



# Austria\*

- \* Headquarters Location in the Heart of Europe  
Legal and fiscal aspects



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## Preface

Finding the right location is a crucial element for a entrepreneurial success. A country's advantages and benefits that offer the highest potential for success and minimize risks must be taken into consideration. This brochure on the potential of headquarters in Austria will give you some basic information on the business location as well as the legal and fiscal environment. It will prepare international investors for their consultations with their attorneys and tax consultants and will facilitate their investment decision.

The first part of this brochure provides an overview of Austria as a business location. The second part contains information on legal aspects, and the third focuses on the tax aspects of establishing companies in Austria. Part four is on ABA-Invest in Austria: Who we are and what we do.

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# I. Austria – Headquarters

## Location in the Heart of Europe

With the EU's Eastern expansion to 27 nations, Austria has shifted to the heart of Europe not just geographically, but in a political and economic sense as well. Austria is now an ideal business location – whether as an East-West interface or as headquarters for a company's Central and Eastern European business activities.

Austria's long tradition with its neighbors to the east has led to a common mindset and many years of experience in doing business together. Until the end of the imperial reign dominating the region in the early years of the 20th century, Hungary, Slovakia, the Czech Republic as well as parts of today's Poland, Romania and Croatia belonged to the unified Austro-Hungarian Empire.

These historical ties and the intense level of ongoing involvement today make Austria the EU's undisputed specialist for Eastern and South Eastern Europe. Three-quarters of all immigrants in Austria come from Central and Eastern Europe. These people have above-average qualifications, and the proportion of college graduates is very high. Austria's universities and educational institutions offer tailor-made training programs, often developed in cooperation with the business community. And in addition, an increasing number of Austrian educational institutions are offering training programs in Eastern Europe – for example the Vienna University of Economics and Business Administration, which has been running an Executive MBA study program in Bucharest since 2007.

Vienna International Airport is the European leader for CEE destinations. With its flight connections featuring 49 cities in 22 Eastern European countries as well as 604 weekly flights to the region, Vienna Airport has further expanded its top position as an East-West hub in European air traffic, and even ranks ahead of the considerably larger Frankfurt Airport.

Austria is internationally recognized as the leading business location for building up business ties to Eastern and South East Europe. Prominent companies spanning all business sectors, ranging from Beiersdorf, BMW, Boehringer Ingelheim, Eli Lilly, Heineken, Henkel and Siemens, have expressed their confidence in Austria as a business location targeting the CEE region.

Some 300 regional headquarters of multinational companies use Austria as a base to carry out cross-border corporate activities. There are 84 regional corporate headquarters alone among the top 500 companies in Austria in terms of revenues.

But it is no longer a one-way street. For future-oriented Eastern European companies, a subsidiary in Austria is often the first step towards the West and an increasing number of them are selecting Austria as their EU foothold. Whereas Russian companies set up only eight subsidiaries in Austria in 2001, this figure climbed to 58 in 2007 alone.

### Competence and contacts – Austria's banks and consultants are reliable business partners in Central and Eastern Europe

Austria's banks and management consultants have traditionally had access to a far-reaching network of business contacts and expertise in Eastern Europe, making them the undisputed leaders in the region. Every third Euro transacted in Eastern Europe is booked to the accounts of Austrian banks or their subsidiaries. Austria's attorneys, tax and management consultants, insurance companies and advertising agencies benefit from comparable networks.

### 1. Austrian employees in the top ranks of the EU

One of the main competitive strengths of Austria as a business location is its qualified and highly motivated employees. Foreign investors appreciate the outstanding quality of Austrian skilled labor.

Austrian workers are highly motivated. There's no better measure than the degree to which Austrian employees identify with their employers' goals – a characteristic that is reflected in the high quality of products and broad customer satisfaction. According to the World Competitiveness Yearbook, Austria's workforce is characterized by an extraordinary work ethic. In international comparison, Austria ranks third in 2009, surpassed only by Denmark and Switzerland. Austria also ranks among the best in the world in an international comparison measuring the number of working days lost due to strikes. In the years 1998-2007, Austria boasted an annual average of only 0.8 strike days per 1,000 employees.

## 2. High purchasing power and above-average productivity at moderate costs

Austria is the fourth most prosperous country in the EU. It not only offers a market boasting extensive purchasing power, but a corresponding consumer infrastructure. Despite its relatively small size and number of inhabitants, Austria is a profitable market for international companies. Austria's economic growth is driven by rising productivity and falling unit labor costs.

An important consideration for foreign investors - apart from the economic climate - is location cost. Austria scores highly in this regard. According to a study carried out by the international commercial real estate services provider CB Richard Ellis, Vienna ranks as one of the cheapest European locations in an international comparison of 173 cities across the globe. On the basis of office rental costs, Vienna is more reasonably priced than Amsterdam, Brussels, Prague, Warsaw, Rome, Frankfurt or Zurich. Berlin and Budapest are slightly cheaper.

## 3. Unmatched quality of life

Today Austria is a prosperous, stable and thriving country, looking back at a long and eventful history. Across the globe, Austria is valued as a nation with a rich cultural heritage, and is considered to be a popular travel destination and business partner, thanks to its broad spectrum of cultural offerings, marvelous landscape and a dynamic and innovative economy.

The selection of a business location is primarily driven by economic considerations. However, the underlying basis for excellence and the top-rate performance of employees is a feeling of well-being and feeling good in the environment in which they live and work. This represents a decisive competitive advantage for Austria. There is hardly any country in the world which offers a comparable quality of life.

The high quality of life is reflected in the low crime rate, the high level of social security and an attractive shopping and recreational infrastructure.

## 4. High personal security

The economic, social and political stability plus the high level of legal certainty are particularly attractive to companies. According to the latest World Competitiveness Yearbook, Austria is rated third in the EU in respect to the protection of personal security and private property.

## II. Legal Aspects of Establishing Companies in Austria

### 1. Introduction to Austrian Company Law

Business activities under Austrian law can be conducted either in the form of a business association which has the character of a legal person, distinct from its directors and shareholders, or as a partnership with unlimited personal liability for all obligations of the business on the part of the partners that actually run the business.

Legal persons under Austrian law include the limited liability company (hereafter GmbH) and the stock corporation (hereafter AG). Both types are legal entities that come into existence upon registration in the commercial register of the competent regional court. The application for registration must bear the notarized signatures of all managing directors. As a basic principle, the shareholders of an Austrian company make a capital contribution to the company (minimum for AG: EUR 70,000, for GmbH: EUR 35,000). This contribution represents the liability fund for potential creditors, which is why the raising and maintenance of this capital stock is subject to special protection provisions. But this does not mean that the contribution has to be saved. On the contrary, the managing directors are allowed to use the capital contribution for the business activities of the company. However, in some instances, for example, when the company is used to perpetrate fraud, the court may lift the corporate veil and subject the shareholders to personal liability.

The constitution of an Austrian company is established by law and, on the other hand, by signing a memorandum of association by the shareholders in form of a notarial deed. The latter states the name, the seat, the objects of the company and the share capital.

Neither the shareholders of a Limited Liability Company (GmbH) or AG, nor the CEO or directors, need be Austrian citizens.

A Limited Liability Company (GmbH) is best suited for investors that are interested in having a transparent and controllable group of shareholders, as well as direct influence on the managing directors of the company. This is ensured by special procedural requirements for certain kinds of management affairs, by the fact that names of shareholders are published in the commercial register, and because the transfer of shares is restricted by the form of a notarial deed.

For the AG and the GmbH, in general 25 % of the capital contribution must be paid in when the company is founded. For a Limited Liability Company (GmbH) with a share capital under EUR 70,000 the minimum paid-in contribution amounts to EUR 17,500.

If, however, the possibility of an easy and rapid exchange of members as well as their anonymity to the outside is sought, the form of an AG is recommended. With an AG – except for the one-person AG – shareholders are not published in the commercial register. Basically, the AG differs from the GmbH in that the AG offers a more highly developed body of company law and a higher degree of statutory control. Thus the AG has a higher reputation in the business community. An important practical advantage of an AG over a GmbH is the method used to transfer shares. The shares of an AG may be transferred without a notarial deed, whereas the transfer of a share in a GmbH requires a notarial deed. The main practical differences between a GmbH and an AG, which often make business persons choose the GmbH, are that an AG must always have a supervisory board and an auditor and the managing directors of a GmbH may be appointed or recalled at any time. The managing directors of an AG may only be recalled for an important reason, the shareholders may give binding instructions regarding all management issues to the managing directors of a GmbH, but this is not permitted in an AG, except in companies belonging to a group (Konzern).

The shareholders' meeting of an AG may decide on management issues only upon submission of a matter by the board of management or the supervisory board (regarding the agenda subject to the consent of the supervisory board); every shareholders' meeting of an AG must be recorded by a notary public, thus causing additional expenses. In a GmbH, the presence of a notary is necessary only in certain cases. Shareholders' resolutions of a GmbH may be adopted in Writing, thus dispensing with a formal shareholders' meeting.

In contrast to a legal person, partnerships are business associations which, particularly under tax law, are not considered legal entities but rather merely associations of owners. However, in order to avoid impractical results, a partnership under Austrian law is treated as a legal person under company and civil law. The general partnership ("Offene Gesellschaft" – OG), a legal entity with shareholders (partners) being jointly and severally liable, is one of the partnership forms. An OG shall have at least two partners, and these shall be – unlike in the case of corporations – personally liable for the partnership's debts. A limited partnership ("Kommanditgesellschaft" – KG) has a structure

very similar to that of the general partnership, but with the important difference that in addition to there being at least one general partner with full personal liability, there must be at least one other partner whose liability in respect of the partnership's creditors is restricted to the amount such partner guarantees. This guaranteed amount is published in the commercial register.

The OG and KG do not need a specific form of articles of association and can be established rapidly. Conversely, the transfer of shares in such entities requires the approval of all partners, whereby changes of partners are often restricted by stipulations in the articles of association. Particularly for tax reasons, the transparency of partnerships is sometimes used in company structures. But a major disadvantage of an OG or a KG is the unlimited personal liability of the OG-shareholder and the general partner of a KG. In order to avoid this disadvantage a GmbH as a limited liability company can be established as the general partner in a partnership (GmbH & Co KG).

## 2. Establishment of private foundations

An Austrian private foundation ("Privatstiftung") is a legal entity, the organisation and purpose of which is largely determined by the grantor, who provides the assets necessary to fulfill this aim. The legal framework of the private foundation is regulated by the Private Foundation Act 1993 ("Privatstiftungsgesetz"). The structure of the Austrian private foundation is characterised by having no shareholder or proprietor but instead having beneficiaries. The foundation must be domiciled in Austria and entered in the Commercial Register.

The private foundation may be established for any purpose, such as the provisioning of a private family ("family foundation"), the support of one or more enterprises, or the support of art. It must have minimum assets of at least EUR 70,000 in the form of cash or contributions in kind.

The private foundation can be established through a declaration of establishment (inter vivos) or through testamentary declaration (mortis causa). In the declaration the purpose of the foundation, as well as the assets contributed, name and seat, and term have to be included. The beneficiaries may be determined in an appendix to the deed (Stiftungszusatzurkunde). In such case, the beneficiaries will not be known to the court. Upon inspection of the commercial register a third party will usually only learn that one or more certain persons have formed a private foundation and have contributed at least the minimum amount.

A private foundation must have a management board (Stiftungsvorstand), consisting of at least three members, two of whom must have their permanent place of residence in the EU. The beneficiary itself as well as the family members of a beneficiary of the private foundation shall not be members of the board, even if they are grantors. An advisory board is optional. The foundation is legally required to have a certified accountant (Stiftungsprüfer), in addition to the managing directors. However, the grantor can determinate the mode for the appointment of the management board, the auditor, the supervisory bodies, the possibility of amendments to the declaration, as well as the possibility of dissolution of the foundation, etc. Therefore, the grantor of the foundation, which can be a physical or a legal person, can structure the foundation according to its own individual requirements.

The declaration of establishment may stipulate a term after which the foundation is to be dissolved. This does not necessarily need to be on a calendar basis, but may be made dependent on the fulfillment of certain conditions. A foundation may also be established for an indefinite term. A maintenance-type of foundation, which does not serve public interest aims, is automatically dissolved after a period of 100 years, unless the final beneficiaries decide upon its extension for maximum of another 100 years.

The main advantages of a private foundation are

- tax incentives,
- high adaption to individual requirements and needs, and
- maintenance of the assets for the following generation.

Furthermore, the private foundation is an excellent instrument

- for bringing clear structures into large family estates,
- for avoidance of conflicts regarding the inheritance,
- for ensuring undisrupted continuance of a company in accordance with the grantor's wishes with no restrictions as regards the appointment of preferred managers, and
- for flexible continuation of a company on behalf of underage heirs.

However, according to the Austrian Act of Private Foundation, the private foundation is not allowed

- to engage in commercial activities other than of purely incidental character,
- to be the personally liable partner of a general or limited partnership, and
- to have the management functions of a commercial company.

On the other hand, the Austrian private foundation may operate as a holding company and can therefore participate in

companies. Most foundations are used as a means of preserving the integrity of shareholdings in family businesses. Every foundation is subject to an annual statutory audit and must prepare financial statements.

### 3. Immigration to Austria

In order to start doing business in Austria there are certain steps that need to be taken in order to obtain a residence title and an employment permit in Austria.

At present, the Austrian immigration law system provides approximately 20 different residence permits for various residence purposes (for instance for key employees, students, family members, seasonal workers etc). The precise reason for residence must be clarified, before an application for permanent residence can be submitted. Depending on the reason for residence, different laws apply (e.g. settlement and residence law, foreign employment law and foreign police law). Depending on the type of residence title, different rights are granted to the possessor (e.g. residence, residence and work), and a different procedure will be applicable.

In general, Austrian immigration law differentiates between residence permits for stays of a limited duration and settlement permits with intent of settling and continuous stay. Whilst a residence permit merely grants a legal right to stay for a defined period of time, settlement (permanent residence) permits ensure the qualified form of legal stay, namely "settlement".

This distinction is of relevance since only the qualified form of residence, which can be obtained through a settlement permit, results in a permanent right of residence after five years, and ultimately can lead to Austrian citizenship. Residence permits for stays of limited duration on the contrary cannot form the basis for permanent residence or Austrian citizenship.

Generally, when applying for a residence/settlement permit of any type, one must provide the following documents:

- Filled in application form,
- Valid Passport,
- Passport Photographs,
- Confirmation of a Suitable Accommodation in Austria,
- Health Insurance,
- Evidence of Sufficient Financial Means,
- Certificate of good conduct (not older than 3 month),
- Quota Allocation (in most cases),
- Birth Certificate,
- Marriage Certificate (mandatory if applicable).

### 4. For individual residence permits, additional conditions may be required.

For highly qualified workers, two residence permits are of special interest: the settlement permit for key employees (either self-employed persons or employed "key employees"), or the residence permit for exceptional cases of non-entrepreneurial occupation (e.g. top managers).

The following discussion focuses on the settlement permit for key employees, as this status of residence not only includes the rights to reside and work in Austria but also offers the possibility of a permanent Austrian residence permit after five years.

To be considered as a key employee, the applicant must demonstrate special qualifications or exceptional professional experience currently required by the Austrian labour market. In addition, a monthly pre-tax salary of at least EUR 2,466 (for the year 2010) must be proved. The target position must be of special interest for the region or the relevant part of the job market. It must create new jobs and/or contribute to the retention of existing jobs. The key employee shall have a considerable effect on the management of the business or be a main reason for the transfer of investment capital to Austria.

The application, together with a detailed description of the key employee criteria, must generally be submitted in person to the competent authority (usually at the Austrian embassy or at the Austrian consulate of the home country). In case of a settlement permit for employed key employees, the employer has to file the application at the office of the governor of the federal state in which the employee in question intends to settle.

After the examination of formal requirements, including the availability of a quota place, the application will be forwarded to the Austrian employment market service, which will determine whether the key employee criteria are fulfilled.

If the employment market service confirms the fulfilment of the criteria, the governor will usually issue a settlement permit for a time period of 18 months, during which the subject individual is expected to work a minimum of 12 months. This permit will include the permission to reside and work in Austria. This permit can also be extended, but it is essential that this be done before the permitted expires. After five years of lawful residence, the applicant may apply for a permanent residence permit. With effect from 1 April 2009 applications for the extension of residence permits have to be submitted for extension before the current residence permit expires. After the current residence

permit has expired, the application will be considered as a first-time application.

capital, services and people. As a result, business activities can be carried out by companies situated in Austria in a non-bureaucratic manner in all countries of the European Union.

## 5. Residential Registration

Residential registration is mandatory in Austria. Any person establishing residence in Austria is obliged to register with the respective competent authority within three days of establishing the residence. Responsible authorities to contact in this regard are either the registration office of the municipality office (*Gemeindeamt*) or the municipal administration (*Magistrat*), or in Vienna, the registration office of the municipal district offices (*magistratische Bezirksämter*).

A completed registration form (*Meldezettel*) should be furnished. This registration form can be obtained from the responsible registration authorities, registry offices (e.g., in Vienna), or the Internet.

The following details are to be provided:

- Name (including all previous names, if any),
- Date of Birth,
- Place of Birth,
- Gender and Nationality,
- Passport and Birth Certificate,
- Residence Registration Certificates for any other places.

The residence registration form must be signed by the lessor (the owner or its representative) and the tenant, submitted personally or by an authorized agent or sent by post to the responsible residence registration authorities (*Meldebehörde*). Upon registering in Austria, the registrant's personal data will automatically be saved in the Central Residence Registry (*zentrales Melderegister*) and made available to various authorities. Every person registered in Austria will be assigned a specific number in the Central Residence Registry (the so-called Central Residence Registry Number or "*ZMR-Zahl*") that is shown on the residence registration certificate (*Meldebestätigung*).

## 6. Conclusion

Some of the aspects that make Austria one of the most attractive locations for foreign corporate groups that intend to expand their influence throughout the European Union include political stability, a high degree of legal certainty, and the position of Austria as a bridgehead between Eastern and Western Europe. Companies constituted under Austrian law benefit from the four European freedoms, namely, free movement of goods,

## III. Taxation of Austrian Holding Companies

Austria as the gateway between West and East is one of the most popular holding locations in Europe. Besides the favorable geographic situation and the political and legal stability, Austria offers a range of benefits to international holding companies from a tax point of view.

Austria has an extensive range of tax treaties (more than 70) to avoid double taxation. The double taxation treaties are very important for holding companies in order to reduce the withholding tax rates on dividends and interest payments. Even in case Austria has not entered into a double taxation treaty with a particular country, Austria has unilateral domestic regulations with the aim to avoid double taxation. Generally these regulations avoid double taxation either by exemption of certain foreign income if this income is subject to taxation in the other country comparable to Austrian taxation, or by crediting the foreign tax under certain circumstances (subject to limitations).

### 1. Austrian Corporate income tax

Austria imposes a corporate income tax at a flat rate of 25%. The tax base is assessed on the basis of the net profit shown in the financial statements with adjustments for tax purposes (e.g. addition of certain for tax reasons non-deductible expenses).

Although the tax rate itself is substantial, the effective tax rate can be substantially lowered by reducing the tax basis (some possibilities of reducing the tax basis are described below e.g. use of tax exemptions - especially international affiliation privilege and exemptions based on double tax treaties - tax deductible expenses i.e. interest payments and the Austrian group taxation scheme.

No other income taxes on corporations exist in Austria (no business excise taxes, no municipal income taxes etc.). Tax losses can be carried forward indefinitely.

### 2. Income from foreign participations

#### 2.1. International affiliation privilege - dividends

Dividends received from a foreign subsidiary are tax exempt at the level of the Austrian holding company if the following criteria are met:

- The foreign subsidiary is a corporation set out in the EC Parent Subsidiary directive or another company comparable to an Austrian corporation;
- The participation has been held continuously for a period of at least one year;
- The Austrian parent company directly or indirectly holds at least 10 % of the equity capital of the foreign subsidiary.

If generally qualifying dividends are distributed within the period of one year after the acquisition, the 25% corporate income tax has to be paid provisionally. This provisionally paid corporate income tax will be refunded or credited after the expiration of the one-year holding period. There is the possibility to postpone filing of the corporate income tax return till the one year period has elapsed in order to avoid paying the provisional income tax.

It is important to know (as this is a significant difference to many other similar regulations in other countries) that this international participation exemption is basically applicable regardless of whether there is a double tax treaty in force with the country of residence of the subsidiary and regardless of whether there is any taxation at the level of the foreign subsidiary (regarding limitations, refer to the anti-abuse provisions below concerning subsidiaries with passive income). Therefore dividends received from a foreign subsidiary actively carrying out any business or trade activities are tax exempt in Austria even if the subsidiary is resident in a tax haven (i.e. is not subject to taxation in the country of residence).

#### 2.2. International affiliation privilege – capital gains

The gains and losses from the disposal of the international participation are also tax exempt under the international affiliation privilege. Nevertheless, the Austrian holding company has the possibility to opt in tax effectiveness of the capital gains and losses (losses must be apportioned proportionately over a period of seven years) by a declaration in the tax return of the year of the acquisition of the international participation. This declaration cannot be subsequently amended. This can be an advantage to shareholders who can use a tax credit in their country of residence.

Losses achieved in the course of liquidation or insolvency of the subsidiary are fully tax deductible also in the case of an international participation, but have to be reduced by tax free dividends received within the last five years before the liquidation/insolvency.

### 2.3. International affiliation privilege - anti-abuse provisions

The anti-abuse provisions state a switch-over from the exemption method to the credit method in cases of dividend payments and capital gains of international participations if the following criteria are fulfilled:

- The focus of the business operations of the foreign subsidiary directly or indirectly involves generating passive income. The regulations define passive income as interest income, income from the leasing of movable assets, income from the sale of shareholdings (that would not be tax exempt under the international affiliation privilege)

AND

- The tax rate or taxable base in the country of residence of the subsidiary is not comparable to taxation in Austria (generally assumed if the average tax burden is less than 15%).

Any other income than the income of a foreign subsidiary as stated above is considered as active income even in the case that no tax at all is levied in the country of residence of the subsidiary. Regarding possible structures to avoid the consequences of this switch over clause, see below.

Austria has no controlled foreign company (CFC) rules which either allocate the income of the subsidiary to the parent company or treat passive income of a foreign subsidiary in low-tax jurisdictions as distributed to the domestic parent company (immediate deemed distribution). Austria only has regulations regarding foreign investment funds under which the income of the funds is directly allocated to the investors.

### 2.4. Exemption of dividend payments from EU/EWR subsidiary not meeting the criteria for the international affiliation privilege

If the criteria of the international affiliation privilege are not fulfilled, the dividend payments to the Austrian holding company are still tax exempt if these payments are distributed from an EU/EWR subsidiary and the following criteria are met:

- The subsidiary is a corporation set out in the EC Parent Subsidiary directive, or
- The subsidiary is a corporation of a country belonging to the European Economic Area which is comparable to an Austrian corporation and a comprehensive administrative and execution assistance exists with this country

AND

- The company is taxed in the country of residence with a tax which is comparable to the Austria income tax and
- The income of the company is taxed in the country of residence with a tax which is comparable to the Austrian income

tax and the tax rate is not more than 10% lower than the Austria income tax rate

- The subsidiary may not be subject to a comprehensive tax exemption in its country of residence.

## 3. Income from domestic (Austrian) participations

### 3.1. Dividends

Dividends paid from an Austrian subsidiary to the Austrian holding company are tax exempt.

### 3.2. Capital gains

Gains arising from the sale of domestic shares are subject to the normal corporate income tax rate of 25%.

## 4. Other income of an Austrian company (e.g. from management activities)

Other income of an Austrian company is subject to the 25% corporate income tax. As mentioned above, a key factor of the effective income tax burden is the tax base.

The tax basis can be reduced e.g. by

- Keeping the income allocated to the Austrian company to a minimum acceptable to the Austrian tax authorities (e.g. calculating the compensation for functions performed by the Austrian company on a cost plus basis (e.g. service fees for management activities)).
- Deduction of expenses that are preferable neither subject to any withholding taxes nor subject to income tax at the level of the recipient (e.g. interest payment of the Austrian holding company to an offshore company or a company in a country that offers beneficial taxation).
- Taking advantage of the Austrian group taxation schemes
- Using structures exploiting the benefits of the Austrian double taxation treaties (e.g. by establishing foreign permanent establishments)

### 4.1. Austrian transfer pricing regulations

Austria generally determines the appropriateness of transfer prices by applying the OECD guidelines. As mentioned above, it is possible to determine the appropriate price e.g. for management services by applying the cost plus method. One important benefit of Austria is that the Austrian tax authorities issue rulings on request of the taxpayer so that the taxpayer can be sure of the tax consequences of his planned activities prior to starting his activities in Austria. Anyhow, it should be mentioned that

applying for a ruling is quite time consuming, since all relevant facts must be disclosed to the tax authorities and the taxpayer (respectively his tax advisor) must describe the expected tax consequences in detail.

#### **4.2. Deduction of expenses described with regard to interest payments**

Deduction of interest payments is particularly interesting in connection with the Austrian holding company since interests that accrue in connection with the debt financing of the acquisition of the participation are considered to be tax deductible operating expenditure. This applies even if the income received from the participation is tax exempt based on the above mentioned participation exemption. That is one of the main differences to other holding locations, since most countries restrict the tax deductibility of interest payments in connection with the debt financing of the acquisition of participations. Another difference to other countries is that Austria also has no claw back regulations in case the participation is sold later on tax exempt.

Yet another difference from many other typical holding locations is the fact that Austria has no interest deduction ceiling rule which restricts the deductibility of interest expenditures or thin capitalization rules. This has to be particularly mentioned in respect to the acquisition of participations. The debt financing only has to be at arm's length to be tax deductible in Austria (with regard to the terms and the proper documentation). There are no other requirements.

In addition, generally no withholding tax accrues on interest payments by an Austrian company, even in case interest is paid to companies resident in low or no tax countries. The Austrian tax authorities only sometimes require that the Austrian company discloses who the final recipients of the payments are (they are particularly interested if persons residing in Austria are the final recipients).

One exception to the rule that no Austrian withholding tax becomes due on interest payments is the EU Savings Directive 2003/48/EG. In this context, the withholding tax is to be withheld in case of interest payments to individuals resident in EU member states, currently at a rate of 20% (no information about the payee is given to his country of residence). Alternatively, the individual can choose a disclosure of the fact that he receives interest payments in Austria to the tax authorities in his home country. In this case, Austria would not claim any withholding tax.

Moreover, also payments based on hybrid financing instruments which qualify as debt do not trigger Austrian withholding tax.

To illustrate the effect, refer to the following example:

An Austrian holding company is financed with 50% equity and 50% by the emission of profit participation rights ("obligationsähnliche Genussrechte"). These participation rights only grant a profit participation (50%) but not a participation in the undisclosed reserves that would be realized e.g. in case of a liquidation. Such participation rights are qualified as debt from an Austrian tax point of view. Therefore the profit participation payments represent operating expenditure, and the tax base in Austria is effectively halved.

The terms of such profit participation rights must be formulated carefully in order to meet the requirements from an Austrian tax point of view. Additionally, they must meet the business requirements of the group (such profit participation rights could even be drawn up in a way that the company issuing them can show them as equity in its financial statements but still be considered as debt from a tax point of view).

#### **4.3. Group taxation**

According to the group taxation scheme, several corporations belonging to such a group are regarded as one unit for tax purposes. So it is possible that profits and losses can be compensated within the group.

In order to be able to form such a group, a certain financial connection with the group member is presupposed. The necessary financial integration is fulfilled in case of participation of more than 50% (direct or indirect) of the share capital and of the voting rights. An organizational or economic integration as well as a profit/loss pooling agreement is not necessary. In this way, a "financial holding" can also be the parent company of a group.

Such a group can also consist of domestic and foreign companies.

Thus the group taxation scheme has also created the possibility to offset current losses from foreign group members with profits of the holding group member or the group parent. Basically, profits from foreign group members are not considered.

The losses of a foreign group member are determined according to Austrian tax law and added to the domestic group parent to the extent of its respective participation.

As far as the foreign group member makes a profit in subsequent years, the domestic group parent has to tax this profit to the extent of the losses deducted before.

In the result derived by the system of group taxation together with the deductibility of the interest, an Austrian holding company has the possibility to deduct paid interest for the debt financing of the acquisition of their domestic and their foreign participations from the tax results of their subsidiaries within the group taxation.

Furthermore, there is the possibility to amortize the goodwill included in the acquisition costs of a participation in a directly held domestic (Austrian) operating company over a period of 15 years. Acquisitions from group companies are hereby excluded. The amount amortized is limited to 50% of the acquisitions costs.

#### **4.4. Structures using the benefits of the Austrian double tax treaties**

If the Austrian holding company shall own participations in low taxed companies earning mainly passive income (e.g. to avoid the application of anti abuse regulations at the level of the shareholder of the Austrian holding company) the following structure would be possible:

The Austrian holding company establishes a permanent establishment. In this case the Austrian company owns and administrates participations via this permanent establishment. The activities of the permanent establishment must be business activities (exceeding mere asset management) e.g. the active management of the subsidiaries.

According to the double taxation treaty, Austria would exempt the income allocated to the permanent establishment and would only tax the appropriate profit resulting from the functions performed by and the risks allocated to the Austrian head office.

Depending on the chosen location and the organization of the business activities (function and risk allocation), very favorable effective tax rates can be achieved.

Alternately, the permanent establishment of the Austrian holding company can carry out the activities resulting in passive income itself. In order to be protected by the Austrian double taxation treaty, the activities of the permanent establishment must meet certain requirements (especially the size and scope of the activities performed by the permanent establishment must be considered as business activities and not mere asset management).

In this case the income of the permanent establishment is tax exempt in Austria according to the tax treaty. The country in which the permanent establishment is situated would have the taxation right. But usually the permanent establishment is created in a country that claims no taxes or only very low taxes.

As mentioned above, the overall effective tax burden depends on the chosen country and allocation of functions and risks (usually effective tax rates of  $\leq 5\%$  can be achieved).

From a practical point of view, such structures are usually recommendable for medium sized or larger companies (on a long term basis, the annual profit should exceed EUR 1 to 2 million). Generally the higher the profit, the higher is the benefit from such structures.

The main benefits of such a structure are

- A very attractive income tax burden
- The contract partner to all contracts is the Austrian company (and not some offshore company)
- Austrian double taxation treaties are generally applicable
- Austria has no switch-over-clause which rules that the Austrian company switches over from the exemption method to the credit method if the branch has passive income and is subject to a low taxation in the country of residence (different from other relevant holding locations).
- As mentioned above, it is possible that the Austrian tax authorities issue rulings upon the request of the taxpayer so that the taxpayer can be sure of the tax consequences of his planned activities prior to starting his activities in Austria. Anyhow it should be mentioned that applying for a ruling is quite time consuming since all relevant facts must be disclosed to the tax authorities and the taxpayer (respectively his tax advisor) must describe the expected tax consequences and the legal reasoning in detail.

## **5. Other taxes and stamp duties**

### **5.1. Wealth tax/net worth tax**

Austria imposes neither a wealth nor net worth tax.

### **5.2. Capital duty**

The contribution or the increase of capital is taxed at a rate of 1 %. Usually there are ways to avoid paying capital duty in Austria (grandparent contribution, exemptions e.g. of the Austrian reorganization tax act). The Austrian tax authorities accept the avoidance of capital duty in several cases (e.g. the Ministry of Finance issued several decrees on these issues confirming that certain usual procedures are generally acceptable).

### 5.3. Stamp duties

The following written agreements, inter alia, are subject to a stamp duty: Loan agreement lease and rental agreements, guarantee agreements, easements, mortgage deeds, compromise and settlement agreements and assignment agreements for receivables and bills of exchange.

The rates vary between 1% and 2%, or are levied as a fixed amount.

In most cases stamp duties are avoidable, but careful planning is necessary

## 6. Withholding tax on profit distribution

For outgoing dividends distributed by the Austrian holding company, no withholding tax is to be withheld if the company to which the dividends are remitted is resident in another EU country (and holds at least 10% of the Austrian holding company's shares for a minimum period of 1 year) according to the EU Parent Subsidiary Directive.

However, if withholding tax is to be withheld, then at a rate of 25%. But if the company is located in a country with which Austria has a tax treaty, the tax rate is generally reduced from the standard rate of 25 % to a rate of between 0% and 15%.

## 7. Private Foundations

The Austrian private foundation can be created in principle for each purpose. Therefore it can also be used as a holding. But it is generally not allowed to pursue a business activity. Furthermore, it may not personally be the unlimited liability partner of a partnership or assume management functions in a company.

The use of an Austrian private foundation can be often of interest to privately held companies (e.g. companies that are only owned by the members of one family). It offers possibilities for asset protection and maintaining centralized ownership of the assets donated to the private foundation as well as the regulating of inheritance issues.

### 7.1. 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%. If properties should be assigned to the private foundation, then the real estate transfer tax additionally accrues. This amounts to 3.5% of the property value.

### 7.2. Corporate Income Tax

A private foundation is in principle subject to a 12.5% corporate income tax. In case of domestic dividend income, there is a full tax exemption. Also foreign dividend income is exempt under the conditions mentioned above.

Gains arising from the sale of shares in domestic and foreign companies are tax exempt if the extent of these participations does not exceed 1% (after a period of one year). Otherwise these incomes are subject to the taxation of 12.5%. Taxation can be omitted, if a tax exempt reserve is formed. This reserve must be dissolved in the subsequent year either taxable or be used for the acquisition of a participation of more than 10%.

### 7.3. Taxation of distribution

In case of distributions to beneficiaries the private foundation has to withhold the 25% withholding tax. If the beneficiary is resident outside of Austria, in most cases (depending on the country) the applicable tax treaty reduces the withholding tax to 0%.

So in case of a foundation holding international equity participations, the Austrian foundation can be very tax efficient. The effective income tax rate is 0% for dividend income and no withholding tax for cross border distributions is to be withheld.

## 8. Pronounced legal protection

Austria has a pronounced legal protection system. The taxpayer has the possibility to object to all tax assessments within one month. Moreover, there are comprehensive correction possibilities which can be used partly by the tax authority ex officio or can be requested by the taxpayer.

Additionally it is possible to apply for a ruling issued by the competent tax authorities.

Generally speaking, the tax authorities are bound to the opinion stated in a ruling according to the principle of good faith (also ruled by the courts). The following prerequisites for the application of the principle of good faith apply:

- The legal advice was provided by the appropriate competent authority and the legal advice is not obviously wrong; (the incorrectness of the advice was not noticeable to the party)
- The party acted accordingly to the advice and suffers a tax disadvantage (only if and as long as the facts described in the inquiry on which the ruling was based) correspond with the actual facts

Any ruling develops legal certainty for the future only if and as long as the facts described in the inquiry (on which the ruling has been based) correspond with actual facts (e.g. functions performed and risks borne). Therefore it is essential that the facts are extensively and clearly described in the inquiry (in accordance with what is actually planned).

## 9. Conclusion

Austria is an interesting holding location. Particularly the comprehensive (international) participation exemption, even if there is no taxation in the country of residence of the subsidiary, as well as the unlimited deductibility of interest payments in case of debt financing are important benefits. In connection with the generally unlimited deductibility of interest payments, the fact that Austria does not generally claim any withholding taxes on interest payments even if the payments are made to an offshore company is of importance.

Additionally, the Austrian group taxation concept with the possibility of cross-border compensation of losses within the group and possible structuring possibilities (especially permanent establishment structures, as described above) and the possibility to obtain rulings should be taken into account when considering the benefits and limitation of an Austrian holding company.

## ABA-Invest in Austria: Who we are and what we do

ABA-Invest in Austria, the national investment promotion company, provides professional consulting services to firms interested in setting up business operations in Austria, focusing on all issues relevant to selecting an appropriate location.

The ABA-Invest in Austria team offers international investors tailor-made information, support and consulting services in the following areas:

- Comprehensive information about all aspects of Austria as a business location
- Identification and selection of appropriate sites, office locations and commercial properties
- All issues pertaining to company start-ups, and practical support in the initial phases
- Incentives and financing
- Labor, tax and legal issues
- Identifying potential Austrian investment partners and supplier linkages
- All business location issues after project realization

The services provided by ABA-Invest in Austria are free of charge.

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