specific other taxes important in Austrian Tax Law.

covered by so called *fee items* (enumeration principle). Transactions are only then subject to tax if a *certificate* is drawn up (so called principle of certificate, § 15 GebG), unless the GebG specifies something different. A certificate is every document on which characters are put and which authenticates the conclusion of a transaction. Subject to duties is the *transaction* itself. The documentation itself is only the condition for taxability. Therefore, the economic view which prevails in tax law normally does not apply for the GebG.

[D] Inheritance and Gift Taxes (*Erbschafts- und Schenkungssteuergesetz, 'ErbStG'*)

Since 1 August 2008, the inheritance and gift taxes have been *abolished*. Gifts now have to be notified to the local tax authorities.

§15.05 PROCEDURAL ASPECTS

[A] From Filing the Tax Return to the Administrative Act

Tax returns for income tax, corporate income tax, VAT and for the determination of income from a co-entrepreneurship are to be filed until the end of April of the subsequent year. If the tax return is filed electronically, the deadline can be extended to the end of July. A general extension of maturity is granted to taxpayers who are represented by professional representatives (e.g., tax advisors).

Persons subject to *unlimited tax liability* in Austria must *file an income tax return* for the relevant year (§ 42 paragraph 1 EStG), if:

- So required by the tax office.
- The income entirely or partly consists of business income and the profit had to be or was computed by way of accounting.
- The income not including income from employment exceeds EUR 11,000. Under certain circumstances, in particular if the employee receives income from two or more employers or from other sources of income exceeding a total amount of EUR 730, the employee must file a tax return (§§ 41 et seq. EStG).
- The income is subject to the special tax rate pursuant § 27a EStG, but no capital yields taxes were levied.

Persons subject to limited tax liability in Austria must *file an income tax return* for Austrian income (§ 42 paragraph 2 EStG), if:

- So required by the tax office.
- The total amount of Austrian Income which has to be assessed according to § 102 EStG exceeds EUR 2,000.

In practice, about 80% of the tax returns are electronically saved and processed by the tax authorities without additional evaluation of the content of the tax return.

Specific cases which seem to require extended evaluation are evaluated by using computer-based standard evaluation criteria such as the total amount of income, significant changes compared to the previous years, etc. All various types of *evidence* can be used in this context (e.g., official and private certificates, witnesses, consult experts, legal inspections...). At the end of the investigation of the tax office when the amount of taxes to be paid is determined, an *administrative act* is issued.

A tax *falls under the statute of limitation*, when it is not executed for a specific period. The statute of limitations has to be claimed *ex officio*. If a tax is assessed although it does already fall under the statute of limitation, the taxpayer may appeal against the assessment. In tax law it has to be differed between the *statute of limitations for assessment* and the *statute of limitations for collection*. A tax may no longer be levied ten years after the tax triggering event ('*absolute statute of limitations*').

[B] Protection of Taxpayers' Rights

[1] Appeals against Assessments

If the taxpayer does not agree with the assessment issued in the administrative act of the tax authorities, he/she may file an *appeal against assessment* within *one month* with the relevant tax office. To facilitate the procedure, in general the tax administration at first has to issue a decision on its own. If the taxpayer still is not satisfied with the assessment, he may request the appeal to be forwarded to the *Federal Financial Court (Bundesfinanzgericht, 'BFG')*. The Federal Financial Court may decide to amend the administrative act in any way. This could be to the advantage or detriment of the taxpayer. Against the decision of the Federal Financial Court, the taxpayer may file an appeal with the *Supreme Administrative Court*; a constitutional issue may be raised by appealing to the *Constitutional Court*. The decisions of these two courts are final, against those decisions there is no judicial remedy.

[2] Federal Financial Court (Bundesfinanzgericht, 'BFG')

The BFG has been newly established with effect of 1 January 2014. As a result of a total reform on the organisation of administrative courts in Austria, it is replacing the former Independent Fiscal Senate (*Unabhängiger Finanzsenat, 'UFS'*). The BFG is an authority independent from the ordinary tax administration. It handles appellate procedures comprising taxes, as well as less serious penal proceedings in tax matters. The court is entitled to amend the administrative act in any way and to hand down a new judgment on the merits. Alternatively, the decision can also be remand for reappraisal to the competent tax authority. In addition, in all of its judgments the BFG also has to decide on whether against this judgment an ordinary appeal to the VwGH shall be possible or not. If the ordinary appeal is denied, the taxpayer is entitled to file an extraordinary appeal stating why – contrarily to the reasoning of the BFG – the taxpayer is of the opinion that an appeal to the VwGH shall be possible.

[3] Supreme Administrative Court (Verwaltungsgerichtshof, 'VwGH')

Similar to administrative law issues also regarding tax law cases the VwGH acts as Supreme Court. For this purpose specialised tax law senates have been established. They mainly deal with the illegality of administrative acts ('*Beschreibbeschwerden*') and appeals claiming a breach of the obligation to reach a timely decision ('*Säumnisbeschwerden*'). Regarding appeals *against the illegality of an administrative act* the VwGH may not only *abolish or confirm* the administrative act of prior instance (mostly the BFG), but also, under certain conditions, is entitled to hand down a new *judgment on the merits*. If an administrative authority completely fails to make a decision within a given period (mostly six months), the petitioner may first request that a higher authority deals with this issue. If this motion fails too, the taxpayer may lodge an *appeal claiming a breach of the obligation to reach a timely decision* and bring the case before the VwGH.

[4] Constitutional Court (Verfassungsgerichtshof, 'VfGH')

The VfGH acts as a Supreme Court with special administrative jurisdiction if the constitutional rights of a taxpayer are infringed. This particularly is the case if tax authorities apply the law in an inconceivable way in legal terms. Such '*inconceivable*' application of the law is a violation of the constitutionally granted *principle of equality*. Moreover, the VfGH has the authority to annul the application of *unconstitutional statutes* as well as of *unlawful regulations*. In addition, in ordinary tax cases the court also has competences regarding certain conflicts of jurisdiction.

SELECTED BIBLIOGRAPHY

- Althuber/Vondrak, *Steuerrecht für Juristen* (2012).
 Beiser, *Steuern*, 12th edition (2014).
 Doralt, *Steuerrecht 2014/15*, 16th edition (2014).
 Doralt/Ruppe, *Grundriss des österreichischen Steuerrecht I*, 11th edition (2013).
 Doralt/Ruppe, *Grundriss des österreichischen Steuerrechts II*, 7th edition (2014).
 Lang/Schuch/Staringer, *Einführung in das Steuerrecht*, 14th edition (2014).
 Tumpel, *Steuern kompakt 2015* (2015).
 Unger/Vock, *Casebook Steuerrecht*, 6th edition (2014).
 Buzanich, *Austria – Individual Taxation 2014*, IBFD Country Analyses.
 Jann/Schuch/Toifl, *Austria – Corporate Taxation 2014*, IBFD Country Analyses.
 Ruppe et al, *58th IfA Congress Vienna 2004*, Bulletin for International Fiscal Documentation 2004, Volume 58, Number 8/9.
 Ubelhoer/Pfeiffer/Huisman/Schaffer, *Introduction to Austrian Tax Law* (2014).