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Due to recent events: Deductibility of donations

In light of the current developments in Ukraine, many people want to support those affected through donations. In order for these donations to be tax-deductible, a number of requirements must be met. Below, we provide an overview of the most important tax aspects of donations.

Tax deductibility of donations

Donations are generally qualified as private expenses for tax purposes and are therefore not tax-deductible. An exemption applies for donations to so-called donation-beneficiary institutions ("spendenbegünstigte Institutionen"). These institutions are either listed directly in the Austrian Income Tax Act (eg Austrian National Library, Federal Museums, Federal Monuments Office or universities) or they are included in the list of beneficiaries of donations maintained by the Federal Ministry of Finance. Most of the larger charitable organizations and aid organizations in Austria are included in this list.

If an organization is neither stated in the Austrian Income Tax Act nor included in the list, donations to such organization cannot be deducted for tax purposes.

The tax relief for donations should not be confused with the Austrian Donation Certificate ("Spendengütesiegel"). The Austrian Donation Certificate is a voluntary seal of quality for the appropriate, efficient, and transparent use of the donations, but has no influence on the tax deductibility of the donations. Many organizations are both, included in the list of organizations that are eligible for tax deductible donations as well as bearers of the Austrian Donation Certificate. For the tax deductibility of the donations, however, only the qualification as a donation-beneficiary institutions is decisive.

Donations by companies

Donations from business assets can be considered in the form of monetary donations as well as in the form of donations in kind. In case of donations in kind, the fair value (market value) of the goods is to be recognized as a business expense. The granting of the right to use certain assets for free (eg a company provides the usage of a truck to a donation-beneficiary institutions for free) also represents a tax-deductible business expense to the extent of the expenses actually incurred by the company.

The amount of tax-deductible donations is limited to 10 % of the tax profit of the corresponding fiscal year. Donations in excess of the threshold are of course possible, but are no tax deductible. For the tax deductibility of donations, a detailed documentation is recommended (confirmation of the receiving organization, proof of market value for donations in kind, etc).

In addition to donations, companies also have the option of claiming assistance in the form of monetary or material assets made in connection with acute disasters (both in Austria and abroad) as advertising expenses. Such an acute disaster can be in the form of natural disasters as well as warlike events or humanitarian disasters (such as e.g. refugee disasters). A prerequisite for the tax deductibility is the existence of an advertising effect (however, the Austrian tax authorities generally do not overstress this requirement). Such an advertising effect exists, for example, if the assistance is part of a media coverage, in the case of references on posters, in displays or on the homepage of the company or in the case of a corresponding notice in the context of self-promotion for the company. In contrast to deductible donations, such assistance is not limited in amount.

For VAT purposes, it is possible (under certain conditions) to qualify the supply of relief goods by companies in the context of national and international aid programmes in emergencies as non-taxable transactions. This could apply both to the supply of relief goods against payment as well as a supply performed free of charge.

Donations by private individuals

Donations by private individuals to donation-beneficiary institutions can be claimed as special expenses. Here, too, a limit on deductible donations of 10 % of the total amount of taxable income for the respective calendar year applies. Donations to charitable institutions or aid organizations are only tax-deductible in the form of monetary donations (but not in the form of donations in kind).

In the case of donations from private individuals, the receiving organization is generally obliged to report the donation electronically to the tax authorities so that they are automatically taken into account in the income tax return of the donor. The donors must provide the receiving organization with their first and last name as well as their date of birth so that a correct allocation of the donations is possible. If the data is not disclosed, there will be no automatic donation notification and, thus, the donation will not be considered in the tax return.

Due to the automatic donation notification, the issuance of a separate donation confirmation is no longer necessary. In practice, however, many organizations continue to (voluntarily) issue such confirmations.

Donations by non-profit associations

In the case of tax-exempt non-profit associations, the question of the tax deductibility of donations usually does not arise. In view of the non-profit status of the donating association for tax purposes, however, it must be ensured that the possibility of passing on donations is included in the respective legal basis (statutes or bylaws) of the association. In addition, the receiving organization must be a donation-beneficiary institution and there has to be an (at least partial) overlap of the respective charitable purposes of the donating association and the receiving organization. Therefore, an adjustment of the statutes or bylaws may be necessary before the donation is made.

Conclusion

Donations can be deducted for tax purposes by both companies and private individuals, however, certain conditions have to be meet. Our experts are happy to answer any questions that may arise in this context. For companies, there is also the possibility of claiming assistance in the event of a disaster as advertising expenses for tax purposes, provided that there is an advertising effect.

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COFAG-Correction Notice: In case COVID-19 subsidies were unjustly obtained

Taxpayers who have received a subsidy from the "COVID-19 Finanzierungsagentur des Bundes GmbH" (COFAG) and it turns out that there was no or only a partial entitlement as the requirements were not met in the first place, may pay back the exceeding amount and disclose this by means of the COFAG-correction notice. Around 2,000 COFAG-correction notices have already been filed with an overall volume exceeding the amount of 25 million Euros (reporting date: 25 February 2022).

In which cases should a COFAG-Correction Notice be filed?

COVID-19 subsidies are granted based on private legal agreements. The taxpayer confirms the correctness and completeness of his*her statements in course of the application. Furthermore, the taxpayer is obliged to immediately notify changes of any kind regarding the relevant requirements for the subsidy.

If a COVID-19 grant has been paid out, but the applicant was not or only partial entitled according to the relevant directive, the COFAG offers the opportunity of correcting the application and paying back the partial or full amount of the subsidy. With the COFAG-correction notice the repayment of the grant is disclosed accordingly.

What are the requirements for filing a correction notice?

- The subsidy product which was applied for (this includes Lockdown Turnover Compensation, Lockdown Turnover Compensation II, Turnover Loss Bonus, Loss Compensation, Fixed-Cost Subsidy I as well as Fixed-Cost Subsidy 800.000) has already been fully paid out by COFAG.
- Missing or discontinuation of the application eligibility (leading to a repayment of 100 %) or partial changes of the eligibility by which a correction of the amount of the subsidy is necessary (leading to a partial repayment).
- The correction amount must be paid back before the correction notice is filed:
- Sender: Applicant or tax consultant/ auditor/accountant
- Recipient: COVID-19 Finanzierungsagentur des Bundes GmbH (COFAG)
- Recipient account: The correction amount must be transferred back to the exact same account of which the subsidy has been received from.
- Purpose of payment: In order to guarantee a clear and fast assignment, the sender must state the purpose of payment which was indicated when the COFAG initially granted the subsidy. Should this be unfeasible, the corresponding subsidy product and the respective tax number have to be stated under purpose of payment (eg: "Fixed_ Cost_Subsidy_800_tax number").

How does the process of filing a correction notice look like?

After paying back the correction amount the correction notice can be filed with the COFAG. In contrast to the application the correction notice cannot be reported via FinanzOnline. The correction notice needs to be filed using the following **link**:

- **Step 1:** For registration the applicant needs to sign in either by means of mobile phone signature ("Handysignatur") or via the Austrian citizen card ("Bürgerkarte"). Alternatively, the applicant may also proceed without registering, in which case the upload of a copy of an official identification document is required.
- **Step 2:** Entering of master data as well as information concerning the repayment.
- **Step 3:** Uploading documents such as the proof of payment (obligatory) and the explanations on the correction amount (optional).
- **Step 4:** Summary of the entered data as well as the possibility to correct them.
- **Step 5:** Completion and transmission

It should be noted that for each subsidy product a separate COFAG-correction notice needs to be filed. In case of the Turnover Loss Bonus a separate correction notice has to be submitted for each month concerned. The correction notice is subsequently assigned to the repayment. As soon as this process is completed, the applicant will receive a confirmation by e-mail stating that the repayment was received. According to COFAG, this process can take some time.

What are the benefits of the correction notice?

In the worst-case scenario, unjustly paid out subsidies may lead to criminal consequences. The COFAG emphasizes that an exemption from punishment ("Tätige Reue")is only applicable if the actual, complete damage is compensated and genuine efforts to make up for any damage were made. Thus, paying back an insufficient amount does not preclude criminal liability.

Conclusion

In order to prevent criminal consequences, the COFAG offers the opportunity to repay unjustly received COVID subsidies and to disclose them by means of a correction notice. It should be noted that a correction notice can only be filed after effectuating the repayment.

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Legal issues regarding vouchers

Vouchers are very important for both retail and service companies. However, contractual framework conditions for issuing vouchers are rare. Furthermore, there is **no explicit legal regulation for vouchers in Austria.** Unless there are specific provisions in particular cases – for instance in form of General Terms and Conditions (GTC) - the contractual basis for vouchers must be derived from the general provisions of Austrian civil law.

First of all, it is important to know that **a voucher is not a payment instrument or a form of exchange**. In fact, according to the prevailing view, **by purchasing the voucher, the actual contract is already concluded**. Therefore, the buyer of the voucher - or the recipient of the voucher - has the right to choose: If no restriction to a specific product or service was already defined at the time of purchase, the holder of the voucher can choose from the issuer's entire product range. In individual cases, however, other possible contract types, such as option contracts, may also be considered for voucher contracts.

Possible controversies in practice

There are various legal aspects relating to the classification of vouchers that always depend on the circumstances of the individual case. For instance, it is important to distinguish whether vouchers are issued and redeemed by a single legal entity or whether they can be redeemed at several (affiliated) companies or even via third-party providers. Some of these relevant issues are presented here by way of example:

- **Limitation period:** Unless otherwise agreed, vouchers expire within the **general limitation period of 30 years.** Although it is **permissible to shorten the limitation period** in individual cases, such a shortening is not permissible without restrictions, since the contract partner will often be a consumer. For example, the Austrian Supreme Court ruled that a limitation period of only one or two years for tourist service vouchers was grossly disadvantageous and thus inadmissible.
- **Company closing:** If a company stops its business, **vouchers do not lose their "validity"** or become worthless, contrary to the view sometimes expressed by companies. From a legal point of view, this is rather a case of so-called subsequent impossibility (“nachträgliche Unmöglichkeit”), which means that the holder of the voucher can reclaim the amount paid by the purchaser for the voucher.
- **Insolvency of the issuer:** As a result of the opening of insolvency proceedings against the assets of the issuer of the voucher, the "claim" documented in the voucher is converted into a monetary claim. In this case, the holder of the voucher has an insolvency claim which can be claimed in the insolvency proceedings and for which he*she will receive satisfaction on a pro-rata basis. However, due to the costs of filing insolvency claims (EUR 25), such a filing will rarely make economic sense, which means that in many cases vouchers are in fact worthless as a result of the opening of insolvency proceedings.
- **Vouchers within a group of companies:** If vouchers are issued by a company within a group and is it also possible to redeem these vouchers at other companies affiliated with the group, this can lead to problems with regard to the **prohibition of the repayment of capital contributions** (Verbot der Einlagenrückgewähr) applicable to companies domiciled in Austria. This is always the case if the holding company issues the vouchers and receives the money, and the holder of the voucher then redeems the voucher at a subsidiary. In these constellations, therefore, an intra-group settlement must always be ensured.

Conclusion

Although vouchers often only relate to small amounts, the resulting legal problems are manifold and should not be underestimated. Especially in the case of basic legal issues that affect a large number of vouchers or have an impact on other areas of law such as corporate law, a more detailed analysis of the legal grounds, eg in the form of "General Voucher Terms and Conditions", should be implemented in any case.

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News on capital maintenance: liability of a third party

A third party becomes liable if she*he accepts payments from a company in violation of capital maintenance rules and thereby at least accepts that this company will suffer a definitive financial loss (OGH 6 Ob 61/21w).

Facts of the case

A GmbH granted a loan to the limited partner of a GmbH & Co KG. However, the GmbH (instead of the limited partner) subsequently repaid the loan to the GmbH. The limited partner was over-indebted in accounting terms both when the loan was granted as well as when the loan was repaid. Furthermore, the GmbH immediately forwarded the amount. The GmbH & Co KG, which has repaid the loan on behalf of its limited partner, could therefore neither obtain reimbursement from the limited partner nor from the GmbH.

The persons acting were aware of both the limited partner's over-indebtedness in accounting terms and the origin of funds. Therefore, the GmbH & Co KG claimed damages from (i) the limited partner's managing director, (ii) the GmbH granting the loan, and (iii) the managing director of the latter.

Capital maintenance rules also apply to GmbH & Co KG

Capital maintenance rules generally prohibit any value transfer to shareholders other than by way of dividends unless concluded at arm's length terms. Capital maintenance rules apply to GmbH & Co KG by analogy if no natural person is a partner with unlimited liability. Consequently, the capital maintenance rules are violated if the GmbH & Co KG bears the debt of its limited partner, as in this case.

Third parties are in principle not addressees of capital maintenance rules

Addressees of capital maintenance rules are generally the company (here: the GmbH & Co KG) and its shareholders (here: the general partner and the limited partner). The management board of a contracting third party (here: the GmbH granting the loan) is therefore not directly addressee of capital maintenance rules. However, in certain cases (collusion and gross negligence) third parties may also be addressees of capital maintenance rules. In such cases, an obligation to repay exists only against the respective recipient of the payment (here: the GmbH granting the loan), but not against its governing body. The liability of the managing director of the GmbH granting the loan can thus only be derived from general tort law due to causing immoral damage.

Personal liability of managing directors for causing immoral damage

The managing director of the GmbH granting the loan accepted repayment of the loan by the GmbH & Co KG (instead of the limited partner who has received the loan). The GmbH & Co KG suffered a loss as it could neither obtain reimbursement from the limited partner (over-indebted in accounting terms) nor from the GmbH granting the loan (it immediately forwarded the repaid amount). Since the managing director of the GmbH granting the loan was aware of both the limited partner's over-indebtedness in accounting terms and the origin of funds, the Supreme Court ruled that the managing director of the GmbH granting the loan was personally liable due to causing immoral damage.

Conclusion

The Supreme Court confirmed that capital maintenance rules apply by analogy to GmbH & Co KG if no natural person is a partner with unlimited liability. New is that a third party becomes liable if she accepts payment from a company in violation of capital maintenance rules and thereby assenting accepts that the respective company suffers a definitive financial loss as a result.

To avoid personal liability, one should also comply with capital maintenance rules when receiving payments – especially, if the source of funds and the financial situation are known.

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Tax Appeals Court ruled on WHT refunds of cum/ex transactions

In its decision of 20 July 2021, RV/7102008/2017, the Tax Appeals Court dealt with the question of WHT refunds in the case of cum/ex transactions for a foreign company. The relevant WHT refund related to dividends from shares of listed domestic companies, which were purchased over the counter (in short: OTC). The focus was on those shares that are traded around the dividend record date. The question arose as to who - seller or buyer - was entitled to a refund of the WHT.

Facts of the case

The complainant is a United Arab Emirates-based corporation that was involved in the following share transactions: Shortly before the dividend record date, the complainant purchased shares with dividend entitlement over the counter (OTC). Due to OeKB's (Österreichische Kontrollbank) settlement practices for full settlement (t+3), the shares were deposited and booked in the buyer's securities account three days later. Therefore, the deposit took place after the dividend record date (ex-dividend). The complainant received a settlement compensation amounting to the net dividend and applied for the WHT refund based on the applicable double taxation agreement.

Decision of the Tax Appeals Court

The Tax Appeals Court decided that a WHT refund is only possible if the dividend is attributable to the refund claimant for income tax purposes. In the Tax Appeals Court view, the deposit entry is decisive for the entitlement to a WHT refund. The time of the acquisition under civil law is not relevant. At the time the securities were deposited, they were already without dividend entitlement and the acquirer was only entitled to a compensation payment.

However, in this case the WHT was not refundable, as beneficial ownership had not yet been transferred to the acquirer. Only when the securities are deposited in the securities account of the acquirer, the acquirer has full authority to dispose the securities. Therefore, a securities transaction concluded cum dividend and delivered ex dividend does not give rise to a claim for a refund of the WHT levied on the original dividend. In its decision, the Tax Appeals Court follows the information of the Ministry of Finance published on 18 September 2014 on the refund of WHT on dividends regarding a taxpayer subject to limited tax liability. As there was no High Administrative Court decision on the legal question of beneficial ownership in cum/ex transactions, the Tax Appeals Court admitted an ordinary appeal.

Approach in practice

Securities transactions of taxpayers subject to limited tax liability around the dividend record date must be examined in detail according to the information of the Ministry of Finance and the respective Tax Appeals Court ruling. For those securities that have already been purchased on the dividend record date but have not yet been booked to the securities account of the taxpayer subject to limited tax liability, it is (still) not possible to request a WHT refund according to the current administrative practice.

The tax authorities continue the review of WHT refund requests by reconciling the WHT refund requests with the securities account statements. If the security in question is booked on the securities account of the refund claimant on the dividend record date, the WHT will be refunded.

Conclusion

In cum/ex transactions, shares are acquired shortly before the dividend record date with a dividend entitlement (cum dividend). In fact, they are delivered to the securities account of the buyer only after the dividend record date without dividend (ex-dividend). Instead of the actual dividend, a compensation payment is made to the buyer, which however, is not originally subject to WHT.

According to the decision of the Tax Appeals Court, the transition of beneficial ownership in OTC transactions occurs only upon delivery of the security to the buyer's securities account. Due to the absence of income tax attributability of the security at the time of the dividend payment, a WHT refund is not possible. The current administrative practice was confirmed by the Tax Appeals Court. However, a final clarification of the underlying legal issue of beneficial ownership in cum/ex transactions remains to be seen, as an ordinary appeal has been admitted. Now, it is the turn of the Administrative High Court and it remains to be seen how the Administrative High Court will decide, as beneficial ownership of the asset (security) is not mandatory for the attribution of income.

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No VAT-opting-in for assumed lease agreements

In the decision of 20 October 2021, Ra 2019/13/0084, the Administrative High Court dealt with the question under which conditions the transitional provision concerning the possibility of an option for VAT liability of tenancies is to be applied in the case of a transfer of a building for consideration by way of singular legal succession. Since the amendment of Sec 6 para 2 UStG with the 1. StabG 2012, opting-in for VAT liability for tenancies that started after 1 September 2012 is only possible if the tenant uses the building almost exclusively (more than 95 %) for transactions that do not exclude the deduction of input tax.

Facts of the case

In 2014, a limited liability company purchased a property on which an office building is located. At the time of the purchase, a small part of the total area of the building was leased to companies with the option to treat the rental relationship with VAT following the previous regulations , as the rental agreements had been concluded and actually started before 31 August 2012.

The taxpayer claimed the entire sales tax associated with the purchase and renting out as input tax. The input tax on the areas rented to the entrepreneur, for which the seller had opted to pay VAT following the previous regulations, was not taken into account by the tax authority. The tax authority stated that the purchase of the property had resulted in a change of landlord, which is why the option to treat the rental as subject to VAT could no longer be exercised.

The Tax Appeals Court upheld the appeal and took the input taxes claimed by the taxpayer into account in full. The court stated that, according to the wording of the transitional provision, it is decisive when the rental relationship actually started. With the purchase of the real estate, the GmbH had entered into the lease agreements – which already existed at the time of the real estate purchase in 2014 – in a mandatory manner under civil law. Due to the legal formal connection of the transitional provision, there is therefore no "new" rental relationship for VAT purposes and the option for the VAT treatment of the tenancies can continue to be exercised in full.

Decision of the Administrative High Court

The Administrative Court first stated that the restriction of the option for VAT liability is intended to prevent an entrepreneur who is in principle not entitled to deduct input tax from obtaining the full input tax deduction from the construction of a business building by means of an "advance arrangement with a construction company". In order to avoid cases of hardship, the legislator has provided a transitional provision that the new regulation shall not apply to rental and lease relationships which already started as of 31 August 2012. According to the wording of the transitional provision, the starting of the rental or lease relationship shall be decisive. This is intended to prevent the new legal situation with a restricted VAT option from being applied to existing rental and lease relationships without any further action on the part of the parties concerned. In the opinion of the Administrative High Court, only in such cases can a case of hardship be said to exist.

In view of the clear objective of avoiding tax structuring and the restrictively interpreted exception (hardship cases), the Administrative High Court stated that the previous regulations should thus only be applied in exceptional cases.

For this case, this means that even if the purchaser enters into the existing contract under civil law in the event of the purchase of a leased property, this does not in principle prevent the application of the new regulations and thus the limited option. Such an understanding, which would amount to a formal link to civil law, would run counter to the clear objective of the legislator to avoid tax arrangements. There is also no case of hardship, since the purchaser has already made his dispositions in knowledge of the new legal situation.

In summary, the Administrative High Court ruled that due to the change in the person of the landlord – through the sale of the leased property – a new tenancy relationship between the old tenant and the new landlord started for VAT purposes, which means that the option to treat the rental relationship with VAT no longer applies.

Conclusion

According to the Administrative High Court, in the event of a singular legal succession to a tenancy, there is a new tenancy, whereby a waiver of the tax exemption for this new tenancy is only possible under the limited conditions of the 1. StabG 2012 (tenants who use the building almost exclusively, that means more than 95%, for transactions that do not exclude the deduction of input tax).

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When are electronic deliveries mandatory?

Electronic correspondence with Austrian authorities and (tax) offices is probably one of the most important steps in digitization in the public sector. The digital transmission of official documents is referred to as electronic delivery ("e-delivery") and has been governed in the E-Government-Act ("E-Government-Gesetz") since the beginning of 2020.

E-deliveries

Electronic communication with public authorities is carried out through the following platforms that are either or accessible for individuals and entrepreneurs:

- oesterreich.gv.at or the app "Digitales Amt" (for private individuals and entrepreneurs)
- finanzonline.bmf.gv.at (for private individuals and entrepreneurs)
  usp.gv.at (only for entrepreneurs)

However, shifting the communication with authorities to the internet raises many questions, such as the legal consequences associated with e-delivery.

In principle, notifications are sent by e-mail as soon as a new document is available in the inbox of the participant. It should be noted that a notification by e-mail is merely of a service character. Aa notification is deemed to have been received in FinanzOnline as soon as it can be accessed, even if the participant has not become aware of the notification itself. If the e-delivery of the document remains unnoticed, deadlines (eg deadlines for appeals) may elapse.

In the following we give you an overview of different groups of taxpayers and their possibilities for deregistering from e-delivery in order to avoid the risks described above.

Employee with income subject to wage tax

For individuals who only earn income subject to wage tax, e-delivery is voluntary. The same applies to individuals who gain income from capital assets (eg dividends). If you do not want to use e-delivery, you should make sure to unsubscribe from the mentioned platforms or to object to e-delivery if it was automatically activated. After deregistration, the notifications will be delivered by postal mail.

E-delivery is automatically activated in FinanzOnline. If you would like to use e-delivery, you should provide a regularly used e-mail address in FinanzOnline in order to receive notifications of incoming documents. In addition, it is advisable to check your inbox regularly (eg monthly) for possibly delivered documents. An already active power of attorney for deliveries from the tax authority to the tax consultant is thereby not affected.

Entrepreneur with business income

The E-Government-Act states that participation in e-delivery is mandatory for all entrepreneurs. For the definition of who is an entrepreneur under the E-Government-Act, the legislator refers to the Federal Statistics Act ("Bundesstatistikgesetz"). For entrepreneurs, ie people who generate business income, there has been an obligation to participate in e-delivery via the "Unternehmensserviceportal" (USP) and FinanzOnline since 1 January 2020. Excluded from the obligation are companies that had a turnover of less than EUR 35,000 in the previous calendar year, which means that there is no obligation to submit monthly VAT returns ("Kleinunternehmer*in"). In addition, the law provides other exceptions, which are in practice however of marginal relevance: Entrepreneurs who do not have an internet connection or the necessary technical requirements are exempt from the obligation. If none of these exceptions apply, an objection to e-delivery is no longer possible.

Individuals with income from rental activities and leasing

It should be noted that individuals who earn income from rental activities and leasing are also considered entrepreneurs according to the Federal Statistics Act. With regard to e-delivery, they are therefore obliged to register in the USP and at FinanzOnline. However, the exceptions described above also apply here ("Kleinunternehmer*in" or lack of technical requirements).

Conclusion

Many users are not aware of the consequences of a negligent handling of e-deliveries and digital government correspondence. An out of office / absence notice can be submitted by entrepreneurs in USP or by individuals on oesterreich.gv.at or in the app "Digitales Amt" for a limited time. During the time of absence, deliveries are made by postal mail. To be on the safe side, a power of attorney for party representatives is recommended so that legal deadlines will not be overseen. Our Deloitte experts are happy to advise you on any questions you may have in that regard.

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Party rights and record access regarding COVID-grant audits

The COVID-19 Subsidy Audit Act (hereinafter referred to as "CFPG") provides for an ex-post audit of subsidies granted due to the COVID-19 pandemic (eg fixed cost subsidies, sales substitution, loss compensation or short-time work subsidy). In the meantime, more and more of these ex-post audits are being carried out by the tax authorities through audits, inspections or accompanying controls. In these cases, the tax offices "merely" act as experts for the subsidy agencies and not in their function as tax authorities. However, in principle the same rules apply to grant-audits as to "classic" audit measures.

Partial application of the Austrian Fiscal Code

The provisions applicable to "classic" audits are also to be applied mutatis mutandis to grant-audits. Section 2 CFPG refers to specific provisions of the Austrian Fiscal Code (hereinafter referred to as "BAO"), which are to be applied within the framework of tax authority audit measures.

This means that an audit assignment must be issued for the subject of the audit (subsidy measure). In addition – as in all tax audits – the right of the parties to be heard during the subsidy audit must be ensured and a final discussion must be held on the results of the audit after it has been completed. The taxpayer, who has been granted the subsidy, must be summoned to this final discussion. Due to the partial application of the BAO, the expert opinion prepared by the tax authority must then be presented to the subsidy-applicant during the final meeting in order to ensure that the party is heard. The applicant must be given the opportunity to inspect and comment on it. A report must be prepared summarizing the final meeting.

In principle, an audit report is only to be issued if incorrect information (doubts as to its correctness) or other circumstances have been discovered which could cause the subsidy agency to reclaim the funding under civil law or file criminal charges. However, since a final meeting must be held anyway, the grant-applicant is entitled to have the fact that no findings were made in the course of the grant-audit recorded in the report of the final meeting, which in turn increases the legal certainty of the taxpayer to whom the subsidy was granted. In any case, the grant-applicant has a right to know whether any findings have been made. The subsidies claimed must therefore be discussed in the final meeting and any findings or non-findings must be recorded.

Conclusion

The CFPG is intended to provide for a retrospective review by the tax authorities for granted COVID-19 subsidies by means of an audit, inspection or accompanying control. Since these audits have been carried out, experience has shown that the reports prepared are often not submitted to the taxpayer for inspection. However, it is crucial that the grant-applicant has the right to inspect the expert opinion within the scope of the grant audit and he*she also has the right to be heard in this context. Our Deloitte experts will be happy to advise you on any questions you may have.

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Insignificance as a factor for the resumption of proceedings

The resumption of proceedings is an effective remedy in fiscal administrative practice in order to intervene in proceedings that have already been legally concluded. Even if there are legitimate reasons for a resumption, the resumption is by no means mandatory. Rather, it is for the authority to decide on this in the exercise of its discretion. The tax amounts (absolute and relative significance) as well as the proportionality of the tax effects are aspects that affect the exercise of discretion and can lead to the avoidance of a resumption.

The resumption as a measure that breaks the legal force

Tax audits often take place long after tax assessments entered into force. Likewise, it often happens that taxpayers subsequently want to claim business expenses, but the tax procedure has already been legally concluded. In both cases, if certain conditions are met, the resumption of the proceedings may break the legal force of a decision. Whether the resumption is actually ordered in the event of a justified reason for resumption (eg newly emerged facts) is at the discretion of the tax authority. Discretionary decisions must always be justified by considering all discretionary circumstances. The absolute and relative significance of the tax amounts and the proportionality of the tax effects may lead to the avoidance of resumption. In such cases, the administrative burden is not economically proportionate to the tax implications, so consequently no resumption is to be ordered.

Absolute and relative insignificance

Absolute insignificance is based on the absolute amount of the additional tax amount resulting from the resumption. The relative insignificance must be assessed based on the tax effects of the specific reasons for resumption in relation to the previous tax amount or the previous tax assessment. If the amendments to the decision that is to be resumed are both absolutely and relatively insignificant, the exercise of discretion in favor of legal validity (ie no resumption) must be exercised. It is however questionable up to what amounts this significance can be assumed. In the judiciary this limit is set relatively low. The following examples from jurisprudence practice are intended to illustrate this:

- The subsequent refusal of VAT in the amount of EUR 746 does not constitute a mere minor change (Administrative High Court 30.6.2021, Ra 2019/15/0125).
- Operating expenses of EUR 120 are marginal in absolute terms and also relatively insignificant in relation to an income of 0.4 % (Tax Appeals Court 10.4.2018, RV/5100361/2018).
- A corporation tax of EUR 1,260 resulting from the resumption cannot be described as absolutely or relatively insignificant (Administrative High Court 24.4.2014, 2010/15/0159).
- A VAT claim of around EUR 145 does not represent a mere minor change in the case of a declared VAT of around EUR 600 (Administrative High Court 28.11.2002, 98/13/0143).

This leads to the conclusion that changes in the upper three-digit range or in the lower four-digit range can be regarded as absolutely insignificant and changes of up to one percent as relatively insignificant. In addition, these tax effects must also be insignificant in their entirety. This circumstance is particularly important in the case of resumptions concerning several proceedings (eg VAT for 2015 to 2017). To determine the significance in these cases, the tax effects of several years must be added up. Accordingly, the tax effects must also exceed the de minimis threshold over the entire period in order to be accessible to resumption. However, this overall tax consideration only applies on the premise that netting is only permissible within the same type of tax (no netting of income tax and VAT) and that there are similar reasons for resumption in every year.

Insignificance and proportionality

If the absolute or relative insignificance thresholds are exceeded, the effects of the resumption must also be reviewed with regards to its overall tax impact. In doing so, the tax authority must weigh up whether

the formal reason for the new decision (reason for resumption) is proportionate to the result of the new substantive decision. The more the established reasons for resumption differ in their tax effects from those which arise overall as a result of the resumption of proceedings, the more weight must be attached to the legal interests of the taxable person in the continued existence of the previously issued final decision.

The tax authority has to deal with this circumstance in the context of the exercise of discretion, taking into account the previous overall behavior of the person liable to pay the tax. Any intention of the taxable person to commit tax fraud or evasion has to be taken into account.

Conclusion

The thresholds of the significance of a tax impact are usually easily exceeded, especially since in the jurisdiction absolute changes in the higher three-digit or lower four-digit range or relative changes of more than one percent are no longer considered insignificant. Where the resumption of proceedings concerns several years of assessment, it must be assessed as a whole whether or not there are only insignificant changes, whereby the effects must be added up within the same type of tax.

If one of these limits is exceeded, the proportionality of the effects must also be considered. For this purpose, the tax effects that result directly from the concrete reasons for resumption are set in relation to those that arise additionally. The authority must always take these aspects into account in its discretionary decision.

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Tax Deadlines in April 2022

On 14 April 2022 the following declarations/payments are due:

- **Intrastat declaration** for March 2022.

On 15 April 2022 the following declarations/payments are due:

- **Advance VAT declaration** for February 2022.
- **Standardized Consumption Tax** for February 2022.
- **Capital Gains Tax for capital gains on debt securities** for February 2022.
- **Tax on energy, coal and natural gas** for February 2022.
- **Advertising Tax** for February 2022.
- **Digital Tax** for February 2022.
- **Wage Tax** for March 2022.
- **Employer-Contribution to the family allowance compensation fund** for March 2022.
- **Surcharge to the Employer-Contribution** for March 2022.
- **Municipal Tax** for March 2022.
- **Withholding Tax defined according to Sec 99 ICTA** for March 2022.
- **„U-Bahn Steuer" for Vienna** for March 2022.
- **Social insurance payments for employees** for March 2022.

On 2 May 2022 the following declarations/payments are due:

- **Recapitulative statement** („Zusammenfassende Meldung") for March 2022.
- **Stability Levy (**"Bankenabgabe") for the second quarter of 2022.
- Submission of the 2021 annual returns **in paper form** (as far as permissible) for: **Income tax, corporate income tax, value added tax** as well as **for the determination of income** according to § 188 BAO.
- End of the **tolerance period for the submission of the 2020 tax declarations by the tax representatives: extension until 30.6.2022** due to the **COVID-19 pandemic**

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