The Inward Investment and International Taxation Review

Tenth Edition

Editor
Tim Sanders

The LawReviews

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This article was first published in February 2020
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The LawReviews

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-472-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ABOU JAOUDE & ASSOCIATES LAW FIRM

ADVOKATFIRMAET GRETTE AS

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AFRIDI & ANGELL

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PREFACE

Many of the jurisdictional tax changes highlighted in the chapters in this volume reflect global tax trends that are likely to continue in 2020 and beyond. Some of these trends merit special mention in this preface.

One such area of material change is the taxation of the digital economy and this edition has a chapter dedicated to this topic. Although OECD attempts to find a consensus-based solution continue, notably with the publication on 9 October 2019 of proposals for a 'unified approach', many countries, frustrated by the time it will take to introduce concrete measures, have decided to take unilateral action, pending an international solution. In Europe, laws have been introduced or are pending in Austria, Belgium, the Czech Republic, France, Hungary, Italy, Poland, Slovenia, Spain and the United Kingdom and outside of Europe other countries are also introducing or proposing new laws, including Malaysia, Chile, Uruguay and Colombia. These domestic laws are likely to be a source of political tension with the United States, which sees such taxes as a threat to major US multinationals such as Google, Facebook and Amazon. This tension manifested itself in December 2019 when the United States threatened France with tariffs on key French exports to the United States on items such as champagne and sparkling wine, cheese, make-up, handbags and homeware such as porcelain and bone china, in retaliation for the introduction of the French digital services tax.

Another area where tax reform already introduced in some countries is likely to expand into other jurisdictions in 2020 is in the area of interest limitation rules. The OECD proposed limiting a tax deduction for net interest expense to 30 per cent of taxable EBITDA. This rule has been adopted in Germany, the United Kingdom and the United States and other EU countries are required to implement similar rules by 2022. It is important that groups review their cross-border financing in the light of these changes particularly as, unlike the case with transfer pricing, there is unlikely to be a right to exempt a receipt from tax in the recipient country when a deduction is denied in the paying country.

The effect of the wide-ranging US tax reform continues to impact the approach of US multinational groups to their overseas subsidiaries and one can expect further impact in 2020 as US groups re-evaluate their non-US financing and treasury operations.

It is hoped that this volume will prove to be a useful guide to the tax rules in the jurisdictions where clients conduct their businesses. Each chapter aims to provide topical and current insights from leading experts on the tax issues and opportunities in their respective jurisdictions. While specific tax advice is always essential, it is also necessary to have a broad understanding of the nature of the potential issues and advantages that lie ahead; this book provides a guide to these.

I should like to thank the contributors to this book for their time and efforts, and above all for their expertise. I would also like to thank the publisher and the team for their support and patience. I hope that you find the work useful, and any comments or suggestions for improvement that can be incorporated into any future editions will be gratefully received.

The views expressed in this book are those of the authors and not of their firms, the editor or the publishers. Every endeavour has been made to ensure that what you read is the latest intelligence.

Tim Sanders
London
January 2020

Chapter 2

AUSTRIA

Niklas JRM Schmidt and Eva Stadler[1]

I INTRODUCTION

Austria, one of the wealthiest countries in the world and a European Union (EU) Member State, continues to attract investors owing to its stable political and social situation and its geographical position in the centre of Europe. Apart from proximity, historical ties to the countries of Central and Eastern Europe (CEE) have made Austria a very attractive location for multinationals to choose as their base of operations regarding CEE.

II COMMON FORMS OF BUSINESS ORGANISATION AND THEIR TAX TREATMENT

i Corporate

The most commonly used form of Austrian business organisation for inbound investments is the limited liability company (GmbH). Owing to its less burdensome corporate governance requirements, it is generally preferred by investors to the more complex stock corporation (AG), a corporate form that has to be used if a listing on a stock exchange is being considered.

Both entities are subject to Austrian corporate income tax on their income. Shareholders are taxed separately on dividends received from these corporations.

ii Non-corporate

Partnerships, such as the general partnership (OG) or the limited partnership (KG), are of lesser relevance for inward investments into Austria. In a general partnership, all partners are subject to unlimited liability for the partnership's debts and obligations, while in a limited partnership, only one partner must have unlimited liability. A structure commonly seen is the GmbH & Co KG; this is a limited partnership with the general partner being a limited liability company.

Partnerships are treated as transparent for Austrian tax purposes. Thus, the income of a partnership is not taxed at the level of the partnership, but rather attributed to its partners and subject to (corporate) income tax at the level of the partners.

1 Niklas JRM Schmidt is a partner and Eva Stadler is a counsel at Wolf Theiss.

III DIRECT TAXATION OF BUSINESSES

i Tax on profits

Determination of taxable profit

Austrian tax-resident corporations are taxed on their worldwide income. The tax base for income from an active trade or business is generally the profit as shown in the financial statements. Adjustments have to be made where mandatory tax provisions deviate from financial accounting rules. Profits are generally taxed on an accruals basis.

As a general rule, expenses incurred in acquiring, securing and maintaining taxable income are tax deductible. The following types of expenses are, however, partly or fully non-deductible: restaurant expenses, penalties and fines, income taxes, remunerations paid to supervisory board members, remunerations paid to employees and managers exceeding €500,000 per person per year, and expenses in connection with earning tax-exempt income. As explained below in further detail, certain interest and royalty expenses may also be non-deductible.

Assets subject to wear and tear are in general depreciated on a straight-line basis over their ordinary useful life. If in the tax year of purchase or construction an asset is used for more than six months, the yearly depreciation amount applies; otherwise, only half of the yearly depreciation amount may be deducted from the tax base. Depreciation for extraordinary technical or economic loss in value is possible. For certain assets, the statute mentions the depreciation rates to be used, namely buildings (generally 2.5 per cent), goodwill (6.67 per cent) and cars (12.5 per cent). Assets having an acquisition cost of not more than €800 can be fully depreciated in the year of purchase.

Only the following provisions are deductible for tax purposes: provisions for severance payments, provisions for pension payments, provisions for other contingent liabilities and provisions for anticipated losses from pending transactions.

Capital and income

Regarding Austrian tax-resident corporations, there is no distinction between the taxation of capital gains and the taxation of ordinary income in Austria. As regards personal income taxation, flat tax rates are applicable to specific types of income, including capital gains from the sale of financial assets and real estate (see below).

Losses

Under Austrian law, tax losses carried forward from past years reduce the corporate income tax base. The utilisation of such losses carried forward is limited to 75 per cent of the income of the respective year in the case of corporations (no time limit applies). A carry-back of losses is not permitted.

A corporation's tax loss carry-forwards are forfeited upon an ownership change if there is a material change in its organisational (e.g., replacement of all directors of the corporation), economic (e.g., a new area of business is pursued by the corporation) and shareholder structure (e.g., the majority of shareholders of the corporation are replaced).

Rates

Corporate income tax is levied at a rate of 25 per cent. In the event that a corporation has not made a profit, a minimum corporate income tax in an amount of 5 per cent of the statutory minimum stated capital of a corporation is due. For example, in the case of a limited liability company this minimum corporate income tax generally amounts to €1,750 per year, and in the case of a stock corporation it amounts to €3,500 per year, with lower rates applying to limited liability companies for the first 10 years. Minimum corporate income tax is creditable against the final amount of corporate income tax assessed for that and the following tax years. Apart from corporate income tax, no other taxes or surcharges are levied on a corporation's income.

Administration

The tax year is generally the calendar year. Corporations may, however, apply to the tax authorities for permission to use a different tax year, if reasons other than tax considerations exist for such application.

Corporate income tax returns must be filed electronically by 30 June of the year following the tax year (in the case of paper-based filings, the deadline is 30 April). Taxpayers making use of tax advisers benefit from longer deadlines. An extension of the filing date is possible in justified cases. Failure to file generally triggers a penalty.

Quarterly prepayments of corporate income tax are due on 15 February, 15 May, 15 August and 15 November. Such prepayments are creditable against the final amount of tax assessed. Any balance is payable within one month after receipt of the tax assessment notice.

Assessment notices of the competent tax office can be challenged before the Austrian Federal Tax Court.

Tax grouping

Austria has a group taxation regime for affiliated companies. Affiliated companies are those that are connected through a direct or indirect participation of more than 50 per cent of the nominal capital and voting power. Such participation must exist throughout the entire fiscal year of the member of the tax group (and in total for at least three years).

The formation of a tax group results in 100 per cent of the taxable income of each resident member of the group being attributed to the top-tier company in the tax group. In the case of non-resident companies that are members of a tax group, only negative income of such companies is attributed to the top-tier company, and only on a pro rata basis (this makes the utilisation of foreign losses possible; this is only of a temporary nature, with a claw-back provision applying). In the case of losses of non-resident companies there is a limitation insofar as only losses amounting to 75 per cent of the sum of the income of the top-tier company in a tax group and the Austrian-resident members of the tax group may be offset immediately.

ii Other relevant taxes

Value added tax

Austria levies value added tax in line with the pertinent EU directives at a standard rate of 20 per cent. Reduced rates of 10 and 13 per cent apply to certain supplies. There are a number of exemptions applicable (e.g., for financial services and health services).

Real estate transfer tax

The transfer of Austrian real estate triggers real estate transfer tax. In the case of a sale of Austrian real estate, the tax base is generally the purchase price, and the tax rate amounts to 3.5 per cent. In addition, a 1.1 per cent court registration fee based on the fair market value of the property transferred falls due.

Further, real estate transfer tax at a rate of 0.5 per cent of the fair market value of the real estate is triggered if Austrian real estate is part of the assets of a corporation or a partnership, and at least 95 per cent of the shares in such corporation or interests in such partnership are pooled in the hand of a single buyer or in the hand of a tax group. The same applies in the case of a partnership holding Austrian real estate if at least 95 per cent of the interests in such partnership are transferred to new partners within a period of five years.

Stamp duty

Austria levies stamp duties on a wide range of legal transactions, including, inter alia, assignment agreements, lease agreements and surety agreements, if a written deed evidencing such stamp-dutiable transaction is signed and a certain Austrian nexus exists. However, these stamp duties can in many cases be avoided by way of careful structuring.

Bank tax

Austria levies a bank tax on the adjusted balance sheet total of credit institutions licensed pursuant to the Austrian Banking Act and foreign credit institutions authorised under the Austrian Banking Act to carry out banking business in Austria by way of a branch (in the case of the latter, only the balance sheet total attributable to the Austrian operations is taken into account).

Wage tax

While income tax is levied by way of assessment, income tax on employment income is in general levied by way of withholding by the employer. Such wage tax is a prepayment of the employee's final income tax and is credited against the employee's assessed income tax liability if the taxpayer files (voluntarily or in certain cases on an obligatory basis) an annual tax return.

IV TAX RESIDENCE AND FISCAL DOMICILE

i Corporate residence

Corporations having their legal seat, their place of effective management, or both, in Austria are deemed to be tax residents of Austria, and are thus subject to unlimited corporate income tax in Austria on their worldwide income. The legal seat of a corporation is the place defined as such by law, by contractual agreement, in its articles of association, etc. The place of effective management of a corporation is the place where all the measures are taken that are required and essential for the management of the corporation.

ii Branch or permanent establishment

Corporations having neither their legal seat nor their place of effective management in Austria are taxable only on specific types of income with an Austrian nexus, which are exhaustively enumerated in the statute. This, inter alia, includes income from an Austrian permanent establishment, which is defined as a fixed place of business through which the business of an enterprise is wholly or partly carried out. A permanent establishment for Austrian domestic tax purposes is quite similar to the Organisation for Economic Co-operation and Development (OECD) concept.

V TAX INCENTIVES, SPECIAL REGIMES AND RELIEF THAT MAY ENCOURAGE INWARD INVESTMENT

i Holding company regimes

Under the national participation exemption, dividends received by an Austrian corporation from its Austrian subsidiary are exempt from corporate income tax regardless of the extent of the participation or the holding period.

Under the international qualified participation exemption, an Austrian corporation is exempt from corporate income tax on dividends received from a foreign subsidiary or capital gains realised on the alienation of shares in that foreign subsidiary if the parent demonstrably holds a participation of at least 10 per cent of the stated share capital of the foreign subsidiary for a minimum duration of one year, and if the foreign subsidiary qualifies as a company of a Member State pursuant to Article 2 of the EU Parent–Subsidiary Directive or is legally comparable to an Austrian corporation.

Under the international portfolio participation exemption, an Austrian corporation is exempt from corporate income tax on dividends received from a foreign subsidiary, regardless of the participation or the holding period, if the Austrian international qualified participation exemption outlined above is not applicable, and if the foreign subsidiary qualifies as a company of a Member State pursuant to Article 2 of the EU Parent–Subsidiary Directive or is legally comparable to an Austrian corporation and has its legal seat in a state with which Austria has agreed to the comprehensive exchange of information. This exemption does not cover capital gains.

These participation exemptions are subject to special anti-abuse provisions outlined below. Further, they do not apply to payments received from foreign subsidiaries under hybrid instruments if such payments are tax deductible at the level of the foreign subsidiary.

ii IP regimes

Austrian tax law provides that companies conducting qualified research and development activities may claim a credit (over and above the full deduction of the expense) equal to 14 per cent of eligible expenses.

VI WITHHOLDING AND TAXATION OF NON-LOCAL SOURCE INCOME STREAMS

i Withholding on outward-bound payments (domestic law)

Dividends distributed by Austrian corporations to their (resident or non-resident) shareholders are subject to Austrian withholding tax at a rate of generally 27.5 per cent.

Royalties paid to non-residents are subject to Austrian withholding tax at a rate of 20 per cent.

Interest on loans (not in the form of bonds) is not subject to Austrian withholding tax.

Certain services rendered by non-residents are subject to Austrian withholding tax at a rate of 20 per cent. This category includes:

a remunerations in connection with an occupation as an author, lecturer, artist, architect, sportsperson or performer in Austria;
b payment for a right of use regarding works protected by copyrights or industrial property rights;
c supervisory board remunerations; and
d payment for commercial or technical consulting work.

ii Domestic law exclusions or exemptions from withholding on outward-bound payments

As an EU Member State, Austria applies the EU Parent–Subsidiary Directive and the EU Interest and Royalties Directive.

Pursuant to the Austrian provisions implementing the EU Parent–Subsidiary Directive, the distribution of dividends is fully exempt from Austrian withholding tax if the recipient of the dividends is a company of a Member State pursuant to Article 2 of the EU Parent–Subsidiary Directive that has held at least 10 per cent of the capital in the paying company for an uninterrupted period of at least one year and meets certain substance requirements.

Similarly, pursuant to the Austrian provisions implementing the EU Interest and Royalties Directive, the payment of royalties is fully exempt from Austrian withholding tax if the recipient of the royalties is an associated company of another Member State. A company is an associated company of a second company if, at least, the first company has a direct minimum holding of 25 per cent in the capital of the second company or the second company has a direct minimum holding of 25 per cent in the capital of the first company, or a third company has a direct minimum holding of 25 per cent both in the capital of the first company and in the capital of the second company. Such holdings must apply for an uninterrupted period of at least one year.

iii Double tax treaties

There are currently 89 treaties in force in Austria. Austria generally follows the OECD Model Convention and the commentary thereto in respect of its treaty policy and interpretation. Because, under Austrian rules of interpretation, the more specific provision takes precedence over the more general provision, double tax treaties generally take priority over domestic law.

VII TAXATION OF FUNDING STRUCTURES

i Thin capitalisation

There are no statutory thin capitalisation rules in Austria. However, the Austrian Supreme Administrative Court has established certain broad guidelines that are used to determine whether the equity funding at hand is adequate for the purposes of taxation. If the equity is inadequate, a portion of the indebtedness to shareholders may be regarded as the equivalent of shareholders' equity. Interest paid on such debt may not be deducted from the taxable income and may be subject to withholding. In practice, debt-to-equity ratios of 4:1 are not uncommon.

ii Deduction of finance costs

In general, interest (including interest incurred in connection with the acquisition of an Austrian or non-Austrian participation) may be fully deducted from a corporation's tax base. Two restrictions regarding deductibility apply.

Firstly, financing costs incurred in connection with the acquisition of shares that were directly or indirectly purchased from a group company or from a controlling shareholder are not deductible.

Second, no deduction is possible for interest paid to a corporation if the payer and recipient are, directly or indirectly, part of the same group, or have, directly or indirectly, the same controlling shareholder; and the interest paid at the level of the recipient (or the beneficial owner, if different) is:

a not subject to corporate income tax owing to a comprehensive personal or material tax exemption;
b subject to corporate income tax at a rate of less than 10 per cent;
c subject to an effective tax rate of less than 10 per cent owing to an applicable reduction; or
d subject to a tax rate of less than 10 per cent owing to a tax refund (here, tax refunds to the shareholder are also relevant).

The latter provision also applies to royalties.

iii Restrictions on payments

Under Austrian corporate law, Austrian corporations may only pay out dividends to their shareholders to the extent they have sufficient balance sheet profits.

iv Return of capital

As mentioned above, dividends paid out by Austrian corporations to shareholders trigger a withholding tax of generally 27.5 per cent. However, the repayment of capital – whether resulting from a formal capital reduction or from the distribution of capital reserves – does not trigger withholding tax under Austrian domestic law. Such repayment of capital reduces the tax basis of the shares (which might be relevant in the case of a later sale: if the repayment of capital exceeds the tax basis, the excess is considered a capital gain, which is generally taxable). Austrian companies must keep a capital account for tax purposes to document the amount distributable as a repayment of capital.

VIII ACQUISITION STRUCTURES, RESTRUCTURING AND EXIT CHARGES

i Acquisition

Austrian businesses are typically acquired by way of a share deal (rather than by way of an asset deal), with the shares in the Austrian company being purchased by a special purpose vehicle in a country with a favourable participation exemption.

ii Reorganisation

Under Austrian corporate law, many types of reorganisations are possible, including mergers, demergers, conversions of partnerships into corporations and vice versa, and share-for-share exchanges.

While such transactions would under the general tax law rules normally constitute a taxable event (making them prohibitively expensive), the Austrian Reorganisation Tax Act allows such restructurings to be carried out in a tax-free manner if certain prerequisites are met.

iii Exit

If, owing to the relocation of a business abroad, Austria loses its right to tax hidden reserves contained in these assets, then corporate income tax is generally triggered on the hidden reserves at the time of exit. Relief might be possible if Austria's right to tax is lost as regards an EU Member State or a state that is a party to the Agreement on the European Economic Area.

IX ANTI-AVOIDANCE AND OTHER RELEVANT LEGISLATION

i General anti-avoidance

Under Austrian tax law, there is the principle that taxpayers are free to arrange their economic affairs in the manner they deem most beneficial to themselves, which includes choosing those structures and approaches that incur the least tax costs. Nevertheless, Austrian law contains a general anti-abuse provision pursuant to which one's tax liability cannot be avoided by abusing the legal forms or methods available under civil law. If such an abuse has been established, the tax authorities may compute the tax as it would have been had a genuine legal arrangement been carried out. Additionally, an action not seriously intended by the parties (i.e., a sham transaction) but performed only to cover up facts that are relevant for tax purposes will be disregarded and taxation will be based on the facts the taxpayer sought to conceal. In addition, various specific anti-abuse provisions exist; for example, a switchover clause in connection with the international participation exemptions discussed immediately below.

ii Controlled foreign corporations (CFCs)

To transpose the EU Anti-Tax Avoidance Directive, Austria, inter alia, introduced CFC legislation. Pursuant thereto, non-distributed passive income of a low-taxed CFC (wherever resident) shall be included in the tax base of the controlling corporation if the following prerequisites are fulfilled:

a the passive income of the CFC exceeds one-third of its total income (the income is to be calculated in line with Austrian tax provisions, whereby tax-exempt dividends and capital gains are also taken into account when calculating the total income);

b the controlling corporation – alone or together with its associated enterprises – holds a direct or indirect participation of more than 50 per cent of the voting rights or owns, directly or indirectly, more than 50 per cent of the capital or is entitled to receive more than 50 per cent of the profits of the CFC;

c the CFC does not carry out a substantive economic activity supported by staff, equipment, assets and premises (in case a substantive economic activity exists, the controlling corporation has to furnish proof thereof); and

d the CFC is low-taxed, meaning that its effective foreign tax rate is not more than 12.5 per cent (to determine the effective foreign tax rate, the foreign company's income is to be calculated in line with Austrian tax provisions and compared to the foreign tax actually paid).

In the event the CFC provision kicks in, the amount of the CFC's passive income to be included in the tax base of the controlling corporation is calculated in proportion to the (direct or indirect) participation in the nominal capital of the CFC; if the profit entitlement deviates from the participation in the nominal capital, then the profit entitlement ratio is decisive. The passive income of the CFC is included in that financial year of the controlling corporation in which the CFC's financial year ends. Losses of the CFC, if any, are not to be included.

The CFC rules also apply to Austrian corporations being tax resident outside of Austria under an applicable double tax treaty and to foreign permanent establishments (even if an applicable double tax treaty provides for a tax exemption in Austria).

Further, dividends and capital gains from the following types of subsidiaries do not benefit from the international participation exemptions outlined above, but are taxable (and a credit is given for underlying taxes in the case of dividends), if they are low-taxed and have a predominant focus on earning passive income:

a shareholdings of at least 10 per cent held for a minimum duration of one year in a foreign subsidiary qualifying under the EU Parent Subsidiary Directive or being legally comparable to an Austrian corporation; and

b shareholdings of at least 5 per cent in a foreign subsidiary qualifying under the EU Parent Subsidiary Directive or in a foreign subsidiary being legally comparable to an Austrian corporation and having its legal seat in a state with which Austria has agreed to the comprehensive exchange of information.

This switchover provision does not apply if passive income has demonstrably been taken into account under the CFC provision mentioned above.

Both the CFC rules and the switchover provision are not applicable to foreign financial institutions if not more than one-third of the passive income stems from transactions with the Austrian controlling corporation or its associated enterprises.

iii Transfer pricing

Pursuant to the case law of the Austrian Supreme Administrative Court, agreements between related parties (e.g., between the shareholder and its company) are only recognised for tax purposes if they have been concluded in writing, if their content is unambiguous and if they have been concluded in accordance with the arm's-length principle (i.e., on terms that unrelated parties would have agreed upon). The Austrian tax authorities in practice follow the OECD Transfer Pricing Guidelines in this respect. Pursuant to the Austrian Transfer Pricing Documentation Act, multinational groups with consolidated group revenues of at least €750 million in the preceding fiscal year are required to prepare a country-by-country report, which Austria will automatically exchange with other countries. Additionally, the Act obliges a separate business unit (that is tax-resident in Austria and that has had revenues of at least €50 million in the two preceding fiscal years) of a multinational group to prepare transfer pricing documentation in the form of a master file and a local file.

iv Tax clearances and rulings

A legally binding formal tax ruling procedure exists in connection with questions concerning restructurings, tax groups, international tax law, value added taxation and the existence of abuse of law. If certain formal prerequisites are met, the competent tax office must issue a tax ruling, generally within a period of two months from application. This ruling has to contain the facts and statutory provisions on which it is based, a legal assessment of the facts and the time frame during which it is valid. In addition, the applicant may be required to report on whether the facts of the case have been implemented and also on whether the implemented facts are different from those outlined in the request. A fee of between €1,500 and €20,000, depending on the applicant's annual turnover, is due in conjunction with any such request.

X YEAR IN REVIEW

The Austrian legislator was not very active in 2019 of its own accord. Most of the tax laws passed in that year were the result of EU developments or developments at an international level (in particular in relation to the Anti-Tax Avoidance Directive).

XI OUTLOOK AND CONCLUSIONS

Austria, as a wealthy and sophisticated jurisdiction with a stable political system in the centre of the EU, will remain a strong candidate for inward investment for years to come.

Appendix 1

ABOUT THE AUTHORS

NIKLAS JRM SCHMIDT

Wolf Theiss

Dr Niklas JRM Schmidt, TEP, is a partner at Wolf Theiss, the largest Austrian law firm. He has been admitted as a lawyer and as a tax adviser. His areas of specialisation include tax law and private clients. Mr Schmidt is frequently engaged as a speaker at tax conferences and has been a visiting lecturer at various universities. Currently, he sits on the editorial board of the *SteuerExpress* magazine. Furthermore, Mr Schmidt is a member of the International Fiscal Association, the International Bar Association, the International Tax Planning Association and the Society of Trust and Estate Practitioners. He has been named one of Austria's top 10 tax lawyers in the Austrian magazine *TREND* and is ranked in tier 1 by many international legal directories.

EVA STADLER

Wolf Theiss

Dr Eva Stadler is a counsel with Wolf Theiss, having been with the firm since 2010. She specialises in taxation of private clients, international tax law, taxation of financial instruments and tax planning of international groups. Further, she regularly publishes articles in international and national tax journals and acts as a speaker at international tax conferences. Eva is involved in the tax activities of the International Association of Young Lawyers and the International Bar Association.

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ISBN 978-1-83862-472-9