FIRST ARBITRATION PROCEDURE UNDER A DOUBLE TAX TREATY BEFORE THE ECJ

On 3 December 2015, Austria filed a request for arbitration against Germany before the European Court of Justice (ECJ) on the basis of the arbitration clause contained in the double tax treaty concluded between Austria and Germany (DTT).

Art. 273 of the Treaty on the Functioning of the European Union (TFEU) provides that the ECJ shall have jurisdiction in any dispute between EU Member States which relates to the subject matter of the Treaty on the European Union or the TFEU, if the dispute is submitted to the ECJ under a special agreement between these EU Member States. Pursuant to art. 25(5) of the DTT, if a dispute cannot be settled within a period of three years under the mutual agreement procedure provided for in the DTT, then, upon the request of the taxpayer involved, the ECJ acting as arbitral tribunal shall decide the case. As far as we are aware, this is the only provision providing for the ECJ as arbitral tribunal which is contained in a double tax treaty concluded by two EU Member States. On 3 December 2015, Austria brought the first request for arbitration before the ECJ under this provision (case C-648/15). The dispute revolves around Germany qualifying payments under profit participating certificates (Genussscheine) as interest income within the sense of art. 11(2) of the DTT. The outcome of this case remains to be seen.

(Eva Stadler)

CERTIFICATES OF RESIDENCY – NEW EAS RULING

On 3 February 2016, the Austrian Ministry of Finance published an EAS ruling dealing with certificates of residency in connection with relief granted under treaty law.

As regards foreign taxpayers having their domicile/habitual abode or legal seat/place of management outside of Austria, domestic tax law entitles Austria to levy (corporate) income tax on Austrian source income. However, applicable double tax treaties (DTTs) may allocate taxation rights differently and may require Austria to (partially) abstain from imposing the domestic rate on such income. In order to adhere to these taxation rules as prescribed by treaty law, there are generally two alternatives: (i) temporarily imposing the Austrian tax rate on the income to be paid to foreign taxpayers and subsequently refunding the Austrian tax; or (ii) granting relief at source by refraining from imposing the Austrian tax rate on the income to be paid to foreign taxpayers.

Relief at source can only be granted when specific record keeping requirements are fulfilled, as provided for in the Ordinance on Relief At Source Due to Double Tax Treaties (DBA-Entlastungsverordnung). Pursuant to the latter, an Austrian payer making a payment of over EUR 10,000 to a foreign payee may grant relief at source if the foreign payee furnishes a certificate of residency. In that context, the Austrian
Ministry of Finance recently dealt with a case where an Austrian company paid fees of over EUR 10,000 to a foreign expert for advisory services. The Ministry held that for purposes of granting relief at source it did not suffice that only a photocopy of the certificate of residency had been provided. Rather, the Austrian company had to have the original form at its disposal. As an exception thereto, the transfer of the certificate of residency by electronic means and the subsequent archiving (without transferring the underlying original form) may be sufficient if, e.g., the original form is being used for other purposes for specific reasons.

(Cynthia Pfister)

THIRTY-ONE COUNTRIES SIGN AUTOMATIC INFORMATION SHARING AGREEMENT FOR COUNTRY-BY-COUNTRY REPORTING

On 27 January 2016, 31 countries – including Austria – signed a tax co-operation agreement to enable automatic sharing of country-by-country information. This agreement is a further step towards automatic exchange of information between governments.

The Base Erosion and Profit Shifting (BEPS) Action Plan adopted by the OECD and G20 countries in 2013 recognised that enhancing transparency for tax administrations by providing them with adequate information to assess high-level transfer pricing and other BEPS-related risks is a crucial aspect for tackling the BEPS problem. Therefore, already the September 2014 Report on Action 13 provided a template for multinational enterprises to annually report specific transfer pricing information for each tax jurisdiction in which they conduct business. This report is called the Country-by-Country (CbC) Report. The CbC report is part of a three-tier structure, along with a "global master file" and a "local file", which together represent a standardised approach to transfer pricing documentation.

The new Multilateral Competent Authority Agreement (MCAA) provides for the automatic exchange of CbC reports. It intends to enable a consistent and swift implementation of the new transfer pricing reporting standards by requiring the signatories to (i) establish the infrastructure for an effective exchange relationship; (ii) provide for the necessary legislation to require companies to file a CbC report; and (iii) safeguard that the information received remains confidential and is only used for purposes of the assessment of transfer pricing risks. It is envisaged that initially the CbC reports will focus on the 2016 accounts. First exchanges on the 2016 information are expected to start in 2017-2018.

The MCAA has been signed by Australia, Austria, Belgium, Chile, Costa Rica, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malaysia, Mexico, the Netherlands, Nigeria,
Norway, Poland, Portugal, the Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland and the United Kingdom.

(Benjamin Twardosz)

CROSS-BORDER POSTING OF EMPLOYEES — NEW DECREES

The Austrian Ministry of Finance published the conclusions of the Salzburg Tax Dialogue 2015 dealing with the taxation of cross-border postings of employees.

Under double tax treaties in line with the OECD model convention (OECD-MC), the remuneration for posted employees may be taxed both in the state of residence and in the state in which the employment is exercised (other state). However, the remuneration shall be taxable only in the state of residence, if the following three conditions are cumulatively met (art. 15(2) of the OECD-MC): (i) the recipient of the remuneration is present in the other state for a period or periods not exceeding in the aggregate 183 days in the respective calendar year; (ii) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other state; and (iii) the remuneration is not borne by a permanent establishment which the employer has in the other state.

According to a decision rendered in 2013 (cf. Austrian Supreme Administrative Court [Verwaltungsgerichtshof, 22 May 2013, 2009/13/0031]), an economic view has to be applied instead of a purely civil law perspective when determining the employer. The Austrian Ministry of Finance has concurred with this approach in a decree issued on 12 June 2014 (see our International Tax Newsletter 3/2015). Based on this decree, it shall be decisive whether the company posting the employee or the receiving company bears the wage costs of the posted employee. However, the receiving company is only deemed to be the employer if passive services are rendered, i.e., services that do not constitute an integral part of the posting company’s commercial activity.

On 27 October 2015, the Austrian Ministry of Finance published the conclusions of the Salzburg Tax Dialogue 2015. These deal with specific questions in connection with the cross-border posting of employees.

As regards the posting of managing directors within a group of companies, the services rendered may be regarded as active or passive. If an Austrian parent company posts a managing director to its foreign subsidiary, the services rendered qualify as active services, provided that the posting aims at exerting influence on the management of the subsidiary. Consequently, the taxation right remains with Austria, provided that the other conditions laid down in art. 15(2) of the OECD-MC are met. However, if the foreign subsidiary requires a managing director due to short-term staff shortages and receives him/her from its Austrian parent company, the services rendered qualify as passive services, provided that the managing director is not subject to any instructions
of the parent company. In that case, the foreign subsidiary has to be regarded as the employer and Austria loses its taxation right.

The new decree also clarifies that the question of whether the posting or the receiving company bears the wage costs of the posted employee is not exclusively decisive when determining the employer. Nevertheless, cost bearing aspects may serve as an indication for that purpose. Other indications are, *inter alia*, the interest in the activities of the parent company or the subsidiary and reporting obligations of the employee. The new decree also states that even very short-term postings of employees can result in a change of the economic employer, but does not define a minimum period. In the end, an overall assessment of all the relevant factors has to be done on a case-by-case basis in order to determine the employer within the meaning of art. 15(2)(b) of the OECD-MC.

*(Bernhard Oreschnik)*
TAX CONTACTS

Should you have any questions regarding tax matters in Austria or any of our jurisdictions please contact our tax partners in Vienna:

Niklas Schmidt  
Partner  
niklas.schmidt@wolftheiss.com

Benjamin Twardosz  
Partner  
benjamin.twardosz@wolftheiss.com

Members of the WOLF THEISS Tax Practice Group (in alphabetical order):

FUCIK Matthias, Associate (Austria)  
GRUBESIC Ana, Associate (Croatia)  
IFTIME-BLAGEAN Adelina, Senior Associate (Romania)  
KOSIC Maja, Associate (Bosnia & Herzegovina)  
KLEYTMAN Rebeka, Senior Associate (Bulgaria)  
KVEDERIS Anna, Associate (Ukraine)  
KYOSEVA Gergina, Associate (Bulgaria)  
MIHAYLOV Atanas, Senior Associate (Bulgaria)  
MYŠKA Jan, Partner (Czech Republic)  
NAKO Sokol, Partner (Albania)  
NASTRAN Neja, Associate (Slovenia)  
ORESCHNIK Bernhard, Associate (Austria)  
PASZTOR Janos, Associate (Hungary)  
PFIESTER Cynthia, Associate (Austria)  
POPOVIC Tomislav, Senior Associate (Serbia)  
RYCHLÝ Tomáš, Partner (Czech Republic)  
SEKOWSKA Anna, Senior Associate (Poland)  
SIKORA Bartłomiej, Senior Associate (Poland)  
NIKODEMOVA Zuzana, Senior Associate (Slovak Republic)  
SCHMIDT Niklas, Partner (Austria)  
STADLER Eva, Senior Associate (Austria)  
TOTH Alexandra, Associate (Hungary)  
TWARDOSZ Benjamin, Partner (Austria)

WOLF THEISS was one of the first Austrian law firms to advise on tax law and has been setting the standards ever since. Our experience covers a wide range of disciplines, from
corporate tax advice for reorganizations and M&A to tax disputes and litigation, financial products, holding companies, fiscal criminal law and private clients. For many years now we have successfully expanded the tax practice also to our other offices. We are known for offering clear solutions for challenging cases in a very efficient manner, which has been recognized by the international legal community many times.

Find out more about the WOLF THEISS Tax Practice and find previous issues of our newsletter on our website: http://www.wolftheiss.com/index.php/Tax.html

(International Tax Review)

Austrian Law Firm of the Year 2012 & 2013
(Chambers Europe)

Law Firm of the Year: Austria, 2014
Law Firm of the Year: Central Europe, 2010 & 2014
(The Lawyer)

This memorandum has been prepared solely for the purpose of general information and is not a substitute for legal advice.

Therefore, WOLF THEISS accepts no responsibility if – in reliance on the information contained in this memorandum – you act, or fail to act, in any particular way.

If you would like to know more about the topics covered in this memorandum or our services in general, please get in touch with the contacts listed above, or with:

WOLF THEISS Rechtsanwälte GmbH & Co KG
Schubertring 6
1010 Wien
Tel. +43 1 515 10 – 0

www.wolftheiss.com