

# INVEST IN AUSTRIA: TAX ASPECTS

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## Overview

Many attempts have been made in Austria in recent years to make the tax and subsidy framework more attractive and simplify complicated procedural provisions. One of the main priorities has been research promotion, which is currently offered in the form of a fourteen percent tax credit for research activities and makes Austria an attractive location for innovative companies. In addition, within the framework of the 2015 tax reform, the relocation incentive for foreign academics and researchers was broadened.

For newly-established business undertakings, there are also numerous subsidies in terms of public charges, labour taxes and social security contributions. Furthermore, for small private limited companies (GmbHs), during the first ten years after formation a further incentive is provided through the reduction of the required minimum share capital to EUR 10,000, of which only EUR 5,000 must be paid up in cash. Moreover, with effect from 1 January 2018 the formation of a private limited company with just one shareholder acting simultaneously as sole managing director has been simplified, as the involvement of a notary is now no longer required, and the formation process takes place electronically.

This brochure is intended to provide a broad outline of the Austrian tax system, summarize changes to the law and provide information on possible tax benefits that foreign investors should take into account when deciding where to locate their business. Due to the complexity of the tax law, however, this brochure can only cover the main points. No claim of comprehensiveness is made for the information.

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# I. Corporations

## 1. Formation of a company

Austrian company law makes a fundamental distinction between sole proprietorships, partnerships and corporations. Corporations include the AG (*Aktiengesellschaft* – public limited company), SE (*Societas Europea*) and GmbH (*Gesellschaft mit beschränkter Haftung* – limited liability company).

Under company law, corporations come into being when they are entered in the commercial register. Since the Financial Reporting Amendment Act 2014 (*Rechnungslegungsänderungsgesetz*), corporations have been categorized according to their size, as micro enterprises, small, medium-sized and large corporations (based on the three criteria of total assets, revenues and number of employees). Assignment to these categories has a number of consequences under commercial law, such as the provisions governing the disclosure of annual financial statements and the requirement to compile notes to the accounts.

### 1.1. Formation of a GmbH

As a rule, the statutory minimum share capital is EUR 35,000, of which half must be contributed in cash. The second half can be contributed in kind. For the initial phase of business activity founding privileges exist (maximum of ten years), which allow GmbHs to be formed with share capital of only EUR 10,000, of which only EUR 5,000 has to be contributed in cash. This also limits the economic risk for the shareholders to EUR 10,000 for the first ten years. This also applies in the case of insolvency. The founding privilege ends *ex lege* after ten years, or earlier in the case of an amendment to the articles of association to this effect. Until then the statutory minimum contribution of EUR 17,500 must be provided.

The founding privilege is intended to enable even persons possessing comparably low amounts of start-up capital to found a GmbH, and thus also benefit from the advantages of this form of corporation (for instance: limited liability) – advantages not held by partnerships and sole proprietorships.

*Overview of the steps for formation of a GmbH:*

1. **Articles of association:** To be able to form a GmbH, the articles of association must be prepared **in the form of a notarial instrument**. The notarized articles of association must contain at least the following: company name, registered office, purpose of the company, amount of share capital and the amount of share capital assumed by each shareholder. To take advantage of the founding privilege, provisions to

this effect must be included in the original articles of association, i.e. in the articles of association that are filed for the first time in the commercial register. In addition, when the founding privilege is used, the amount of the equity contribution and the amount that must be paid in must be specified for each shareholder.

2. **Appointment of management:** At least one managing director (and supervisory board members, if required) must be appointed by means of a shareholder resolution if this has not already been done in the articles of association.
3. **Payment of equity:** The shareholders must pay in their statutory or agreed capital contributions, and bank confirmation of these payments must be obtained.
4. **Application for entry in the commercial register:** The application for entry in the commercial register must be certified and must include the following attachments:
  - » Articles of association in the form of a notarial instrument
  - » Certified shareholder resolution for the appointment of the managing director (if the managing director is not already appointed in the articles of association)
  - » List of shareholders, stating their names, dates of birth and normal place of residence, signed by the managing directors
  - » List of managing directors, stating their names, dates of birth and normal place of residence
  - » Bank confirmation
  - » Certified specimen signatures of managing directors
5. **Business registration:** The following attachments are required for business registration:
  - » Extract from the commercial register
  - » Certificate of good conduct from the land of origin for the managing director(s) under trade law and for all shareholders with significant influence over the management who are not resident in Austria or have been resident in Austria for less than five years
  - » Declaration that there are no reasons disallowing the operation of a business for all individuals with significant influence (managing directors or shareholders with management authority or similar).

The following are also required for *managing directors under trade law*:

- » Passport
  - » Social security confirmation of registration as an employee, unless the individual is simultaneously a managing director under commercial law
  - » Proof of qualifications (e.g. master craftsman examination certificate)
  - » Declaration by the managing director under trade law of his activity within the company (form)
6. **Regional health insurance fund:** Employees must be registered with the appropriate regional health insurance fund promptly before the start of employment. If a managing director under trade law is employed, this must be notified to the regional health insurance fund before the business is registered.
7. **Commercial social insurance:** Registration of managing shareholders with the Austrian Social Insurance Authority for Business (SVA) during the first month if they are not already insured in this function under the Austrian General Social Security Act (Allgemeines Sozialversicherungsgesetz – ASVG)
8. **Tax authorities:** Notification of commercial operations to the tax authorities during the first month and application for a tax identification number
9. **Municipality:** Notify municipality or city of the employment of employees for municipal tax purposes

With effect from 1 January 2018, formation of a private limited company (GmbH) with just one shareholder acting simultaneously as sole managing director has been simplified. With this simplified formation process, a standardised set-up declaration may be used, and the GmbH may be registered using a citizen card or mobile phone signature without making use of a notary (no need for a notarial deed or notarisation of registration in the Commercial Register). The process requires physical identification by a bank when making the initial capital contribution in cash. This new legislation has initially been introduced for a limited time period of three years.

## 1.2. Founding of a public limited company (AG)

The primary difference between the AG and GmbH is that the AG is subject to a greater degree of statutory supervision. For example, a supervisory board must be appointed for an AG and the annual financial statements and management report must be audited by an independent auditor. In addition, the members

of the management board and supervisory board must review and report on the circumstances leading to the formation of the company. In certain cases, formation must also be examined by a court-appointed formation auditor.

An AG must have at least EUR 70,000 in share capital, which can be raised using par value or no-par value shares. Par value shares must have a par value of at least one euro. No-par value shares do not have a nominal value, with each share participating in the share capital of the company to the same extent. One important advantage of the AG versus the GmbH is that a notarial instrument is required for transferring shares in a GmbH, but not for AG shares.

In order to found an AG, the *articles of association* must be prepared *in the form of a notarial instrument* containing at least the following: company name, registered office, purpose of the company, amount of share capital, in the case of listed companies an indication of whether bearer or registered shares were issued, an indication of whether the share capital is divided into par value shares or no-par value shares (nominal value of the individual shares, number of no-par value shares, class of shares), the composition of the management board, and the form in which company publications are made. The appointment of the first supervisory board is undertaken by the founders and must be notarized. The supervisory board then appoints the management board.

## 1.3. The European Company

The SE (Societas Europea) is a special form of joint stock corporation. Creating an SE does not necessarily require the formation of a new company. Mergers of public limited companies and changes in legal form are also possible. Either the two-tier system (as in Austria, with a supervisory body and a management body) or the single-tier system (as in Anglo-American countries, with one administrative body that combines both functions) can be used when forming an SE. The statutory share capital for this form of company is EUR 120,000. This legal form has many advantages, in particular great flexibility in terms of location. It is relatively easy to move the registered office of the company to another country in the EU, and uniform procedures are available for mergers, the formation of holding companies and restructuring. These uniform procedures result in lower administrative and legal costs and a uniform legal structure, management and reporting system.

## 1.4. Subsidies

The *Austrian Business Start-Up Promotion Act (Neugründungsförderungsgesetz)* facilitates several aspects of business start-ups and transfers of small and medium-size companies. For exam-

ple, a variety of stamp duties and court fees for registration in the commercial register and land register can be waived under certain conditions. If real estate is contributed to a company in return for shares in the company, no real estate transfer tax is levied. The act also provides tax concessions for non-cash labour costs.

### 1.5. Shareholder capital contributions and loans

Shareholder *capital contributions* to a company are not included when determining corporate income. They are tax-neutral. This is due to the principle of separation of company and shareholder taxation (*Trennungsprinzip*). Capital contributions belong to the untaxed shareholder sphere and not the income of the corporation itself.

In the case of *shareholder loans*, a distinction must be made as to whether these are granted on arms-length terms or not. Arms-length loans are recognized as performance relationships, and the interest paid by the company is deductible as operating expenses and represents shareholder income. If loans are not provided on arms-length terms, or there is no intention to repay the loan, the interest is not deductible as operating expenses and for tax purposes represents a hidden dividend distribution.

### 1.6. Capital transaction tax

As a result of the 2014 Tax Amendment Act (*Abgabenänderungsgesetz 2014*), tax on capital contributions (*Gesellschaftssteuer*) was abolished in full with effect from 1 January 2016.

### 1.7. Other start-up costs

Depending on the scale of the company and the articles of association, notary fees may be incurred. In addition, a filing fee is required for entry in the commercial register. The founding of a new company is proclaimed solely in the Austrian government's edict file (*Ediktsdatei*), which does not involve any costs.

## 2. Taxation of corporations

Corporations, in particular AGs and GmbHs, are subject to corporation tax. Corporations that have their management or registered office in Austria have unrestricted tax liability in respect of their income (domestic and foreign).

As a rule, the income is taxable both at the company and shareholder (for distributions) levels.

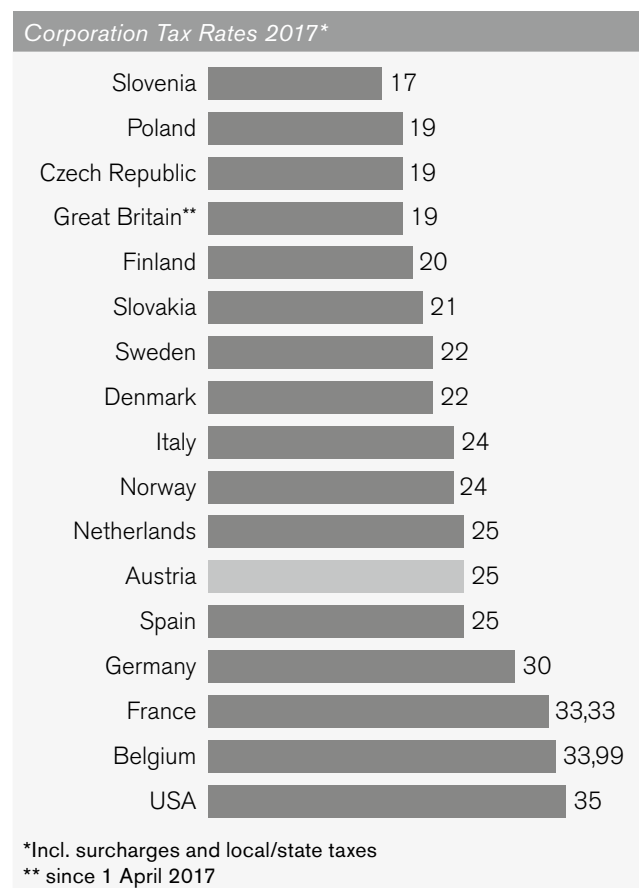
The corporation tax rate is 25 percent and is levied at the company level. A minimum corporation tax equal to five percent of one quarter of the statutory minimum amount of share capital

must be paid quarterly (EUR 437.50 for GmbHs, EUR 875 for AGs, and EUR 1,500 for SEs). Thus the annual tax payable by AGs is EUR 3,500, GmbHs EUR 1,750, and SEs EUR 6,000. The annual minimum corporation tax increases to EUR 5,452 for financial institutions.

The following relief is provided for a period of ten years for GmbHs established after 30 June 2013: minimum corporation tax of only EUR 125 is due for each full quarter (EUR 500 per year) during the first five years after formation of a GmbH and the start of unlimited tax liability, and EUR 250 per full quarter (EUR 1,000 per year) for the next five years.

As a rule, if corporate profits are distributed to shareholders, capital gains tax (*Kapitalertragsteuer*) of 27.5 percent must be withheld from the dividend distribution.

On an international comparison, Austria falls in the middle in terms of the rate of corporation tax:



Source: Deloitte Resources, Corporate Tax Rates 2017 (as of: 17 March 2017)

According to the BAK Taxation Index 2015 (published by BAK Basel<sup>1</sup> in cooperation with the ZEW<sup>2</sup>), the *effective average tax burden* in Austria is **22.4 percent**. Taxation is thus lower than in Italy (23.1%), Belgium (27%), Germany (29.3%), France (34.9%) and the United States (41.2%).<sup>3</sup>

## 2.1. Group taxation

The concept of group taxation makes it possible to offset the profits and losses of financially affiliated companies, including recognition of cross-border losses. The first step is to calculate the taxable profit or loss for each individual member of the group. These profits and losses are then allocated to the company at the next higher level in the group and ultimately to the parent company of the group. The profit or loss of the individual companies calculated in accordance with commercial law remains unchanged. No special integration of the individual companies into the parent company is required to form a group. Profit transfer agreements are also not required.

*Parent companies* may be corporations with unlimited tax liability, trade and industrial cooperatives, financial institutions and mutual insurance companies, but also EU companies with limited tax liability, and companies comparable to corporations that have their management and registered office in the European Economic Area. Foreign companies are required to have an Austrian branch office (a largely independent business unit that is at a different location to the main office and operates under its own management) that is registered in the commercial register, and the interests in the group companies must be attributable to this branch office.

*Group members* may be corporations with unlimited tax liability, trade and industrial cooperatives, and comparable foreign corporations that have their registered office in

a member state of the European Union or a country that offers comprehensive administrative assistance.<sup>4</sup>

Foreign group members may only be subordinate group members (investees), i.e. only one “foreign level” may exist. Corporations can only be a member of a single group of companies.

Formation of a group of companies requires a *financial affiliation* of more than 50 percent of the share capital or cooperative capital and of the voting rights. In addition to direct interests, indirect interests are also possible (via a partnership or other group members). Foreign group members can also be used to create an indirect financial affiliation. If a company on its own does not hold an interest of more than 50 percent, it can, under certain conditions, form a consortium with other companies. This requires one participant to hold at least 40 percent, and each additional minority interest holder to hold at least 15 percent.

A group of companies must exist for at least three years, and the financial connection between the individual group members must exist during the entire financial year. In addition, a *written group application* must be signed by the parent company and all the Austrian entities to be included in the group.

The first step in determining the consolidated profit or loss of the group is to calculate the income of each group member. This income is then allocated to the entity at the next higher level, offset against its income, and the resulting profit or loss in turn allocated to the group member at the next higher level. Ultimately the parent company is assessed using the full income of the group. For Austrian group members the taxable profit or loss is allocated in full. In the case of a consortium, the profit or loss is allocated to the consortium members on a pro rata basis. Companies other than the parent company that have *pre-group losses* may only offset these losses against their own future profits. In the case of the parent company, loss carryforwards from

1 An economic research and consulting institute

2 Centre for European Economic Research (Zentrum für Europäische Wirtschaftsforschung – ZEW)

3 The calculation was performed using a profitable investment that provides a pre-tax return of 20%. A manufacturing corporation was assumed. Investments were made in a specified combination of assets, using a variety of financing methods. Taxes at the national, regional and local levels were included.

4 As at 1 January 2017, according to information from the Austrian Finance Ministry (BMF-010221/0810-VI/8/2016) this pertains to the following States: all EU Member States, Egypt, Albania, Algeria, Andorra, Anguilla, Argentina, Armenia, Aruba, Azerbaijan, Australia, Bahrain, Barbados, Belarus, Belize, Bermuda, Bosnia-Herzegovina, Brazil, British Virgin Islands, Chile, China (People's Republic), Costa Rica, Curaçao, Faroe Islands, Georgia, Ghana, Gibraltar, Greenland, Guernsey, Hong Kong, India, Indonesia, Iceland, Isle of Man, Israel, Japan, Jersey, Cayman Islands, Cameroon, Canada, Kazakhstan, Qatar, Colombia, Korea (Republic), Liechtenstein, Morocco, Mauritius, Macedonia, Mexico, Moldavia, Monaco, Montenegro, Montserrat, Nauru, New Zealand, Nigeria, Niue, Norway, Philippines, Russia, Samoa, San Marino, Saudi Arabia, Switzerland, Senegal, Serbia, Seychelles, Singapore, St Maarten, St Kitts and Nevis, St Vincent and the Grenadines, South Africa, Tajikistan, Taipei, Thailand, Tunisia, Turkey, Turkmenistan, Turks and Caicos Islands, Uganda, Ukraine, Uruguay, Venezuela, United States of America and Vietnam.



before the time the group was formed can be included, and can thus also be offset against the profit or loss of group members. Write-downs to going concern value for investments in group members and losses realized on disposal are not deductible.

In the case of foreign group members, only tax losses proportional to the interest held can be allocated (no allocation of foreign profits). Starting with the 2015 tax assessment, foreign losses can only be claimed up to a maximum of 75 percent of the total own income of all group members with unlimited tax liability and of the group parent in the year the losses are allocated. Any additional losses are added to the loss carryforward of the group parent. Foreign losses must be recalculated to conform to Austrian tax law before they can be claimed, and furthermore the loss to be allocated is limited to the losses calculated under foreign tax law. Hence if the application of Austrian law produces a loss, but foreign law does not, then the loss cannot be used. In order to prevent losses from being used twice, the losses are recaptured in Austria if they are used (or could be used) abroad or the foreign group member leaves the group.

A loss of “comparability” (hollowing out) of the foreign group member also leads to recapture. The group member is no longer comparable if it is hollowed out economically and maintained as a shell company. Comparability is based on operating criteria, such as revenue, total assets and number of employees. If there is a reduction of scope to the extent of 75 percent of the relevant criteria, comparability can no longer be assumed. In practice, this primarily occurs in the case of sales, discontinued operations and demergers.

Corporations with unlimited tax liability are subject to the *minimum corporation tax* in the group of companies. The minimum corporation tax is based on the total income of the group of companies, and is payable if the total income falls below the amount applicable for the parent company and the group members that are subject to the minimum tax. Under certain conditions, the minimum tax of a group member from pre-group periods may be offset against other group members or the parent company.

If a group member leaves the group of companies, the group continues to exist. A group member leaving within the three-year period has retroactive effects, and the profits and losses calculated in previous years must be adjusted in order to create the situation that would have existed if the group member had not been part of the group. If the parent company declares that it is leaving the group, the group of companies must be dissolved

and be retroactively returned to the previous state of taxation within the three-year period.

## 2.2. Income from participations

In order to avoid multiple taxation, particularly in the case of group of companies, income from participations is exempt from corporation tax under certain conditions.

*Income from participations* includes, among other things, profit shares of all kinds based on investments in Austrian corporations and cooperatives held in the form of corporate shares and cooperative shares, and profit shares of all kinds from profit participation rights in respect of Austrian corporations. The exemption is granted regardless of the size of the participation or how long it has been held.

An exemption is also provided for income from foreign participations. As a result of the implementation of the *Parent-Subsidiary Directive*, comparable profit shares from corporations in the EU that are listed in Annex 2 to the Austrian Income Tax Act (*ESiG*) are exempt from the corporation tax for the parent company receiving the dividend. Moreover the investment income exemption also applies to investment income from third countries where comprehensive administrative assistance arrangements are in place with the third country in question.<sup>55</sup>

In order to prevent abuse, the Austrian Corporation Tax Act (*Körperschaftsteuergesetz – KStG*) stipulates a change from the exemption method to the imputation method if the foreign income from foreign participations was not previously taxed or only taxed at a low rate (foreign corporation tax rate less than 15 percent). In a further move to preclude non-taxation in both countries, there is no exemption from corporation tax if the profit shares in question are deductible by the foreign corporation making the payments.

The tax exemption applies to profit shares of all kinds. Profits from ordinary business operations with the subsidiary, loan interest, gains on disposal of the participation and liquidation proceeds, however, remain taxable.

Notwithstanding the exemption for income from participations, investment income tax must be withheld by a domestic distributing company if the parent company holds a participation of less than ten percent. The tax can be claimed by means of a deduction or refund.

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<sup>55</sup> See footnote 4, page 8

### 2.3. International cross-shareholdings

Similar to the exemption for income from participations, profit shares of all kinds from international cross-shareholdings are also exempt from corporation tax. The *international preferential treatment of profits earned by foreign affiliated companies* requires:

- a parent company (corporation) that falls under Section 7(3) of the Austrian Corporation Tax Act
- an interest in a foreign subsidiary which is comparable to an Austrian corporation or is an EU company as per Annex 2 to the Austrian Income Tax Act
- an interest of *at least ten percent* held for an uninterrupted period of at least one year.

The international cross-shareholding takes precedence over the exemption for income from foreign profit shares. This plays an important role particularly for the tax neutrality of the investment and the abuse provisions. The exemption applies not only to current profits, but also to *gains and losses on disposal* and other changes in value.

**Taxation option:** The taxpayer can however elect to make the investment subject to taxation. Such election must be made in the corporate income tax return for the year of acquisition, and can only subsequently be made or revoked within one month of the submission of the corporation tax return. This option also makes gains and losses on disposal and write-downs to going concern value (must be spread over seven years if deductible) subject to taxation. Current profit shares from the investment, however, remain tax-exempt.

*There is also an anti-abuse provision* that leads to a change in the method for international cross-shareholdings. In particular, a change to the imputation method takes place if the foreign company focuses on earning passive income (e.g. interest income, income from the transfer or use of movable tangible or intangible assets, disposal of investments) and the foreign tax rate is significantly lower than in Austria (income tax 15 percent or less).

In order to prevent non-taxation in both countries, the corporation tax exemption is also unavailable if the profit shares are deductible for the foreign entity (e.g. for hybrid financing instruments).

### 2.4. Loss carryforward

Operating losses that cannot be offset against positive income in the year they are incurred may be deducted as special expenses in the subsequent years. The prerequisite for this is proper accounting in the year the loss was incurred. However, only losses

of up to 75 percent of total income may be deducted each year. If there is still a residual loss, this can be carried forward to following years. This carryforward limit does not apply to certain types of income specified by law (e.g. restructuring gains, gains on the disposal and discontinuation of businesses, business units and partnership interests).

In the case of a “*shell company acquisition*” (*Mantelkaufatbestand*) the right to carry losses forward is lost. The characteristics of a “shell company acquisition” are:

- Change to the organizational structure (change to the management and administrative bodies)
- Change to the economic structure (economic unit lost)
- Change to the shareholder structure (assessed on a case-by-case basis, always assumed for more than 75 percent change)

While in principle all three criteria have to be fulfilled, nonetheless the evaluation must be based on the overall situation. A shell company acquisition can exist even if the individual characteristics are present to different degrees. The right to carry losses forward is not lost if a shell company is acquired for restructuring or rationalisation purposes.

### 2.5. Reorganization

Reorganization refers to events that change a company’s legal entity while leaving its assets generally unchanged. Unlike a reorganization that changes the legal form of a company, reorganization by transfer (transfer of assets to a receiving legal entity) leads to the disclosure of hidden reserves and therefore to a tax obligation. The aim of the Austrian Reorganization Tax Act (*Umgründungssteuergesetz*) is to permit reorganization by transfer with *no additional tax burden*. It makes it compulsory for the carryover basis accounting method to be used, so that that the pending tax obligation associated with hidden reserves passes to the legal successor. The act defines six different types of reorganization: merger, transformation, transfer of assets, consolidation, division of assets and asset partition.

The EU Merger Directive covers cross-border reorganization within the EU, but mergers, divisions and asset transfers (as well as share exchanges) are only covered by this when companies from two or more member states are involved. The carryover basis and non-taxation of hidden reserves also apply in this case provided that Austria’s right of taxation is not lost.

### 2.6. Private foundations

A private foundation is a legal entity formed under civil law that has no owners or members. The foundation uses assets donated by the founder for achieving its purpose. Any natural person and legal entity can establish a foundation as long as they

provide it with EUR 70,000 in capital. A distinction is made between charitable, private-interest and business foundations.

**Charitable foundations** are exempt as far as possible from corporation tax. They are subject to unlimited corporation tax only for any business enterprises, and to limited corporation tax on any income for which the tax is levied through tax deduction. Rental income, lease income and income from participations, on the other hand, are tax-exempt. The beneficiaries of gratuities received from a charitable foundation are not taxed on these as investment income.

**Private-interest foundations** are required to make extensive disclosures to the tax authorities (foundation deed, supplementary foundation deed). If they fail to do so, taxation rules that are beneficial to them do not apply, and the tax authorities notify the Austrian Money Laundering Unit (*Geldwäschemeldestelle*).

**Business foundations** receive special tax treatment, as they are also exempt as far as possible from corporation tax. Such foundations serve solely to fulfil the business purpose of the founding entrepreneur. Foundations in support of corporate purposes (*Unternehmenszweckförderungsstiftung*), employee development foundations (*Arbeitnehmerförderungsstiftung*) and employee share ownership foundations (*Belegschaftsbeteiligungsstiftung*) are business foundations.

**The taxation of foundations** takes place at three levels:

- Taxation of donations (foundation receipt tax)
- Ongoing taxation of the foundation
- Taxation of outgoings

Gratuitous donations to a private foundation are subject to the **foundation receipt tax** (*Stiftungseingangssteuer*). The tax liability applies to the donor (place of residence or normal residence in Austria) or the foundation (registered office or management in Austria) and is normally 2.5 percent. If a private-interest foundation does not fulfil its disclosure requirements, the foundation receipt tax is 25 percent. When unencumbered real estate is contributed to a foundation, the foundation receipt tax is calculated using the value of the plot. (For details of how this value is calculated see 7.1.) The tax rate varies between 0.5 percent and 3.5 percent (stepped tariff). It is increased by an additional 2.5 percent of the site value (tax equivalent to the foundation receipt tax).

**Interim taxation** (*Zwischenbesteuerung*) is a special feature of the ongoing taxation of foundations. This represents advance taxation and when future distributions are made is credited to the beneficiaries, insofar as the distribution is subject to capital

earnings tax. Interim taxation applies to the following forms of investment income if they are among the foundation's income from capital assets:

- Domestic and foreign investment income from deposits and securities held by financial institutions
- Income from realized increases in the value of capital assets
- Income from derivatives

Income from private real estate transfers is also subject to interim taxation.

The interim tax is 25 percent.

Foundations receive a special tax concession for the disposal of equity investments. Hidden reserves that are revealed upon disposal of an investment may be transferred within twelve months to the acquisition costs of a new investment if the new investment represents an equity holding of more than ten percent and the new shares are not acquired by affiliated persons. A tax-exempt amount can be formed for hidden reserves that are not transferred in this way during the calendar year.

**Distributions** by private-interest foundations to beneficiaries that are natural persons are generally subject to investment income tax (tax on outgoings). Distributions to entities with unlimited tax liability are not covered by the exemption for income from participations and are therefore also subject to capital gains tax. On the other hand, distributions of foundation capital to beneficiaries are tax exempt, as following the abolition of the inheritance and gift tax the donor could also give his assets as a gift without taxes being incurred. Distribution amounts that exceed the sum of the net retained profits at the beginning of the financial year, the retained earnings and the taxable hidden reserves of the donated assets of the foundation are eligible for this exemption. Foundation distributions do not represent tax-exempt capital distributions until this "threshold value" (*maßgeblicher Wert*) is exceeded.

### 3. Special aspects - operating expenses

#### 3.1. Depreciation and amortization

Depreciation and amortization are intended to account for the loss in value of an asset over the course of time due to wear and tear. Under tax law, depreciation and amortization must be linear, that is, evenly distributed over the period of use.

A statutory useful life or depreciation/amortization rate is set for certain assets. In the case of **buildings**, the depreciation rate for residential buildings is 1.5% and a standard rate of 2.5%

for all other buildings. Any *goodwill* that exists for agricultural and forestry operations and businesses is amortized over 15 years. The useful life for passenger cars and station wagons is a minimum of eight years. *Low-value assets*, i.e. assets with an acquisition cost of no more than EUR 400, may be written off in full in the year of acquisition.

### 3.2. Debt financing costs

*Debt financing costs* for the *acquisition of shareholdings* (if these are held as business assets) are deductible, provided these do not relate to the acquisition of shareholdings within a group of companies. The term interest should be interpreted so that only the interest that is a direct consideration paid for the transfer of the external capital is deductible. The costs of procuring funds and the ancillary expenses incurred in connection with raising the external capital are not deductible.

Interest payments to entities within a group are only tax-deductible if the interest incurred by the beneficial owner is subject to taxation of at least ten percent. The interest for debt financed *distribution of profits* is deductible as operating expenses regardless of whether there is a direct connection between the borrowing and the distribution. If the distribution is actually a repayment of capital contributions, the debt financing interest must not be deducted.

### 3.3. Provisions

Provisions are formed for expenses that are not incurred until later periods, but are attributable economically to the current financial year. Tax law only allows the formation of provisions indicated in the law. Unlike corporate law, neither flat-rate provisions nor provisions for internal expenses are allowed. Provisions may only be formed in the year in which the economic basis for the liability occurs. Provisions that are expected to exist for more than twelve months after the balance sheet date are referred to as long-term provisions. Long-term provisions for liabilities or impending losses are, as a basic rule, discounted using a discount rate of 3.5 percent over the actual remaining term. This does not apply to provisions for severance pay, pensions and employee anniversary bonuses.

### 3.4. Donations

Donations are voluntary gifts and are therefore generally not deductible. An exception exists for donations of business assets *to eligible organizations for eligible purposes*<sup>6</sup>. This includes donations in connection with science and research, those made to universities and museums, and those undertaken for

charitable purposes that are being pursued in a country forming part of the EU or the EEA, for combating poverty and crises in developing countries, and for rendering assistance in cases of catastrophes. Organizations with their registered office in a member state of the European Union or a country that offers comprehensive administrative assistance<sup>7</sup> are considered as being equivalent to eligible Austrian organizations if they are comparable to such organizations and have a connection with Austria. The deductibility of donations is limited to ten percent of profits as calculated before taking account of the donations.

### 3.5. Taxes

Operating taxes (e.g. property tax, motor vehicle tax) are operating expenses and can therefore be deducted. Corporation tax and other personal taxes are not deductible. The deductibility of accessory claims (e.g. late filing penalties) is determined based on the deductibility of the underlying tax.

### 3.6. Interest and royalty payments

The deduction of royalty payments undertaken within a group is limited in the same way as in the case of interest payments. Royalty payments made to entities forming part of the group are tax deductible only in such cases in which the royalties accruing to the beneficial owner are subject to actual taxation of at least 10 percent.

### 3.7. Managers' salaries

The Austrian Tax Amendment Act of 2014 introduced a limit on the deduction of operating expenses from the remuneration paid to top earners. Under this legislation, expenses or outlays paid as remuneration for work or services are no longer considered tax deductible operating expenses of over EUR 500,000 per person per financial year.

## 4. Special international aspects

### 4.1. Double taxation conventions and deduction at source

In order to prevent the same income being taxed in two or more countries, Austria has concluded *double taxation conventions* with many countries based on the OECD Model Convention. These conventions determine which contracting country has the right to tax certain income. If one of these distribution norms (Art. 6 to 22) should not give either country the sole right of taxation, but instead allows the possibility of taxation in both contracting countries, the contracting countries mutually undertake that the applicable country of residence of the tax-payer

<sup>6</sup> The list of eligible institutions can be found at [https:// service.bmf.gv.at/Service/allg/spenden/show\\_mast.asp](https://service.bmf.gv.at/Service/allg/spenden/show_mast.asp)

<sup>7</sup> See footnote 4, Page 8

must avoid double taxation. In such cases, the contracting countries mutually agree on which *tax relief method* shall be applied, namely the credit method or exemption method.

In addition, since the transposition of the EU Parent-Subsidiary Directive, dividend distributions between corporations have been exempt from *deduction at source* if the extent of the shareholding is at least ten percent and a retention period of one year has been fulfilled. In addition, payments of interest and royalties between affiliated companies in the EU are exempt from deduction at source if a direct holding of 25 percent or more is held or a joint parent company has at least a 25% holding in both companies.

When the *credit method* is used, the income from the source country is included in the tax base in the country of residence, yet the foreign taxes paid are credited against the domestic tax

burden. In most cases, the law provides for a statutory “maximum tax credit”, i.e. foreign taxes can only be credited against domestic taxes up to a certain maximum limit, resulting in the foreign income being taxed at least at the Austrian tax rate.

The credit method is mainly used for dividends and interest payments when the source country has the right to deduction at source.

When the *exemption method* is used, on the other hand, the foreign income is exempt from taxation in the country of residence in order to avoid double taxation. This method is often used together with “exemption with progression”, i.e. foreign income is only included when calculating the tax rate, but not the tax base. Exemption with progression is only relevant for natural persons, since the constant corporation tax rate of 25 percent means that exemption with progression would not increase the tax rate for corporations.

The following table shows the countries which have active double taxation conventions with Austria and the withholding tax rates applicable for dividends, interest and royalties:

| Country                | Equity holding | Dividends <sup>1</sup> | Interest <sup>1</sup> | Royalties <sup>1</sup> |
|------------------------|----------------|------------------------|-----------------------|------------------------|
| Albania                | 25             | 5/15                   | 5                     | 5                      |
| Algeria                | 10             | 5/15                   | 0/10 <sup>2</sup>     | 10                     |
| Armenia                | 10             | 5/15                   | 0/10 <sup>3</sup>     | 5                      |
| Australia              | -              | 15                     | 10                    | 10                     |
| Azerbaijan             | 25             | 5/10/15 <sup>4</sup>   | 10                    | 5/10 <sup>5</sup>      |
| Bahrain                | -              | 0                      | 0                     | 0                      |
| Barbados               | 10             | 5/15                   | 0                     | 0                      |
| Belarus                | 25             | 5/15                   | 5                     | 5                      |
| Belgium *              | -              | 15                     | 15 <sup>6</sup>       | 0/10+                  |
| Belize                 | 25             | 5/15                   | 0                     | 0                      |
| Bosnia and Herzegovina | 25             | 5/10                   | 0/5 <sup>7</sup>      | 5                      |
| Brazil                 | -              | 15                     | 0/15                  | 10/15/25 <sup>8</sup>  |
| Bulgaria *             | -              | 0/5 <sup>9</sup>       | 0/5                   | 5                      |
| Canada                 | 10             | 5/15                   | 10                    | 0/10 <sup>17</sup>     |
| Chile                  | -              | 15                     | 5/15 <sup>10</sup>    | 5/10 <sup>11</sup>     |
| China                  | 25             | 7/10                   | 10                    | 10                     |
| Croatia *              | 10             | 0/15                   | 5                     | 0                      |
| Cuba                   | 25             | 5/15                   | 0/10 <sup>23</sup>    | 5                      |
| Cyprus *               | -              | 10                     | 0                     | 0                      |
| Czech Republic *       | 10             | 0/10                   | 0                     | 5 <sup>48</sup>        |
| Denmark *              | 10             | 0/15                   | 0                     | 0                      |
| Egypt                  | -              | 10                     | 0                     | 0                      |
| Estonia *              | 25             | 5/15                   | 0/10 <sup>12</sup>    | 5/10 <sup>13</sup>     |
| Finland *              | 10             | 0/10                   | 0                     | 5                      |
| France *               | 10             | 0/15                   | 0                     | 0                      |
| Georgia                | 50/10          | 0/5/10 <sup>14</sup>   | 0                     | 0                      |
| Germany *              | 10             | 5/15                   | 0                     | 0                      |

| <i>Country</i>      | <i>Equity holding</i> | <i>Dividends<sup>1</sup></i> | <i>Interest<sup>1</sup></i> | <i>Royalties<sup>1</sup></i> |
|---------------------|-----------------------|------------------------------|-----------------------------|------------------------------|
| Great Britain *     | 25                    | 5/15                         | 0                           | 0/10+                        |
| Greece *            | 25                    | 5/15                         | 8                           | 7                            |
| Hong Kong           | 10                    | 0/10                         | 0                           | 3                            |
| Hungary *           | -                     | 10                           | 0                           | 0                            |
| Iceland             | 10                    | 5/15                         | 0                           | 5                            |
| India               | -                     | 10                           | 10                          | 10                           |
| Indonesia           | 25                    | 10/15                        | 10                          | 10                           |
| Iran                | 25                    | 5/10                         | 0/5                         | 5                            |
| Ireland *           | -                     | 10                           | 0                           | 0/10+                        |
| Israel              | -                     | 25                           | 15                          | 0/10 <sup>15</sup>           |
| Italy *             | -                     | 15                           | 10                          | 0/10+                        |
| Japan <sup>16</sup> | 50                    | 10/20                        | 10                          | 10                           |
| Kazakhstan          | 10                    | 5/15                         | 0/10 <sup>18</sup>          | 10 <sup>19</sup>             |
| Korea               | 25                    | 5/15                         | 0/10 <sup>21</sup>          | 2/10 <sup>22</sup>           |
| Kuwait              | -                     | 0                            | 0                           | 10                           |
| Kyrgyzstan          | 25                    | 5/15                         | 0/10 <sup>20</sup>          | 10                           |
| Latvia *            | 25                    | 5/10                         | 0/10 <sup>24</sup>          | 5/10 <sup>25</sup>           |
| Liechtenstein       | 10                    | 0/15                         | 0                           | 5/10 <sup>26</sup>           |
| Lithuania *         | 25                    | 5/15                         | 0/10 <sup>27</sup>          | 5/10 <sup>28</sup>           |
| Luxembourg *        | 25                    | 5/15                         | 0                           | 0/10+                        |
| Macedonia           | 10                    | 0/15                         | 0                           | 0                            |
| Malaysia            | 25                    | 5/10                         | 15                          | 10/15 <sup>29</sup>          |
| Malta *             | -                     | 15                           | 5                           | 0/10 <sup>30</sup>           |
| Mexico              | 10                    | 5/10                         | 0/10 <sup>31</sup>          | 10                           |
| Moldavia            | 25                    | 5/15                         | 5                           | 5                            |
| Mongolia            | 10                    | 5/10                         | 0/10                        | 5/10 <sup>32</sup>           |
| Montenegro          | 5                     | 5/10                         | 10                          | 5/10 <sup>33</sup>           |
| Morocco             | 25                    | 5/10                         | 10                          | 10                           |
| Nepal               | 25/10                 | 5/10/15                      | 0/10/15 <sup>34</sup>       | 15                           |
| Netherlands *       | 25                    | 5/15                         | 0                           | 0/10+                        |
| New Zealand         | -                     | 15                           | 10                          | 10                           |
| Norway              | -                     | 0/15 <sup>35</sup>           | 0                           | 0                            |
| Pakistan            | 20                    | 10/15                        | 15                          | 10                           |
| Philippines         | 10                    | 10/25                        | 15                          | 15                           |
| Poland *            | 10                    | 5/15                         | 0/5 <sup>36</sup>           | 5                            |
| Portugal *          | -                     | 15                           | 10                          | 5/10+                        |
| Qatar               | -                     | 0                            | 0                           | 5                            |
| Romania *           | 25                    | 0/5                          | 0/3 <sup>37</sup>           | 3                            |
| Russia              | 10                    | 5/15 <sup>38</sup>           | 0                           | 0                            |
| San Marino          | 10                    | 0/15                         | 0                           | 0                            |
| Saudi Arabia        | -                     | 5                            | 0/5 <sup>39</sup>           | 10                           |
| Serbia              | 25                    | 5/15                         | 10 <sup>41</sup>            | 5/10 <sup>42</sup>           |
| Singapore           | 10                    | 0/10                         | 0/5                         | 5                            |
| Slovakia *          | -                     | 10                           | 0                           | 5                            |
| Slovenia *          | 25                    | 5/15                         | 0/5 <sup>43</sup>           | 5                            |
| South Africa        | 25                    | 5/15                         | 0                           | 0                            |
| Spain *             | 50                    | 10/15                        | 5                           | 5                            |
| Sweden *            | 25                    | 5/10                         | 0                           | 0/10+                        |
| Switzerland         | 20                    | 0/15 <sup>40</sup>           | 0                           | 0                            |

| Country              | Equity holding | Dividends <sup>1</sup> | Interest <sup>1</sup>   | Royalties <sup>1</sup> |
|----------------------|----------------|------------------------|-------------------------|------------------------|
| Taiwan               | -              | 10                     | 0/10 <sup>45</sup>      | 10                     |
| Tajikistan           | 15             | 5/10                   | 0/8 <sup>44</sup>       | 8                      |
| Thailand             | 25             | 10/15/20 <sup>46</sup> | 0/10/25 <sup>47</sup>   | 15                     |
| Tunisia              | 25             | 10/20                  | 10                      | 10/15 <sup>49</sup>    |
| Turkey               | 25             | 5/15                   | 0/5/10/15 <sup>50</sup> | 10                     |
| Turkmenistan         | 25             | 0/15                   | 0/10 <sup>51</sup>      | 10 <sup>52</sup>       |
| Ukraine              | 10             | 5/10                   | 2/5 <sup>53</sup>       | 0/5 <sup>54</sup>      |
| United Arab Emirates | -              | 0                      | 0                       | 0                      |
| USA                  | 10             | 5/15                   | 0                       | 0/10                   |
| Uzbekistan           | 10             | 5/15                   | 0/10 <sup>55</sup>      | 5                      |
| Venezuela            | 15             | 5/15                   | 0/4,95/10 <sup>56</sup> | 5                      |
| Vietnam              | 70/25          | 5/10/15 <sup>57</sup>  | 0/10 <sup>58</sup>      | 7,5/10 <sup>59</sup>   |

Source: Deloitte International Tax Resources

- 1 The lower tax rate applies if the equity holding is greater than or equal to the percentage shown (column 2). No taxes are withheld in EU member countries marked with \* if the conditions for application of the Parent-Subsidiary Directive are satisfied. Interest paid to non-Austrian corporations is not subject in Austria to limited tax liability so no withholding tax is levied. No tax is levied for EU member states (\*) that satisfy the conditions for application of the Interest and Royalties Directive. Withholding tax is deducted at the rates marked with + if the recipient holds more than 50% of the equity of the company paying the royalties.
- 2 If the recipient is the beneficial owner, the withholding tax is 10%; in special cases 0%.
- 3 If the recipient is the beneficial owner, the withholding tax is 10%; in special cases 0%.
- 4 5% for equity holdings that are at least 25% and greater than USD 250,000, 10% for equity holdings at least 25% and greater than USD 100,000; otherwise 15%.
- 5 5% for industrial royalties and know-how if not older than 3 years; otherwise 10%.
- 6 Up to 15% withholding tax; special definition of interest for certain types of interest falling under Art. 7 or 21 of the DTC.
- 7 If the recipient is the beneficial owner, the withholding tax is 5%; in special cases 0%.
- 8 10% for copyright royalties for literary, artistic and scientific works, 25% for trademarks; otherwise 15%.
- 9 Dividends paid to corporations are exempt from the tax.
- 10 5% in connection with loans granted by credit institutions, listed bonds and the sale of machines on credit; otherwise 15%. The most-favoured nation clause applies in respect of DTCs between Chile and the OECD states.
- 11 5% for royalties for industrial, commercial and scientific equipment, otherwise 10%. The most-favoured nation clause applies in respect of DTCs between Chile and the OECD states.
- 12 If the beneficial owner is a person resident in another country, the withholding tax is 10%; in special cases 0%.
- 13 5% for royalties for industrial, commercial and scientific equipment, otherwise 10%.
- 14 0% for equity holdings that are at least 50% and greater than EUR 2 million, 5% for equity holdings at least 10% and EUR 100,000; otherwise 10%.
- 15 0% for copyright royalties for literary, artistic and scientific works (except for film and television royalties); otherwise 10%.
- 16 A new DTC has already been concluded which will probably come into force in 2018. In accordance with the new DTC the withholding tax on dividends is 0% for a 10% shareholding, otherwise 10%. The withholding tax on interest and royalties will also be 0%.
- 17 0% for royalties for copyrights to literary and artistic works (excluding film and television royalties) and to computer software, patents for industrial, commercial and scientific works; otherwise 10%.
- 18 If the beneficial owner is a person resident in another country, the withholding tax is 10%; in special cases 0%. The most-favoured nation clause applies in respect of DTCs between Kazakhstan and the OECD states.
- 19 The most-favoured nation clause applies in respect of DTCs between Kazakhstan and the OECD states.
- 20 If the beneficial owner is a person resident in another country, the withholding tax is 10%; in special cases 0%.
- 21 If the recipient is the beneficial owner, the withholding tax is 10%; in special cases 0%.
- 22 2% for royalties for industrial, commercial and scientific equipment and information; otherwise 10%.
- 23 If the recipient is the beneficial owner, the withholding tax is 10%; in special cases 0%.
- 24 If the beneficial owner is a person resident in another country, the withholding tax is 10%; in special cases (e.g. bank loans) 0%.
- 25 5% for royalties for industrial, commercial and scientific equipment, otherwise 10%.
- 26 5% for royalties for industrial production sites, otherwise 10%.
- 27 If the beneficial owner is a person resident in another country, the withholding tax is 10%; in special cases 0%.
- 28 5% for royalties for industrial, commercial and scientific equipment, otherwise 10%.
- 29 10% for royalties for patents and trademarks, scientific works and industrial, commercial and scientific equipment and information; otherwise 15%.
- 30 0% for copyright royalties for literary, artistic and scientific works; otherwise 10%.
- 31 If the recipient is a person resident in another country, the withholding tax is 10%; in special cases 0%.
- 32 10% for copyright royalties for literary, artistic and scientific works; otherwise 5%.
- 33 5% for copyright royalties for literary, artistic or scientific works, for patents, marks and prototypes 10%.
- 34 15% withholding tax if the recipient of the interest is the beneficial owner; 10% withholding tax if the beneficial owner is a bank that undertakes banking transactions; in special cases 0%.
- 35 15% if the beneficial owner is a person resident in another country. If the beneficial owner is a company (however not a partnership), then 0%.
- 36 If the beneficial owner is a person resident in another country, the withholding tax is 5%; in special cases 0%.

- 37 If the beneficial owner is a person resident in another country, the withholding tax is 3%; in special cases 0%.
- 38 5% for an equity holding of at least 10% and USD 100,000; otherwise 15%.
- 39 If the recipient is the beneficial owner, the withholding tax is 5%, in special cases 0%.
- 40 If the requirements for the application of the Parent-Subsidiary Directive are met within the framework of the agreement with Switzerland, no tax is levied.
- 41 The most-favoured nation clause can be applicable in respect of DTCs between Serbia and the EU member states, according to which renewed negotiations will start insofar as Serbia agrees a more favourable interest rate with another EU state.
- 42 5% for copyright royalties, otherwise 10%.
- 43 If the recipient is the beneficial owner, the withholding tax is 5%; in special cases 0%.
- 44 If the recipient is a person resident in another country, the withholding tax is 8%; in special cases 0%.
- 45 If the recipient is a person resident in another country, the withholding tax is 10%; in special cases 0%.
- 46 10% applies in respect of Austria when the 25% threshold is exceeded; 15% for industrial companies in Thailand and 20% for all other cases in Thailand insofar as 25% threshold is exceeded.
- 47 10% withholding tax if the interest accrues to a financial institution; 0% in special cases; in all other cases 25%.
- 48 5% withholding tax for certain royalties (e.g. patents, trademarks), otherwise the national withholding tax rate applies.
- 49 10% for royalties for literary, artistic and scientific works (apart from films, television), 15% for industrial royalties and know-how, films and television.
- 50 5% for interest in connection with the Österreichische Kontrollbank AG or the Turkish equivalent and the promotion of exports. 10% if the interest is obtained from a bank. 0% if interest is paid to the other contractual country or the central bank. 15% in all other cases.
- 51 If the beneficial owner is a person resident in another country the withholding tax is 10%; in special cases 0%.
- 52 The most-favoured country clause applies in respect of DTCs between Turkmenistan and the EU member states until February 2021.
- 53 If the recipient of the interest is the beneficial owner, the withholding tax is 5%, in special cases 2%.
- 54 5% for copyright royalties for literary and artistic works, otherwise 0%.
- 55 If the recipient of the interest is the beneficial owner, the withholding tax is 10%, in special cases 0%.
- 56 If the recipient is the beneficial owner of the interest and a bank, the withholding tax is 4.95%, in all other cases 10%; in special cases 0%.
- 57 The most-favoured country clause applies in respect of DTCs between Vietnam and the EU member states.
- 58 If the recipient is the beneficial owner, the withholding tax is 10%; in special cases 0%. The most-favoured country clause applies in respect of DTCs between Vietnam and the EU member states.
- 59 7.5% for technical services, otherwise 10%. The most-favoured country clause applies in respect of DTCs between Vietnam and the EU member states.

#### 4.2. DTC Relief Ordinance

Under the Austrian Income Tax Act and Austrian Corporation Tax Act, the domestic income of *taxpayers with limited tax liability* is subject to taxation in Austria. This right of taxation is greatly limited by the large number of double taxation conventions with other countries mentioned above, so that there are two possibilities for DTC-compliant taxation:

- Full taxation according to national law followed by a *tax refund* to the taxpayer with limited tax liability.
- Immediate DTC-compliant taxation using the *relief at source* method

The Austrian DTC Relief Ordinance (*DBA-Entlastungsverordnung*) stipulates under which conditions relief may be provided directly at source and under which conditions relief can be provided in the form of a refund by the tax authorities.

Relief at source is permitted for total remuneration of *up to EUR 10,000* if the recipient of the income provides the following information in a *written declaration*:

- Family and given names or name of legal entity
- Declaration that there is no place of residence in Austria
- Addresses of residences in foreign countries representing the centre of the recipient's interests
- Country of establishment for legal entities and address of the location of the actual management
- Declaration that the recipient is under no obligation to pass the income on to other persons
- Declaration that the income is not going to a domestic permanent establishment
- Type and amount of the remuneration received

For payments *of more than EUR 10,000*, relief at source in accordance with the convention is only permitted if the recipient of the income provides a *certificate of residence* issued by the foreign tax administration. Forms ZS-QU1 (for natural persons) and ZS-QU2 or ZS-EUMT (for legal entities) must be used for this purpose.

If the foreign recipient of the income is a legal entity, the following information must be included with the declaration regardless of the amount of the remuneration (unless a decision to provide a reimbursement was made in the last three years):

- Declaration that the entity's activities are not limited to asset management
- Declaration that the entity has its own employees
- Declaration that the entity has its own business premises

If the recipient is a tax transparent partnership, the requirements above apply to each partner and the company name and address must be provided.

If the total remuneration of a partner does not exceed EUR 10,000, only the name and address of the party making the payment must be documented.

Relief at source is not permitted in the following cases:



- Deficient documentation
- If it is known or should have been known that the income is not attributable to the foreign recipient
- If the remuneration is not paid to the provider of the activity (writer, artist, architect, athlete, etc.), but to a third party and no more precise information on the provider of the service is available
- If the recipient of the income is a foreign foundation, foreign trust or investment fund
- If investment income is paid out upon maturity or on disposal of securities by financial institutions acting in their capacity as securities custodian or manager
- If the income is received by a legal entity and the location of the actual management is outside the country of founding

In these cases, the party paying the remuneration must deduct and pay withholding tax to the tax authorities. If the requirements are satisfied, the foreign recipient of the payment will receive, on request, a refund of the difference between the withholding tax deducted and the withholding tax due under the DTC. The Bruck/ Eisenstadt/Oberwart Tax Office is responsible for the refund process.

### 4.3. Transfer prices

*Intercompany payments for goods and services* are an important aspect of tax planning for international groups. For this reason, regulations for internal group transfer prices have become increasingly important for the tax administration in the past. Both national and international guidelines are used when examining and evaluating transfer prices.

In Austria, the provisions of Sections 138, 162 of the Austrian Federal Fiscal Code (*Bundesabgabenordnung – BAO*) allow the tax administration to examine intercompany payments for goods and services. Section 138 of the Austrian Federal Tax Code stipulates that taxpayers have an increased duty of cooperation for foreign matters. This includes in particular the *duty of precautionary documentation of evidence* (*Beweisvorsorgepflicht*) and the *duty to provide evidence* (*Beweismittelbeschaffungspflicht*). The tax-payer is accordingly required to explain such matters and provide proof of their accuracy or make them plausible. If the taxpayer cannot provide complete proof, he must bear the associated tax risk. With regard to intercompany payments in particular, the taxpayer is required to retain all foreign documents related to payments within the group in its accounting system (duty of precautionary documentation of evidence) and to provide all evidence related to intercompany business relationships to the tax authorities upon request (duty to provide evidence). Under Section 162 of the Austrian Federal Fiscal Code, the tax authorities can demand that the taxpayer

precisely identifies the creditor or recipient of amounts owed or other expenditures in order to ensure effective taxation of such deducted payments (e.g. commissions). Otherwise the payment will not be recognised as tax-deductible and a penalty surcharge of 25 percent of this amount will be added to the corporation tax.

The examination of intercompany transfer prices is aimed at determining whether goods and services charged to and recharged by an Austrian company are priced too highly and are therefore unreasonable. This is intended to ensure that intercompany transfer prices satisfy the *arm's length principle*. If intercompany transfer prices do not pass the arm's length test, an adjustment must be made to the profits of the companies concerned. This arm's length principle is stated in Art. 9 of the OECD Model Convention for double taxation conventions. The OECD Transfer Pricing Guidelines also provide interpretation guidance that has been mandatory for the tax authorities since standardization of the *Austrian Transfer Pricing Guidelines*. The Austrian Transfer Pricing Guidelines create a uniform legal interpretation that ensures greater legal certainty.

Under the Austrian Transfer Pricing Guidelines, a risk and functional analysis of the economically relevant functions of the companies involved is first performed to check that the value of the goods and services charged is accurate. The methods used to check transfer prices are the same as those in the OECD Transfer Pricing Guidelines:

- Comparable uncontrolled price method
- Resale price method
- Cost plus method
- Profit split method
- Transactional net margin method

In addition, intercompany transfer prices must be documented appropriately in order to ensure that values can be verified. This includes the *documentation* of the allocation of business functions within the group, the documentation of the transfer pricing and the methods used for this. If no transfer pricing documentation can be provided for review by the tax authorities, the transfer prices are estimated using the OECD methods.

2016 the **Transfer Pricing Documentation Act** (*Verrechnungspreisdokumentationsgesetz*) came into force in Austria; this provides for obligatory documentation of transfer prices in accordance with the OECD documentation approach. Austrian business units of an international group whose sales revenues have exceeded EUR 50 million in the last financial two years, must prepare both a *master file* and a *local file* and transmit these to the tax office at the latter's request within 30 days of

filing their annual corporation tax return. If the sales revenues shown in the consolidated annual financial statements of the international group exceed EUR 750 million, in addition since 1 January 2016 a *country-by-country* report must be prepared by the Austrian parent company if no other foreign company that forms part of the group assumes this obligation and the CbC report is accessible to the tax office. The report must be transmitted to the tax office within twelve months of the end of the financial year. In the event of the deliberate omission or transmission errors, a fine of up to EUR 50,000 per offender must be anticipated; gross negligence if the report is not sent in on time or is incomplete will attract a fine of up to EUR 25,000. However, the grossly negligent transmission of incorrect data is not punishable.

The local file relates to the respective business unit, and should provide information about the respective business unit, intra-group transactions, and financial information in connection with the annual financial statements. The master file must contain information concerning the group in terms of its organisational structure, business activity, intangible assets, intra-group financial activities, the financial situation and tax items. The country-by-country report must contain three tables, each showing an aggregated list of certain key ratios, a list of the companies belonging to the group and their business activities, and additional material information for each tax jurisdiction.

Since transfer pricing is a highly complex area, the Austrian legal system includes special provisions in Section 118 of the Federal Tax Code. These provisions give taxpayers the opportunity to obtain a binding *advance ruling* on their transfer pricing from the tax authorities. It is important to note that an advance ruling application can only concern one specific issue, although more than one question can be raised on points of law. This legal information guarantees taxpayers the legal entitlement to a future tax evaluation in accordance with the ruling if the matter in question essentially take place largely unchanged. Future deviations from the ruling can only take place to the benefit of the taxpayer. In return for the legal certainty provided by this ruling, the taxpayer must pay an administrative fee of between EUR 1,500 and EUR 20,000, depending on revenues.

## 5. Tax concessions

### 5.1. Research tax credit

In Austria a credit for research of *fourteen percent of the qualifying expenses* can be claimed for in-house and contract research expenses, with the definitions of the terms “research and development” being based on the OECD Frascati Manual.

The research tax credit for in-house research can be claimed if the research is performed in an Austrian firm or Austrian permanent establishment, and in cases in which the assessment basis is not subject to a limitation on amount.

A tax credit of 14 percent of expenses can also be claimed by the commissioning party for *contract research*, but only to a maximum of EUR 1,000,000 of expenses (thus a maximum research tax credit of EUR 120,000 from contract research). The contract research must also satisfy the following conditions:

- The research must be outsourced by an Austrian firm or Austrian permanent establishment.
- The company contracted must have its registered office in the European Union or European Economic Area.
- The company contracted must not be under the control of the outsourcing company or a member of the same consolidated tax group.
- The commissioning party must inform the company contracted that it is making use of this option before the expiry of the financial year concerned.

Austria's Income Tax Act requires that an *assessment* be obtained *from the Austrian Research Promotion Agency (Forschungsförderungsgesellschaft – FFG)* in order to claim the research tax credit for in-house research and development. As part of the requirements, the FFG must be provided with detailed descriptions of the research projects, which are subject to strict formal requirements. The descriptions must include the following: project name, objective and content, methodology, innovation, proportion of the entire base of calculation stemming from the respective project, and the planned term of project. The tax authorities have full discretion in evaluating the reports as evidence. Objections to the FFG assessment can be raised during the issuance procedure.

To increase the legal certainty, a research certification (*Forschungsbestätigung*) or ruling can be applied for in advance. Application for a research certification can be filed with the tax authority for each research project to certify that the requirements for the content of the project under material law that apply when claiming the research tax credits are satisfied – as long as the research project has not yet been completed. The fee is EUR 1,000 for each project application, or EUR 200 if the application is rejected. The *ruling* certifies the amount of the assessment basis for the research credit in one financial year, and also requires certification by an auditor. The research certification and ruling can be requested in parallel or separately.

## 5.2. Apprenticeship subsidy

There is a *basic subsidy* (*Basisförderung*) for apprenticeships. This can be applied for retrospectively after completion of each year of apprenticeship, is graduated according to the apprenticeship year, and is equal to between one and three times the gross collectively-agreed apprenticeship remuneration (*Bruttolehrlingsentschädigung*) per year of apprenticeship. For half years, time credits and reductions of apprenticeship time the basic subsidy is calculated on a pro rata basis. The deadline for application is three months after the end of the apprenticeship year concerned.

There are also *quality-related subsidies* for apprentices with learning difficulties, as well as for training and development and for foreign internships organised by the company. In addition there are subsidies for further training for apprentice trainers, under which 75 percent of the course costs up to a maximum of EUR 2,000 per year can be subsidised. In addition, subsidies of EUR 200 and EUR 250 are available for good and excellent apprenticeship exam results.

## 5.3. Investment growth premiums

Small and medium-sized businesses (with up to 250 employees) can receive subsidies in the form of the SME investment growth premium. In 2017 and 2018 this subsidy is granted for the acquisition in an Austrian permanent establishment of depreciable assets (except for vehicles and land) which must be capitalised and which are at least EUR 50,000 (for small companies) or EUR 100,000 higher (for medium-sized companies) than the average acquisition and production costs of the last three years. The subsidy is 15 percent (for small companies) or ten percent (for medium-sized companies) of the fundable investment growth.

For large companies with more than 250 employees there is also an investment growth premium, which similarly to the SME investment subsidy premium is granted for tangible new investments in depreciable assets that have to be capitalised for an Austrian permanent establishment. However, subsidies cannot be used for the purchase of vehicles, intangible investments or land. The premium is ten percent of the fundable investment growth, with the amount of the subsidy being limited under the de-minimis rule to EUR 200,000 (over three financial years) or to EUR 1 million in a regional development area.

## 5.4. Start-up benefits

In 2016 the Council of Ministers approved a package providing for numerous funding measures for start-ups; however it has not yet become law. For employers there will be tax relief for the ancillary wage costs for the first three employees for three years

and for foreign key workers access to the labour market will be made easier by the introduction of a start-up visa. In addition there will be up to 20 percent subsidies for cumulative investments of up to EUR 250,000 per year into the equity of start-ups. Administrative barriers to founding businesses will also be reduced by developing a digital one-stop shop for the start-up phase through which all the interactions with the authorities can be dealt with in one place. In addition the development of business ideas will also be subsidised by awarding grants to researchers in the total amount of EUR 5 million.

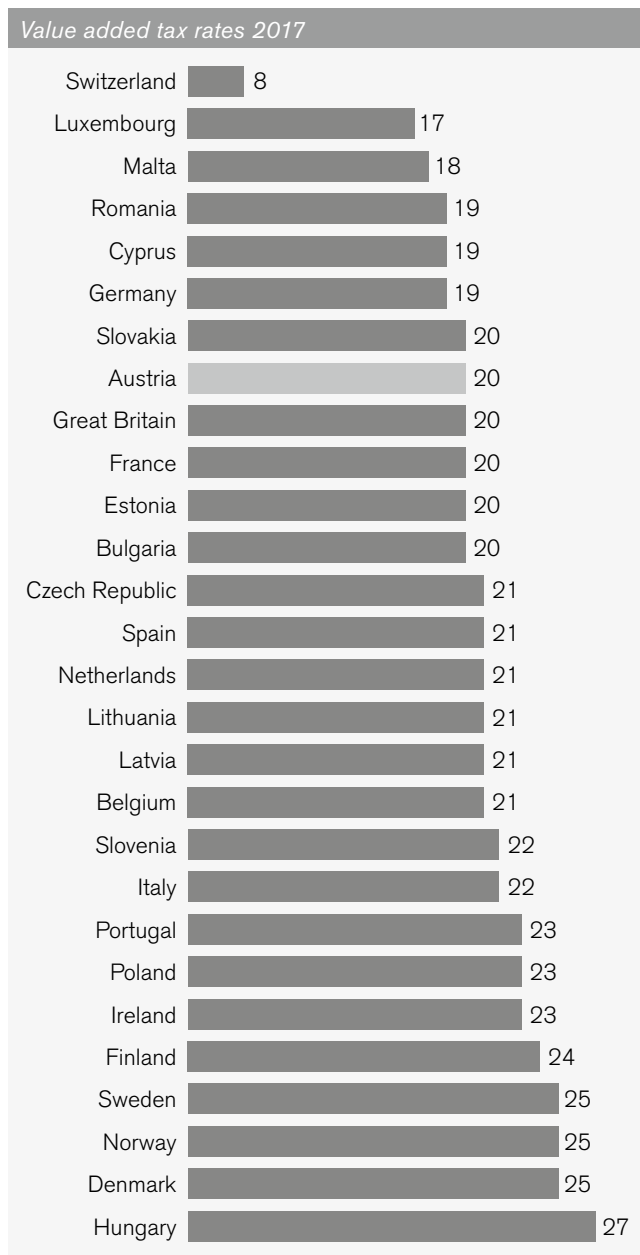
## 6. Value added tax system

The following transactions are subject to value added tax (VAT) in Austria:

- Goods and services provided by an entrepreneur in Austria in return for payment as part of the entrepreneur's business activities
- Own use in Austria
- Imports into Austria from third countries (import VAT)

In Austria the VAT rate is normally 20 percent of the tax base. A reduced rate of ten percent applies among other things to food, books, medications and property rental for residential use. Since 2016, there has been a second reduced rate of VAT of 13%, which applies to certain live animals, animal fodder, stamps, admission to sports events, accommodation and cultural services (e.g. cinemas, museums) etc.

An international comparison of normal tax rates places Austria at the low end of the mid-range:



Source: Deloitte Global Resources, Global Indirect Tax Rates

The **tax base** for goods and services is equal to the price paid, excluding VAT. The tax base for goods and services furnished to parties outside a company is determined by the costs attributable to provision of the goods and services.

### 6.1. Goods

The place of delivery is determined by where the goods are located at the time when the power of disposal is acquired. The following applies for *international trade*:

- When goods are shipped to a buyer, the place of delivery is the place where the shipment begins.

- In the case of imports from third countries, delivery is deemed to take place in the country of import if the VAT is due from the supplier.
- Intra-community purchase is deemed to take place in the member state in which the goods are located at the end of transport.
- Exports, i.e. goods transport or shipment to third countries, are tax-exempt.
- Intra-community deliveries are exempt from VAT. An intra-community delivery takes place if the goods are transported from one member state to another in the community and the buyer is an entrepreneur within the meaning of the Austrian Value added tax Act (*Umsatzsteuergesetz – UStG*).

### 6.2. Services

The place of performance for services depends primarily on whether the service is provided to an entrepreneur or non-entrepreneur.

The place of performance for services *provided to an entrepreneur* is generally the location from which the recipient runs their company (B2B General Clause). If services are provided at the permanent establishment of a company, the location of the permanent establishment is the place of performance.

*Exceptions* from the General Clause include for example, property services, restaurant and catering services, and passenger transport services.

The place of performance for services *provided to a non-entrepreneur* is normally the location from which the entrepreneur providing the service runs their company (B2B General Clause). If the service is provided from a permanent establishment, the permanent establishment is deemed to be the place of performance.

*Exceptions* from the general clause include, for example, goods and passenger transport services, artistic, cultural and scientific services and events, services listed in the Austrian Value added tax Act (*catalogue services*) (e.g. the services of attorneys or tax advisers, financial advice, etc.) and provided to non-entrepreneurs in third party countries, electronic services, and services in the areas of telecommunications, radio and television.

### 6.3. Input tax deduction

In Austria, the entire burden of VAT is borne by the end consumer. The VAT charged to an entrepreneur can be deducted as input tax, and as a rule, therefore, it does not represent a cost factor. Entrepreneurs are only entitled to deduct input tax, however, if the goods or services are obtained for the purposes of the

business, are used at least ten percent for the pursuit of business purposes, and a proper invoice is issued. Import VAT on imports from third countries can also be deducted as input tax. Input tax may not be deducted, however, if the entrepreneur provides goods or services that are not genuinely exempted from VAT (e.g. certain financial services, insurance agent services). All entrepreneurs providing goods and services in Austria are required to invoice VAT, regardless of whether they are resident in Austria.

The Graz City Tax Office has jurisdiction over entrepreneurs with no registered office or permanent establishment in Austria. These entrepreneurs may also obtain input tax refunds from this tax office if they do not provide any taxable goods or services in Austria. Non-EU entrepreneurs must apply to the Graz City Tax Office for a refund of input tax by 30 June of the following year. EU entrepreneurs have until 30 September of the following year to electronically file an application in their respective country of residence.

#### 6.4. Reverse charge

The liability for VAT on services and contracts for work and materials passes to the recipient of the services (reverse charge principle) if the entrepreneur providing these services or work does not operate a business in Austria and does not have a permanent establishment in Austria that is involved in providing the services, and the recipient of the services is an entrepreneur in Austria.

In the case of construction services, the liability also passes to the recipient of the services if the recipient has been engaged to provide the construction services or normally provides construction services itself.

The reverse charge system also applies to:

- The supply of assets assigned as security
- The supply of property with retained title
- Foreclosure sales of property
- The supply of natural gas, electricity, heating or cooling
- The transfer of natural gas and electricity certificates
- The transfer of greenhouse gas emission certificates
- The supply of mobile devices, video game consoles, laptops and tablets if the amount paid is at least EUR 5,000
- The supply of certain metals
- The taxable supply of investment gold

#### 6.5. Tax exemptions

The Austrian Value added tax Act provides many other tax exemptions in addition to the exemption for *exports and intra-community supplies*. These include a number of banking trans-

actions, property sales, insurance services and transport services for cross-border transport of goods. In addition, there is a VAT exemption for *small entrepreneurs* whose sales do not exceed EUR 30,000 per year. However, since this also leads to the loss of the input tax deduction (not genuine exemption), small entrepreneurs have the option of waiving the VAT exemption.

#### 6.6. Tax returns and procedure

As a rule, companies must submit *monthly VAT advance returns*, which count as a tax return, by the 15th day of the second following month. Any advance payment owed as a result of the advance return must also be paid to the tax authorities by the 15<sup>th</sup> day of the second following month. A credit is provided for any negative amounts. Companies with less than EUR 100,000 in sales in the previous year only need to submit their advance returns quarterly.

After the end of the calendar year, the entrepreneur must file a tax return for the total VAT, input tax and import VAT incurred. As a rule, the return must be submitted electronically by 30 June of the following year.

## 7. Other taxes

### 7.1. Real estate transfer tax

Acquisitions of real estate in Austria are subject to real estate transfer tax. Such acquisition includes not only the transfer of title based on a purchase agreement, but also acquisition by foreclosure, adverse possession, or the consolidation of at least 95 percent of the shares in a corporation, or the transfer of at least 95 percent of the shares in a partnership within five years if its assets include real estate in Austria. The acquisition of real estate by means of a gift or by reason of death is also subject to real estate transfer tax.

As defined in the Austrian Real Estate Transfer Tax Act (*Gründerwerbsteuergesetz*), the term *real estate* means land and buildings, as well as growing things (e.g. plants, animals) and appurtenances (e.g. office furniture and equipment). The Austrian Real Estate Transfer Tax Act treats heritable building rights (*Baurecht*) and structures on third-party land (*Superädifikat*) as equivalent to real estate. Real estate does not, however, include machinery and other operating equipment that form part of an operating facility (e.g. cranes, tanks).

Transactions *exempt from real estate transfer tax* include the following:

- The acquisition of real estate with a tax base of up to EUR 1,100 (exemption limit)

- The gratuitous acquisition of agricultural and forestry real estate up to a value of EUR 365,000 (allowance) if the acquirer is a natural person who is part of the family and the person gifting the real estate is at least 55 years of age, or is incapacitated due to a physical or mental disability, if the gift is a business, business unit or partnership interest. For all other properties, the allowance is increased to EUR 900,000, which is also applicable pro rata to acquisitions on a partially commercial basis, and is not restricted to members of a family.
- The acquisition of real estate for an official measure aimed at improving the structure of a building plot
- Acquisition as a result of an official intervention or as a result of a legal transaction undertaken to avoid such an intervention that can be shown to have been imminent
- The partition of real estate among co-owners, if the value of the portion acquired equals the co-owner's share of the entire real estate before partition
- Acquisitions between spouses or registered partners for the purpose of building a residence with a maximum of 150 m<sup>2</sup>.

Acquisitions that are gratuitous or partially gratuitous (consideration not greater than 70 percent of the value of the real estate) there is a *stepped tariff*. This is 0.5 percent up EUR 250,000, 2 percent between EUR 250,000 and EUR 400,000, and above this 3.5 percent. In the case of acquisitions by reason of death, and acquisitions within the family, the stepped tariff can always be applied irrespective of any consideration.

The *general rate* is 3.5 percent, and there are further special provisions as well. Thus for the business transfers benefitting from this, the real estate transfer tax is capped at 0.5 percent of the total value of the real estate. For farmers and foresters the real estate transfer tax for transfers within the family is two percent. In the case of the consolidation of shares, changes to the shareholders in partnerships and reorganisations, the tax rate is 0.5 percent. If the stepped tariff is applied, or a tax rate of 0.5 percent, on application the real estate tax can be spread over two to five years. Acquisitions between the same persons are added together for the application of the tariff within five years.

As a rule, real estate transfer tax is calculated using the *value of the consideration* provided, plus the other liabilities assumed. If no consideration is provided, the calculation is based on the *value of the real estate*. This also applies if the consideration is less than the value of the real estate. There are two exceptions to this basic rule:

- In certain cases the value of the real estate always forms the tax base. This includes transfers between close family members, acquisition by reason of death, reorganisations pursuant to the law on restructuring tax, share consolidations/transfers

by real estate companies, and changes to the shareholders in partnerships.

- The assessed tax value (*einfache Einheitswert*) forms the tax base for transfers of agricultural and forestry real estate between close family members or acquisition by reason of death between such family members, and in the case of consolidations and changes to the shareholders in partnerships if at least 95 percent of the shares are transferred, or for reorganisations falling under the Austrian Reorganization Tax Act when agricultural and forestry real estate is concerned.

The *real estate value* is either the sum of the extrapolated (pro rata) three times the value of the property and the (pro rata) value of the building, or is equivalent to the value derived from a suitable schedule of real estate prices. If documentary evidence is provided, the fair value can also be assessed as the base of calculation. The details of the calculation of the property's value are contained in a regulation.

*The liability for real estate transfer tax* arises at the time at which the acquisition is realized (e.g. conclusion of agreement, or the final decision on devolution of estate or certification by the probate court in the case of acquisition by reason of death). In the case of acquisition by operation of law, the owner and acquirer are liable for the tax, and in the case of acquisition by reason of death only the acquirer is liable. In the event of the consolidation of at least 95 percent of the shares of a company, the party owning these consolidated shares is liable for the tax. In cases of changes to the shareholders in partnerships within five years, the partnership is responsible for the tax. For all other forms of acquisition, all of the parties involved in the acquisition are liable for the real estate transfer tax.

A tax declaration (*Abgabenerklärung*) must be submitted for acquisitions subject to real estate transfer tax by the 15<sup>th</sup> day of the second month following the date the liability arises. An assessment notice is issued based on the tax declaration. The tax liability generally becomes due one month after this notice is served. When acting as authorised representatives, lawyers and notaries have the right to calculate the real estate transfer tax themselves and pay it to the tax authorities.

After the real estate transfer tax has been paid in full, the tax authorities issue a certificate of non-objection, which is required for entry in the land register. In the case of self-calculation by a representative of one of the parties, a self-calculation declaration (*Selbstberechnungserklärung*) is sufficient. However, should the property acquisition tax be paid in instalments, the issuance of the self-calculation declaration takes place after the payment of the first instalment.

## 7.2. Stamp duties and legal transaction fees

Legal transactions are subject to fees in Austria when they are executed by means of a legal instrument that is expressly mentioned in the Austrian Fees Act (*Gebührengesetz*). A distinction is made between fixed fees (e.g. official copies, excerpts, travel documents, drivers licences, marriages) and percentage-based fees (e.g. rental agreements, guarantees, out-of-court settlements, assignments, bills of exchange). While a fixed amount is levied for fixed fees, in the case of percentage-based fees a percentage of the contract amount must be paid as a fee. In addition, the tax authorities must be notified of percentage-based fees by the 15<sup>th</sup> day of the second month following the date on which the liability is incurred and an assessment notice issued. An assessment notice with a surcharge of 50 percent can be issued for fixed fees that are not paid in accordance with the regulations. For all other fees apart from betting fees, a surcharge up to the amount of the original fee can be levied.

*Fees are required* only for those *legal transactions that are* executed by means of a legal instrument, with written letters of acceptance also being considered to be legal instruments. According to a finding issued by the Austrian Administrative Court, emails are also be considered legal instruments which give rise to a liability for fees in Austria. Legal transactions that fall under the Austrian Real Estate Transfer Tax Act (*Grundwerbsteuergesetz*), Austrian Capital Transfer Tax Act (*Kapitalverkehrsteuergesetz*) and Insurance Act (*Versicherungsgesetz*) are exempt from fees under the Austrian Fees Act. This also applies to legal transactions that fall under the Austrian Foundation Receipt Tax Act (*Stiftungseingangsteuergesetz*).

*Liability for fees* arises for legal instruments that are executed in Austria at the time they are signed by all contracting parties. If an instrument is signed by only one contracting party, the liability for the fees arises when the instrument is provided to the other contracting party. In the case of legal instruments executed outside Austria, liability for fees arises at the time of signature, if the parties are resident in Austria and the instrument relates to a matter in Austria or one of the parties undertakes to provide performance in Austria. Fees are still required for instruments executed outside of Austria if the parties are not resident in Austria, but the instrument is brought to Austria and relates to a matter in Austria, or one of the parties undertakes to provide performance in Austria, or in cases in which official use is made of the deed. In the latter case, the liability for fees arises at the time at which the deed is brought into Austria or at which official use is made of it. The Austrian Fees Act does, however, include exceptions for some legal instruments in terms of the time at which liability for a fee arises (e.g. bills of exchange, betting).

Both contracting parties are *liable for the fees* except for legal transactions that only obligate one party, in which case the party in whose interest the instrument is issued is liable. As is the case for the time at which liability arises, exceptions also exist here (e.g. bills of exchange, betting). All the parties liable for fees are jointly and severally liable. In addition to these parties, all the other parties involved in the legal transaction are also liable.

The amount of the fee depends on the underlying legal transaction and whether the fee is a fixed or percentage-based fee. For example, the following *fee rates* apply (as a percentage of the tax base):

- Rental agreements      1%
- Assignments            0.8%
- Guarantees              1%

## II. Permanent establishment – Branch office

### 1. Branch office

If a legal entity resident outside of Austria establishes a branch office in Austria, the branch office must be entered in the *commercial register*. A fine can be imposed if this is not done. The law does not define the level of economic activity from which a branch office exists. Based on the literal meaning of the words, however, it can be assumed that a head office exists outside of Austria.

As a rule, a branch office is *independently managed* in its interactions with the outside world, with the manager frequently having independent power of representation in this area. It generally makes no difference if the manager is bound to instructions from top management. Established case law does not require separate assets, but according to European Court of Justice decisions the existence of a fixed establishment can only be assumed if there is a *minimum level of permanent personnel and technical resources*<sup>8</sup>. The branch office must conclude and process major transactions for the enterprise as a whole (i.e. not just ancillary transactions). A company that only concludes transactions, but does not process them, therefore cannot be a

<sup>8</sup> Straube, Wiener, Commentary on the Austrian Commercial Code, Accounting, 2012, Section12, marg. number 24 et seqq

branch office. Although separate accounting is an indicator, it is not a requirement for the existence of a branch office.<sup>9</sup>

A branch office does not acquire its own legal capacity through being registered, which means that the contracting party is always the foreign entity. As a rule, therefore, the executive bodies of the foreign company also represent the branch office.

Taxation of a branch office depends on whether it is considered a *permanent establishment* for tax purposes. In practice, branch offices generally satisfy the criteria for a permanent establishment, as the meaning of a permanent establishment is broader than that of a branch office.

## 2. Definition of permanent establishment for income tax purposes

As a rule, the country in which a taxpayer's place of residence or registered office is located has the right to tax company profits. However, if an entrepreneur establishes a permanent establishment in another country, he will have limited tax liability in the country of the permanent establishment for all the profits attributable to the permanent establishment. The term "permanent establishment" is therefore very important, as the issue of at what point a permanent establishment exists for tax purposes often arises in practice.

Under the OECD Master Convention, a permanent establishment is taken to be a *fixed place of business* through which the activity of an enterprise is wholly or partly exercised. The term includes, for example, a place of management, branch, business office, factory, workshop, and also a building site or construction or installation project if this lasts more than a certain period. The term does not include warehouses, showrooms, shopping facilities or premises for the collection of information. Multiple, spatially separated places of business must be evaluated separately for categorization as a permanent establishment.<sup>10</sup>

To qualify as a permanent establishment the following conditions must be satisfied:

- **Static element:** An owned or rented place of business at the disposal of the enterprise
- **Functional element:** Business activity must be carried out through this place of business

<sup>9</sup> Schuhmacher, Gruber, Legal issues concerning the branch office, 1993, p. 7 et seqq

<sup>10</sup> Bertl, Djanani, Kofler, Handbuch der österr. Steuerlehre (Manual of Austrian Taxation), 1998, p. 570 et seqq.

- **Time element:** Not of just a temporary nature; no permanent establishment exists if use is only temporary.

Case law views the term "fixed place of business" in terms of the business and requires that the business be wholly or partly carried out there. The more the actual business activities take place outside the fixed place of business, the less the requirements for the extent of the business activities necessary to form the basis of a permanent establishment become.

An *international representative office*, for example, which consists of just a small office with only one or a few employees, and whose main task is to initiate business deals and maintain contact with potential customers, but which cannot process any orders itself will thus generally not be a permanent establishment for income tax purposes. In some cases, however, this depends on the activities of the enterprise and the provisions of the applicable DTC. The Austria-Japan DTC, for example, includes the negative delimitation that a fixed place of business maintained exclusively for advertising, providing information, performing scientific research or carrying out similar activities that are of a preparatory nature for the enterprise or are ancillary activities *does not qualify as a permanent establishment* within the meaning of the convention.

## 3. Taxation of Austrian permanent establishments

If there is a permanent establishment in Austria, this non-Austrian company has *limited tax liability* in Austria and must register with the Austrian tax authorities. The tax liability exists for all the income of the domestic permanent establishment. The profits the permanent establishment would have earned if it had carried out similar activities under the same or similar conditions as an independent enterprise are attributed to it. In practice, two methods have developed for this purpose:

**Direct attribution of profits:** A permanent establishment is treated as an independent business, and the business relationships it has with third parties are attributed to it. As well as general operating expenses, general management expenses are attributed to it, but a profit margin is not. In practice, the earnings of the permanent establishment are attributed on the basis of the accounting or, if this is unavailable, they are estimated.

**Indirect attribution of profit:** The total earnings of the enterprise are first determined and then divided between the head office and permanent establishment using appropriate allocation formulae.



*Any deductions of losses* in subsequent years can only be included to a limited extent. The losses must have been generated in the permanent establishment in Austria, and must exceed the remaining (global) income of the enterprise. The domestic loss must therefore be offset *primarily against positive domestic income*. Foreign income must be determined and disclosed in accordance with Austrian tax law. Loss deduction can only be applied secondarily applied to the country of residence. It is irrelevant whether it is possible to offset the loss in the country of residence. However, in the case of a DTC that prohibits discrimination involving operating facilities (operations must not be put in a worse position in respect of tax than entrepreneurs with unrestricted tax liability) , a loss carryforward must be granted if the losses cannot be used in the country of residence. For information concerning the special aspects of operating expenses, special international aspects, tax concessions and other taxes, please refer to Part I on corporations.

#### 4. Taxation of permanent establishments outside Austria

Since corporations with unlimited tax liability in Austria are liable for tax on their total global income, losses from foreign permanent establishments can also be deducted from income in Austria. This is only the case, however, if these losses have been calculated in accordance with Austrian law, and in addition, the amount of such losses that can be deducted is limited to the amount calculated in accordance with foreign law. Losses that have already been deducted abroad cannot be deducted in Austria. If foreign income is exempt from domestic taxation (exemption method), the foreign losses reported for domestic tax purposes must be fully or partially recaptured in each calendar year in which they are fully or partially taken into account, or could be taken into account, abroad. In addition, recapture is also mandatory for foreign losses claimed for domestic tax purposes after three years at the latest if the country from which the losses originate does not offer comprehensive administrative assistance.<sup>11</sup>

#### 5. VAT liability of a permanent establishment

The definition of entrepreneur within the meaning of the Austrian Value added tax Act, and therefore the liability for VAT, does not depend on the legal form. The discussion on VAT in Part I therefore also applies to permanent establishments.

The *concept of “permanent establishment”*, however, is also of critical importance in the area of VAT, namely in connection with the provision of services. If, as is discussed in section 8.2, a service is provided to the permanent establishment of a company, the location of the permanent establishment is deemed to be the place of performance, and the service is taxable at this location.

Services provided to an Austrian permanent establishment are therefore taxable in Austria, and the foreign company to which the permanent establishment belongs can claim the input tax invoiced. Conversely, if a service is provided by a permanent establishment, the location of the permanent establishment is deemed to be the place at which the service is provided. The company to which the permanent establishment belongs must issue an invoice with Austrian VAT and pay the VAT to the tax authorities.

The term “permanent establishment” is interpreted here based on Community case law. The European Court of Justice Cox refers in this connection to a “fixed establishment” characterized by a sufficient *minimum level of permanent personnel and technical resources* necessary to provide a service, and a sufficient degree of permanence in the sense of the permanent interaction of personnel and technical resources. The concept of a fixed establishment cannot however apply if there is neither the personnel nor a structure allowing a service to be provided.<sup>12</sup><sup>11</sup>

*Example:* A leasing company that does not have the personnel or a structure allowing the autonomous provision of service in the country in which the vehicles are used does not have a fixed establishment.

### III. Taxation of natural persons

#### 1. General information

Natural persons with their *place of residence or usual abode* in Austria have unlimited tax liability in Austria. This tax liability applies to all domestic and foreign income (global income). If natural persons have neither their place of residence nor their usual abode in Austria, tax liability is limited to their Austrian income.

<sup>11</sup> See footnote 4, Page 8

<sup>12</sup> Ruppe, Umsatzsteuergesetz Kommentar (Commentary on the Value-Added Tax Act) 2005, Section 3a marg. number 107

The Austrian Income Tax Act differentiates between seven different types of income. These seven income types represent an exhaustive list. Income that does not fall under one of these income types is not subject to income tax in Austria.

**Business income** includes:

- Income from agriculture and forestry
- Self-employment income
- Income from business operations

The **non-business types of income** are:

- Employment income
- Investment income
- Rental and lease income
- Other income

The first step in determining total income is to add together all the income in each income type. The next step is to offset the different income types against one another (where possible) or add them together. The result is the taxpayer's total income for income tax purposes. Deductions may also be claimed for certain special expenses (*Sonderausgaben*), extraordinary expenses (*außergewöhnliche Belastungen*) and allowances. Progressive income tax is then applied to the income determined in this way.

Income below EUR 11,000 is exempt from income tax. Progressive tax rates are applied to income above EUR 11,000. Since 2016, income of over EUR 90,000 has been taxed at 50 percent, and portions of income of over EUR 1 million are taxed at 55 percent. The 55 percent rate is of limited duration until 2020. The total tax due is therefore calculated as follows:

| income (I)                  | rate of income tax |
|-----------------------------|--------------------|
| for the first EUR 11,000    | 0%                 |
| for EUR 11,000 to 18,000    | 25%                |
| for EUR 18,000 to 31,000    | 35%                |
| for EUR 31,000 to 60,000    | 42%                |
| for EUR 60,000 to 90,000    | 48%                |
| for EUR 90,000 to 1,000,000 | 50%                |
| over EUR 1,000,000          | 55%                |

An international comparison of top tax rates shows the following:

| Country        | Maximum rate | ...starting at |
|----------------|--------------|----------------|
| Czech Republic | 15%          | flat rate      |
| Hungary        | 15%          | flat rate      |
| Slovakia       | 25%          | EUR 35,022,31  |
| Poland         | 32%          | PLN 85,528     |
| United States  | 39,60%       | variable       |

|               |      |                |
|---------------|------|----------------|
| Ireland       | 40%  | EUR 33,800     |
| Italy         | 43%  | EUR 75,000     |
| Japan         | 45%  | JPY 40,000,000 |
| Great Britain | 45%  | GBP 150,000    |
| Germany       | 45%  | EUR 256,304    |
| France        | 45%  | EUR 152,260    |
| Austria       | 50%* | EUR 90,000     |
| Slovenia      | 50%  | EUR 70,907.20  |
| Belgium       | 50%  | EUR 38,830     |
| Netherlands   | 52%  | EUR 67,072     |

Source: IBFD 2017<sup>13</sup>

\* Since 2016, incomes of over EUR 1 million have been taxed at 55 percent. This regulation is of limited duration until 2020.

## 2. Employment income

In addition to salary and benefits from existing and former employment (remuneration for active service and company pensions), employment income also includes payments from statutory health and casualty insurance funds, pension funds and company pension schemes. Both cash and non-cash remuneration (remuneration in kind) are included, e.g. employee housing, work clothes provided, use of a company car and parking at the place of employment.

Employment income is taxed in the form of **income tax** that is deducted from employee pay. It is the employer's duty to calculate, deduct and pay this payroll tax to the tax authority, and the employer is also liable for deducting and paying the tax correctly.

### Social security

The employee portion of statutory social security contributions is also deducted and paid at the same time as the income payroll. Social security contributions are calculated based on gross pay using the following rates for salaried employees (different rates apply for waged employees):

| Type of contribution   | Employee contribution | Employer contribution |
|------------------------|-----------------------|-----------------------|
| Health insurance       | 3.87%                 | 3.78%                 |
| Accident insurance     |                       | 1.3%                  |
| Pension insurance      | 10.25%                | 12.55%                |
| Unemployment insurance | 3%                    | 3.35%                 |
| Other                  | 1%                    | 0.5%                  |
| <b>Total</b>           | <b>18.12%</b>         | <b>21.48%</b>         |

Source: WKO.at, Beitragswesen Dienstnehmer 2017

(Employee Contributions 2017)

A monthly *maximum threshold* of EUR 4,980 (maximum contribution base) applies to regular salary payments. In the case of special payments (*Sonderzahlungen*), there is an annual threshold of EUR 9,300, while the employee contribution in this case is 17.12 percent and the employer contribution is 20.98 percent.

In addition, 1.53 percent of employees' salary must be paid into a corporate pension fund. An (employer) contribution equalling 3.9 percent of gross salary must be made to the Austrian Family Assistance Fund (*Familienlastenausgleichsfonds*) and three percent to local government. The Austrian Economic Chamber contribution (employer surcharge) (*Wirtschaftskammerumlage*) is approximately 0.4 percent, depending on the province. If family members are co-insured, the employee must pay a contribution equal to 3.4 percent of the contribution base. Total non-wage labour costs for the employer are therefore approximately 30.5 percent.

Further deductions in the form of *income-related expenses* (*Werbungskosten*), *special expenses* (*Sonderausgaben*), *extraordinary expenses* (*außergewöhnlichen Belastungen*) and *allowances* (*Freibeträge*) can be claimed in the employee's tax assessment.

#### *Benefits in kind*

Special provisions apply to benefits in kind. If there are no special flat rates (e.g. for company cars), benefits in kind must be reported at the end prices after being reduced by the typical discounts at the place of provision.

Some forms of benefits in kind, such as meal vouchers (EUR 4.40 per day) and company outings (up to EUR 365), are exempt from income tax. For the private use of a company car, depending on the distance and the CO<sub>2</sub> emissions value of the vehicle, 0.75 to 2 percent of the acquisition costs is applied, up to a maximum amount of EUR 960.

#### *Other remuneration*

Other remuneration (for instance: 13th and 14th months' remuneration) is given preferential tax treatment. These are tax-exempt up to EUR 620, with amounts above this taxed at a rate of 6 to 35.75 percent up to EUR 83,332, but subject to a limit of one-sixth of regular pay. No tax is levied if one-sixth of regular pay does not exceed EUR 2,100. The following rates apply to other remuneration below the one-sixth of regular pay limit:

|                                |                     |
|--------------------------------|---------------------|
| first EUR 620 . . . . .        | 0%                  |
| EUR 620 to 25,000 . . . . .    | 6%                  |
| EUR 25,000 to 50,000 . . . . . | 27%                 |
| EUR 50,000 to 83,333 . . . . . | 35.75%              |
| above EUR 83,333 . . . . .     | according to tariff |

Bonuses for dirty working conditions (*Schmutzzulage*), difficult working conditions (*Erschwerniszulage*) and dangerous working conditions (*Gefahrenzulage*), and bonuses for weekend, holiday and night work are tax-exempt up to EUR 360 per month. The overtime premium for the first ten hours of overtime per month, up to a maximum of 50 percent of the basic wage, is not taxed – the limit here is EUR 86 per month.

*Severance pay* due on the termination of employment is also considered employee pay, and is therefore included in employment income. In the case of severance amounts equal to a multiple (depending on the length of employment) of regular pay, the payroll tax is calculated as a multiple of the income tax on the regular pay. A preferential tax rate of six percent is applied, however, if this reduces the amount of payroll tax. Voluntary severance pay is also taxed at six percent up to the maximum amount of EUR 44,820, provided the total does not exceed one-quarter of the regular pay for the last twelve months.

*Employees with limited tax liability* are only subject to income tax in Austria if the employer maintains a permanent establishment in Austria. EUR 9,000 is added to the income of employees with limited tax liability when their income tax is calculated.

### 3. Tax concessions for seconded employees

Individuals that have a place of residence or usual abode in Austria, i.e. they spend more than six months of the year in Austria, have *unlimited tax liability* in Austria. Individuals who are temporarily posted in Austria by a foreign employer to work for an Austrian employer, and did not have a place of residence in Austria in the last ten years, are deemed "expatriates". The employment in Austria cannot last longer than five years and the employee's permanent residence must remain abroad.

In order to simplify payroll accounting for foreign managers seconded to Austria ("expatriates"), the Austrian Ministry of Finance issued a decree granting certain deductions to the seconded employees. The deductions can be made by the employer, in which case they do not need to be claimed in later assessments.

Deductions can be claimed for actual moving expenses (maximum 1/15 of annual gross pay), expenses for maintaining two households (e.g. rent, operating costs, maximum EUR 2,200 per month), expenses for the vocational training of one child outside the place of residence (flat rate of EUR 110 per month)

and expenses for family trips home (maximum EUR 306 per month).

Income-related expenses and extraordinary expenses other than those indicated in the decree must not be included in this simplified procedure, but can be claimed on the annual tax return.

The tax authorities must be notified that the simplified procedure will be used at the beginning of the period of employment and at the beginning of each subsequent calendar year.

Since the 2016 tax assessment year, other income-related expenses can be deducted from taxes in the form of a lump sum amounting to 20 percent of the calculation basis (gross remuneration minus tax-free remuneration and other remuneration), but to a maximum of EUR 2,500 a year. The claim for the lump sum allowance can be immediately filed by the employer (please also see Point 9 on flat-rate allowances).

If employees have no place of residence or usual abode in Austria, their *tax liability is limited* to their Austrian income for work that is performed or used in Austria.

To avoid double taxation of income that is taxable in Austria, double taxation conventions with other countries regulate which country is entitled to the right of taxation. These conventions are based on the OECD Model Convention, which stipulates that the right to tax self-employment income remains with the country of residence if

- The recipient of the remuneration spends *no more than 183 days* in the other contracting country within one calendar year and
- The remuneration is paid by or for an employer that is *not resident in the other country* and
- The remuneration is *not paid by a permanent establishment* of the employer in the other country.

In its decree of 12 June 2014, the Austrian Ministry of Finance made it clear that the term employer should be interpreted in an economic sense in this connection, and that the employer is given employer status in accordance with the convention. This means that employees are also liable to taxation in the country of employment even if their stay there is less than 183 days. There are, however, exceptions to this, but in individual cases, the provisions of the double taxation convention between the countries concerned must be clarified.

#### *Social security*

As a rule, individuals employed in Austria are subject to the national statutory provisions on social security contributions.

On the other hand the “spillover principle” applies, according to which domestic social security should not be interrupted if a taxpayer is temporarily seconded to another country. The application of both of these principles can result in an obligation to make social security contributions in two or more countries. To avoid this, *bilateral treaties and EU regulations* were adopted to regulate the country in which there is an obligation to make social security contributions exists and which benefits can be claimed, as well as the mutual recognition of claims and coverage periods. In many cases, these treaties allow employees seconded for a limited period of time to remain in their previous social security systems.

#### *Right of residence*

As a rule, citizens of the EEA and Switzerland have an unrestricted right of entry and temporary residence in Austria. Citizens of third countries who wish to pursue employment in Austria for a period of no more than six months must apply to an Austrian consulate abroad for a *visa* valid for up to six months. For longer periods of stay, an application for a *residence permit or permanent residence* is necessary or obligatory. Citizens of third countries (and currently also citizens of Croatia) must also obtain an Austrian work permit from the Austrian Foreign Office.

#### *Other reporting requirements*

An entrepreneur who seconded employees from other EU/EEA states or Switzerland to Austria must report the secondment to the Central Coordination Office (ZKO) of the Austrian Federal Ministry of Finance. This must be done no later than one week before the start of employment.

## 4. Self-employment income

Income in this category includes income from scientific, artistic, literary, teaching and educational employment, and also income from professional employment as a doctor, lawyer, notary, public auditor or tax advisor (*Wirtschaftstreuhänder*), interpreter, or journalist (the so-called liberal professions). Employment income from asset management activity, such as property managers or supervisory board member, is also included in this income type. *Shareholder directors* are however given special treatment.

As a rule, income received by a shareholder director is employment income if the shareholder holds an interest of up to 25 percent in the company. If the interest is greater than 25 percent, then the income of the shareholder director is generally considered to be self-employment income, even if the shareholder director performs no management activities in the company.

Shareholder directors who do not hold a material interest earn employment income, and therefore fall into the category of employees subject to payroll tax. This means that the company must deduct payroll tax during payroll accounting. Classification as a shareholder director with a non-material interest means that the shareholder director is entitled to all of the tax concessions available for employees (e.g. preferential taxation of special payments and severance pay).

Shareholder directors holding an interest greater than 25 percent earn self-employment income that must be reported for assessment – even if they are bound by instructions under the articles of association. They are not entitled to any employee tax concessions.

## 5. Investment income

Investment income includes not only income from the provision of capital (for example, dividends, interest, income from profit participation rights and profit shares from interests held as a silent partner), investment income also includes realized increases in the value of investments and income from derivatives.

Dividends, income from the disposal of investments and income from securitized derivatives are subject to the “special tax rate” of 27.5 percent. Income from financial investments and other non-securitized assets at financial institutions – excluding compensation payments and lending fees – are taxed at a special tax rate of 25 percent. If the paying agent or bank holding the custody account is located in Austria, the special tax rate is levied in the form of a capital gains deduction. If such income comes from a foreign source

(paying agent or bank holding the custody account is located abroad) it is taxed at the “special tax rate” of 25 percent during assessment. A credit can be claimed for tax deducted at source,

regardless of whether a double taxation convention exists. In the case of foreign dividends, the credit is limited to 15 percent of the capital earnings.

*Bank interest and interest* from securities in Austrian securities accounts relating to a person resident in Austria is subject to final taxation by means of the deduction of capital gains tax; as this discharges the income tax liability, no assessment is required. This is also the case for Austrian *dividend income* received from an Austrian paying agent or bank holding the custody account. Capital gains tax must be paid for investments held as private assets as well as those held as business assets.

Taxpayers with a progressive tax rate of less than 27.5 percent can have the tax they have paid on their income in the form of final taxation refunded or credited if they invest this. It is important to note, however, that in this case all investment income must be included in the assessment. It is not possible to continue applying the final taxation tax to part of the investment income.

Investment income in the form of *realized increases in the value of investments* is also subject to the 27.5 percent special tax rate when it comes from the sale of a new portfolio (company or fund shares bought after 31 December 2010 and other financial investments acquired after 31 March 2012) or from the sale of shares in bonds, certificates or securitized derivatives that were acquired between 1 October 2011 and 31 March 2012. All other financial assets are considered old portfolios and can be divested exempt from taxes. The income derives from the difference between the proceeds from disposal and the acquisition costs. Incidental acquisition costs may also be included if the investments are held as business assets, but this is not possible for investments that are not held as business assets. If investments are held as private assets, the deduction of capital gains tax definitively discharges the tax liability; this is not the case for investments held as business assets.

This can be summarized as follows:

| <i>Income</i>                         | <i>Dividends</i>                  | <i>Interest</i>                   | <i>Realized increases in value</i>  | <i>Derivatives</i>                  |
|---------------------------------------|-----------------------------------|-----------------------------------|-------------------------------------|-------------------------------------|
| Subject to capital gains tax if       | paying agent/debtor is in Austria | paying agent/debtor is in Austria | Austrian custodian/<br>paying agent | Austrian custodian/<br>paying agent |
| Full tax settlement (private assets)  | yes                               | yes                               | yes                                 | yes                                 |
| Full tax settlement (business assets) | yes                               | yes                               | no                                  | no                                  |

Special *provisions govern the deduction of losses* suffered. As a rule, claims for deductions relating to investment losses can only be submitted during the tax assessment. They may not, however, be offset against other income types. Even for income of the same type, losses cannot be offset against income that is not subject to the special tax rate, nor can disposal losses be offset against interest income from cash deposits and other receivables from banks. Private persons cannot carry forward any remaining losses, although 55 percent of losses can be carried forward for business purposes. The loss is offset directly by the bank at which the securities account is held. In cases in which there are two or more securities accounts and where these are maintained at different banks, the losses can only be offset by means of a tax assessment.

Interest from private loans, non-securitized derivatives and profit shares of a silent partner is taxed at the normal progressive tax rates.

## 6. Investment funds held as private assets

Investment funds are portfolios of assets consisting of securities, money market instruments and other liquid financial assets that are divided into unit certificates and thus co-owned by the unit holders. Because investment funds are not subject to taxation, income is taxed at the unit holder level based on the pass through principle.

The taxation depends on the *time* at which the income is realized, and a distinction must be made between *distributed income* and *deemed distribution income*. Distributed income is recorded and taxed at the time of distribution. Deemed distribution income primarily consists of income retained (reinvested) by the fund. This income is deemed distributed on the date of the announcement by the Reporting Unit.

For the purpose of taxation, a distinction must be made between reporting funds and non-reporting funds. In the case of

*reporting funds* the tax representative reports the tax assessment bases to the reporting office (Österreichische Kontrollbank), which determines the taxable earnings and the amount of capital gains tax on the basis of this. *Non-reporting funds* do not have a tax representative. The amount of taxable income is estimated as 90 percent of the difference between the first and last redemption prices set during the calendar year, or ten percent of the final redemption price for the calendar year, whichever is greater. The Austrian custodian or paying agents must withhold the capital gains tax based on this flat-rate estimate of income. If the investor reports the income himself, the flat-rate estimation is avoided and an adjustment to the investment tax deducted is made during the tax assessment.

If the *coupon paying agent is in Austria*, the taxable fund income is definitively discharged through the deduction of capital gains tax. If the paying agent is *abroad*, the income is reported for assessment and taxed at the *special tax rate of 27.5 percent*. Capital gains tax is not levied on Austrian dividends that were already taxed when received by the investment fund (they effectively indirect definitive discharge of tax liability).

If capital gains are distributed, they are 100% taxable. Earnings that have already been taken into account as deemed distribution income can be distributed free from tax according to a legally standardised sequence. Retained capital gains are taxed at 60 percent.

On the disposal of fund units, the realized increase in value is also taxed at the investment income tax rate of 27.5 percent or the special tax rate of 27.5 percent. However, fund units that were acquired before 1 January 2011 can still be sold tax-free. Deemed distribution income that is already taxed is added to the acquisition costs, and tax-exempt distributions reduce the acquisition costs. If the disposal of the units results in a loss, the loss can be offset during the tax assessment, but cannot be carried forward.

|   | Reporting funds                         |               | Non-reporting funds           |                               | Disposal gains for fund units acquired on or after 1 January 2011 |
|---|---|---------------|-------------------------------|-------------------------------|---|
|   | Reinvested earnings                     | Distributions | Reinvested earnings           | Distribution                  |   |
| Austrian securities account or paying agent | 27.5% final capital gains tax           |               | 27.5% final capital gains tax | 27.5% final capital gains tax |   |
| Foreign securities account or paying agent  | Assessment at special tax rate of 27.5% |               |                               |                               |   |

## 7. Real estate taxation

Real estate sales are taxable regardless of the time of acquisition or holding period. The income (profit on disposal) is subject to a “special tax rate” of 30 percent. For privately held real estate this discharges the income tax.

The special tax rate of 30 percent also applies in the commercial area for real estate held as assets. However, the income must be included in the tax return and is taxed at 30 percent in the context of the tax assessment. The special tax rate does not apply when:

- The property belongs to current assets
- A focus of the business activities is on the transfer and sale of real estate
- The property has been written down to going concern value
- Hidden reserves realized before 1 April 2012 were transferred to the property

The profit on disposal is the difference between the disposal proceeds and the acquisition costs (adjusted for construction costs, repair costs and depreciation). Income-related expenses in connection with the disposal are not deductible, except for expenses incurred for calculation of the real estate tax by the representatives of the parties or notification of this to the tax authorities.

Special flat-rate estimates for determining capital gains apply to *properties under the old tax regime*, i.e. properties for which the speculative holding period expired on or before 31 March 2012. For properties converted after 1987, 60 percent of the profit on disposal is deemed to be income, corresponding to an effective tax rate of 18 percent. For all other properties, tax is levied at a rate of 4.2 percent of the profit on disposal. Upon request, the profit on disposal can also be calculated using the method for properties under the new tax regime.

This can be summarized as follows:

|                            | <i>Property under old tax regime</i>   | <i>Property under new tax regime</i>  |
|----------------------------|--|---|
| Definition                 | Speculative period expired, i.e. acquired <b>before 31 March 2002</b> and held as private assets or business assets in the case of Section 4(1) and Section 4(3) | Speculative period not expired, i.e. acquired <b>after 31 March 2002</b> or prior to this in the case of Section 5(1) |
| Taxation as private assets | 30% special tax rate with definitive discharge of tax liability (general income tax rate upon request)   |   |

|                             |   |                    |
|-----------------------------|---|--------------------|
| Taxation as business assets | Assessment with 30% special tax rate (general income tax rate upon request)                       |                    |
| Tax base                    | Flat-rate of 60% of disposal proceeds if converted after 1987; otherwise 14% of disposal proceeds | Profit on disposal |

Owner-occupied homes or residential units that have been used as a primary residence for an uninterrupted period of at least two years since acquisition or production (completion) and until sale, or an uninterrupted period of five years during the last ten years prior to sale, are exempt from taxation. Owner-constructed buildings are also exempt from taxation if they have not been used to earn income in the last ten years and the person disposing of the property is also the builder of the property. The exemption for properties sold as the result of an official intervention also remains in place.

The payment of real estate income tax is linked to the payment of the real estate transfer tax.

- If the real estate transfer tax is calculated by a representative of the parties (e.g. notary, lawyer) and at the same time the sale of the property generates income, then the tax authority must be notified and the real estate income tax calculated and paid by the representative.
- If the real estate transfer tax is not self-calculated, when the return for real estate transfer tax is filed the tax authority must be informed whether the sale of the property generated income. The taxpayer must make a “special advance payment” for this income himself.

If the real estate income tax is paid by the representatives of the parties, this definitively discharges the income tax liability. If a special advance payment is made, the income must be reported in the income tax return. This also applies to real estate held as business assets.

Positive and negative income can only be offset during income tax assessment, and the special tax rate of 30 percent continues to apply. 60 percent of any remaining loss can be curtailed, and in the non-operating area can be offset against income from renting and leasing for 15 years. Alternatively, the curtailed loss can be offset against income from renting and leasing exclusively in the first year. Losses cannot be offset against business income if the special tax rate applies.

## 8. Deductions

### *Profit allowance for business income*

Natural persons can claim a *profit allowance* where business income types are involved. However, investment income taxed at the special tax rate of 27.5 percent and profits on the disposal of businesses, business units or partnership shares are excluded from the tax base for the profit allowance.

The profit allowance is divided into a basic allowance and an investment-based profit allowance. The *basic allowance* can be claimed for 13 percent of profits (maximum EUR 3,900), regardless of the investments made. In addition, an *investment-based profit allowance* of 13 percent can be claimed for investments in eligible depreciable assets or domestic and foreign residential construction bonds (*Wohnbauanleihen*). The profit allowance is:

- Up to EUR 175,000 of the tax base 13%
- For the next EUR 175,000 of the tax base 7%
- For the next EUR 230,000 of the tax base 4.5%

Thus the maximum profit allowance that can be claimed each financial year is EUR 45,350.

The following are eligible assets:

- Depreciable fixed assets with a normal usable life of at least four years that are used in an Austrian permanent establishment or in the EU/EEA areas.
- Domestic convertible bonds issued by AGs to promote residential construction (*Wohnbauanleihen*) and foreign bonds of this nature that serve to promote residential construction in Austria, originate in the EU or a third country that offers comprehensive administrative assistance, and are held as business assets for at least four years<sup>14</sup>.

The investment-based profit allowance is limited by the size of the investments made in the financial year in question.

No investment-based profit allowance is available for:

- Passenger cars and station wagons (except for driving school vehicles or commercial passenger vehicles)
- Aircraft
- Low-value assets
- Used assets
- Assets acquired by a company controlled by the taxpayer
- Assets for which a research subsidy has been claimed

In the case of partnerships, the entire profit allowance is available to the partners on a pro rata basis (based on their profit participation shares). Taxpayers that use flat-rate estimates for all or part of their profits can only claim the basic allowance, not the investment-based allowance.

If eligible assets are held as fixed assets for less than four years, the investment-based profit allowance claimed must strictly be recognized as an addition to profits in the year of disposal.

### *Transfer of hidden reserves*

Natural persons can transfer *hidden reserves* that are revealed at the time an asset is sold (sale price greater than the carrying amount) to the acquisition costs of newly acquired assets. The following conditions must be met:

- The asset must have belonged to the fixed assets of the company *for at least seven years* at the time of disposal (the period for real estate is 15 years if hidden reserves were previously transferred to it).
- The newly acquired asset to which the hidden reserves are to be transferred must be used in an *Austrian permanent establishment*.

Hidden reserves may also be transferred if the asset no longer forms part of the business assets as a result of *force majeure* or an official intervention. The holding period of seven or fifteen years does not apply in this case.

A variety of restrictions apply to the transfer of hidden reserves. For example, hidden reserves can only be transferred to the acquisition costs of land if the hidden reserves also come from the disposal of land.

Hidden reserves cannot be transferred to the acquisition cost of businesses, business units, partnership interests or financial assets. In addition, hidden reserves from the disposal of businesses, business units, or partnership interests may not be transferred to other assets.

If hidden reserves cannot be transferred to newly acquired assets in the year of disposal, they can be transferred to a *tax-exempt reserve* (transfer reserve). This transfer reserve can be transferred to the acquisition cost of a newly acquired asset within a period of twelve months of the date of disposal of the asset (24 months in the case of force majeure or official intervention). If a transfer is not possible within this period (calculated to the day), the transfer reserve must be reversed and recognized as an addition to profit.

<sup>14</sup> This applies to financial years that end after 30 June 2014 and begin before 31 December 2016.



*Income-related expenses, special expenditures and other deduction items*

**Income-related expenses** are expenses or outlays for acquiring, securing or preserving income. These include, for example, expenses for tools, contributions for compulsory insurance, compulsory contributions to statutory special-interest groups and expenses for training and development. Income-related expenses can be deducted from taxable income. For income from employment without supporting documentation an annual flat-rate deduction of EUR 132 can be claimed. Expenses in excess of this amount can be claimed if supporting documents are available.

Contributions to voluntary health, accident and pension insurance, voluntary contributions to pension funds and expenses for the creation or renovation of residential living space are considered *special expenses*. An annual flat-rate allowance of EUR 60 can be claimed for these. If proof of higher payments can be provided, a standard maximum deduction of EUR 2,920 per year can be claimed. This increases if the taxpayer is entitled to the sole-earner or single-parent credit, or their (marital) partner has a low income. In each case, however, only a quarter of the special expenses actually incurred can be deducted. This deduction can be made until 2020 for contracts concluded prior to 1 January 2016. In other cases, these special expenditures can no longer be claimed as of 1 January 2016.

Church contributions can be claimed as special expenses up to a maximum amount of EUR 400 per year. Expenses for tax advice are fully deductible. Cash donations to certain eligible organizations pursuing charitable purposes may be claimed up to a maximum of ten percent of income.

Since 2017 church contributions and voluntary donations no longer need to be reported to the tax authorities via tax returns, as they are automatically taken into account when the formal requirements are met.

Taxpayers forced to incur *extraordinary expenses* can deduct them in certain circumstances. The prerequisite for this is that the taxpayer's economic capacity is significantly impaired, with expenses exceeding a minimum threshold of six to twelve percent of income, depending on the amount of income. No minimum threshold applies in the case of catastrophic damages. Childcare expenses may be claimed up to a maximum amount of EUR 2,300 per child until the age of ten. The childcare must be provided by a public childcare institution or individuals with the proper educational qualifications.

A number of *credits* can be deducted from the income tax calculated. Employees and retired persons can claim a commuter tax credit or pensioner tax credit (*Absetzbetrag*) of EUR 400 per year. Taxpayers with at least one child who have been married or have had a registered partner for more than six months of the calendar year are entitled to the sole-earner credit (*Alleinverdienerabsetzbetrag*) of EUR 494 for one child and EUR 669 for two children if their partner has an annual income of no more than EUR 6,000. The annual single-parent credit (*Alleinerziehendeabsetzbetrag*) is EUR 494 for one child and EUR 669 for two children. In addition, taxpayers receiving the family allowance (*Familienbeihilfe*) are entitled to a monthly child credit (*Kinderabsetzungsbeitrag*) of EUR 58.40. Persons providing statutory maintenance for a child who is not a member of their household are entitled to a maintenance credit (*Unterhaltsabsetzbetrag*) of EUR 29.20 per month.

## 9. Flat-rate estimates

There are a variety of options available for making flat-rate estimates of income-related expenses and operating expenses, which allow these expenses to be deducted without documentary evidence of the actual expenses paid.

With respect to income-related expenses, the Austrian Federal Ministry of Finance issued a regulation with average rates for the income-related expenses of members of certain occupational groups, including, for example, artists, journalists, musicians, forestry workers, building caretakers, members of city, municipal and local government councils, and expatriates. The average rate is applied to the gross pay minus the tax-exempt pay and other remuneration that is not subject to payroll tax. It must be noted that no other income-related expenses can be claimed.

In the business area, a distinction is made between the statutory basic flat-rate deduction and industry-specific flat-rate deductions. As a rule, flat-rate deductions can only be claimed if there is no requirement for bookkeeping and accounts are not maintained voluntarily. To claim a deduction, a certain sales limit must not be exceeded and the actual amount of sales must be determined.

The statutory basic flat-rate deduction can be claimed by all taxpayers with self-employment income or income from business activities whose sales do not exceed EUR 220,000. Profits must be determined in accordance with Section 4 (3) of the Austrian Income Tax Act (cash-basis accounting). The average rate is six percent for income from providing commercial and technical advice, literary, speaking and scientific activities, and for shareholder directors, and twelve percent in other cases. In

addition, the actual expenses for goods, raw materials and supplies, wages (including incidental wage costs), third party wages and compulsory liability insurance may also be claimed.

Separate flat-rate deductions are provided for certain industries. These can also only be claimed if a certain sales limit is not exceeded, and there is no bookkeeping requirement and accounts are not maintained voluntarily. Industry flat-rates are available for the restaurant and accommodation industry, food retail and general stores, pharmacists, sales representatives, artists, writers and athletes. A regulation also exists for flat-rate deductions for income from agriculture and forestry and businesses that do not keep accounting records.

## 10. Assessment procedure

The assessment period for income tax is generally the calendar year. For taxpayers with income subject to payroll tax, the law provides an exhaustive list of situations in which an assessment is required. An assessment can also be performed at the taxpayer's request.

An **assessment is obligatory**, for example, when taxpayers with income subject to payroll tax also earn over EUR 730 in income that is not subject to the deduction of income tax. Up to EUR 22 in investment income is disregarded in this connection (de minimis limit). An assessment is also required if incomes subject to the deduction of income tax are obtained from two or more employment relationships.

An assessment must also be undertaken if the sole-earner/single-parent credit is applied in regular payroll accounting when the requirements for this are not satisfied. Low-income employees who do not pay income tax are reimbursed with a "negative tax" amounting to 50 percent of the social insurance contributions, up to a maximum of EUR 400. In these cases where credits are issued, an employee tax assessment automatically takes place on the basis of their wage slip.

A **request for a tax assessment** can be submitted up to five years after the end of the assessment period. This is normally done by filing a tax return. The request allows the taxpayer to claim the deductions for income-related expenses, special expenses, extraordinary expenses, and the sole-earner/single-parent credits. An assessment can also be undertaken if the employee credit leads to negative income tax or if there is a loss in respect of other income.

Tax returns filed electronically must be submitted by the end of June the following year. If the official form is used, the deadline is the end of April.

As a rule, every taxpayer must make **advance payments** in respect of their income tax. In the case of employment income, instalment payments are only required if the EUR 730 threshold is exceeded or if two or more incomes subject to payroll tax are received simultaneously, but are taxed separately. The tax office sends a notice specifying the instalment payments, and these must be paid quarterly.

## 11. Partnerships

Partnerships are contractual agreements by two or more persons to exercise economic activities under a joint company name that appears as a single legal entity in legal relations but does not have its own legal personality. Partnerships include the *OG (offene Gesellschaft – general partnership)* and the *KG (Kommanditgesellschaft – limited partnership)*, with at least one of the partners having unlimited liability in respect of the company's creditors. Partnerships are formed by means of the articles of association without any formal requirements. OGs and KGs cannot enter into relationships with third parties until registered in the commercial register.

Partnerships are not subject to income tax themselves. The profit or loss of a partnership is determined by a **uniform and separate assessment** and attributed directly to the partners. A loss for the partner can be offset against other income or carried forward if applicable in accordance with the general provisions. Taxation at the partner level takes place using progressive tax rates as for natural persons.

However, for capital partnerships (such as atypical silent partners) that are natural persons, the offsetting or compensation of losses are subject to restrictions. Like natural persons, partnerships can earn business or non-business income (mainly rental and lease income). The information provided with respect to natural persons also applies in this case.

## 12. References

With regard to the special aspects of operating expenses, special international aspects, tax concessions, the VAT system and other taxes, please refer to the information provided in Part I on corporations.



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