AUSTRIA TO LEVY TAX ON ONLINE ADVERTISING

On 30 January 2017, the Austrian coalition parties agreed on the government's policy agenda for 2017/2018 and announced therein that the scope of the advertisement tax will be extended to online advertising.

After intensive negotiations, the Austrian federal government reached a consensus regarding their new policy agenda for 2017/2018. In particular, foreign multinationals and online businesses are to be subject to more "efficient" taxation in Austria. To achieve these objectives, the coalition parties want to extend the currently existing advertisement tax (*Werbeabgabe*) to include online ads. Advertisement tax was introduced in 2000, and only took account of the then prevailing media such as print media, television, radio and billboards. Consequently, online advertisements are currently not subject to taxation. It is intended to reduce the tax rate (of at present 5%) and to simultaneously broaden the tax base, so that the overall tax revenue from the advertisement tax will remain the same. The policy agenda states that the extended advertisement tax shall become effective as of 1 January 2018. A draft of the bill has not yet been published.

(*Benjamin Twardosz*)

GUIDANCE ON EXCHANGE OF INFORMATION REGARDING RULINGS RELEASED

Recently, the Austrian Ministry of Finance published guidance on the automatic and spontaneous exchange of information on advance cross-border rulings and advance pricing arrangements.

The guidance note (20 October 2016, BMF-010221/0708-VI/8/2016) first explains the terms "advance cross-border ruling" and "advance pricing arrangement". In particular, it clarifies that information exchange obligations not only apply in connection with formal rulings pursuant to sec. 118 of the Federal Fiscal Procedures Act (*Bundesabgabenordnung*) and bi- or multilateral advance pricing arrangements concluded pursuant to income tax treaties, but also in connection with informal rulings on which a taxpayer may rely under certain circumstances based on the general principle of equity and good faith (*Grundsatz von Treu und Glauben*).

Secondly, the guidance note deals with cases in which automatic or spontaneous exchanges of information have to take place:

With respect to other EU Member States, information generally has to be exchanged automatically as follows: (i) within three months of the end of the half of the calendar year of issuance, amendment or renewal in case of rulings and arrangements which were issued, amended or renewed after 31 December 2016; and (ii) before 1 January

2018 regarding rulings and arrangements which were issued, amended or renewed after 31 December 2011 and before 1 January 2017 (regarding rulings and arrangements which were issued, amended or renewed before 1 January 2014, this only applies if they were still valid on 1 January 2014).

With respect to third countries, information is to be exchanged spontaneously. The legal basis for this is (i) art. 7 of the Convention on Mutual Administrative Assistance in Tax Matters; or (ii) provisions contained in income tax treaties concluded by Austria corresponding to art. 26 of the OECD Model Convention. The guidance note refers to the following cases covered by BEPS Action 5: (i) rulings related to preferential regimes with low or no taxation; (ii) cross-border unilateral advance pricing arrangements or transfer pricing rulings; (iii) cross-border advance rulings giving a downward adjustment to profits; (iv) cross-border advance rulings on the (non-) existence of permanent establishments and/or the attribution of profits to permanent establishments; and (v) conduit rulings. The exchange of information has to take place: (i) within three months from issuance, amendment or renewal in case of rulings and arrangements which were issued, amended or renewed after 31 March 2016; and (ii) before 1 January 2017 regarding rulings and arrangements which were issued, amended or renewed after 31 December 2009 and before 1 April 2016 (regarding rulings and arrangements which were issued, amended or renewed before 1 January 2014, this only applies if they were still valid on 1 January 2014).

(*Eva Stadler*)

NEW LEGAL UNCERTAINTY ON TREATMENT OF INTEREST EXPENSES WITHIN TAX GROUPS

The Federal Tax Court (*Bundesfinanzgericht*) recently held that interest expenses incurred in connection with the acquisition of an affiliated company within a tax group are not tax-deductible. This decision contradicts a former decision of said court.

Under Austrian tax law, no deduction is possible for interest in connection with debt arising from the acquisition of shares that were, directly or indirectly, purchased from a group company or from a controlling shareholder. The question whether this prohibition also applies in case of acquisitions within a tax group (*Unternehmensgruppe*) is contentious. Pursuant to sec. 9 of the Austrian Corporate Income Tax Act (*Köperschaftsteuergesetz*), affiliated companies may form a tax group by jointly filing a group taxation application with the tax authorities, resulting in 100% of the taxable income of each member of the group being attributed to the top-tier company in the tax group.

In a decision of 2015 (22 October 2015, RV/4100145/2012) the Federal Tax Court ruled that interest expenses are, in principle, tax-deductible as there is an economic link between interest expenses for the acquisition of a company that are borne by the top-tier company and income of the top-tier company. This follows from the fact that the

income of the acquired company, as a group member, is attributed to the group parent.

However, in a comparable case the Federal Tax Court recently denied the interest deduction. In its decision (10 June 2016, RV/7102088/2013), the court had to deal with an intra-group loan provided by a group member to its top-tier company for financing the acquisition of two target companies. The tax office and subsequently the Federal Tax Court denied the deduction of the interest paid by the top-tier company even though the taxpayer had referred to the decision cited above. As a result, by not allowing the deduction of the interest paid by the top-tier company and by taxing the interest income of the group member that is to be attributed to the top-tier company, double taxation occurred. An appeal against this decision is pending.

(*Bernhard Oreschnik*)

RULING ON CROSS-BORDER PERSONNEL LEASING PUBLISHED

The Austrian Ministry of Finance published an EAS ruling dealing with tax issues of intra-group cross-border personnel leasing.

Under double tax treaties that follow the OECD Model Convention, the remuneration for posted employees may be taxed both in the state of residence and in the state in which the employment is exercised. However, art. 15(2) of the OECD Model Convention determines that the remuneration shall be taxable only in the state of residence, if, *inter alia*, (i) the recipient is present in the other state for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned; and (ii) the remuneration is paid by, or on behalf of, an employer who does not reside in the other state.

In 2013, the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*) decided that an economic view, rather than a purely civil law perspective, has to be applied when determining the employer in terms of art. 15(2) of the OECD Model Convention (22 May 2013, 2009/13/0031). In a guidance note issued in 2014, the Austrian Ministry of Finance followed this approach and clarified that the judgement of the Austrian Supreme Administrative Court is only applicable to cases in which the employer is rendering passive services, *i.e.* services that do not constitute an integral part of the posting company's commercial activity such as advisory or training services (12 June 2014, BMF-010221/0362-VI/8/2014).

In that context, the Austrian Ministry of Finance recently dealt with a case where a German company incorporated an Austrian subsidiary and subsequently decided to post employees from Germany to Austria (EAS 3375). It was held that in such cases, the question of whether active or passive services are provided needs to be assessed on a case-by-case basis. According to the Austrian Ministry of Finance, active services are

provided in cases in which (i) the personnel leasing caters for the interest of the posting company; and/or (ii) the posted employees remain subject to the instructions of the posting company. In contrast thereto, passive services are provided in cases where the leased personnel are used to pursue the receiving company's commercial activity. Furthermore, a passive service is deemed to exist if the receiving company requested the cross-border posting of employees due to a short-term shortage of manpower. The reason for this is that the personnel leasing will be carried out in the interest of the receiving company and the posted employees will provide their labour to the receiving company.

In the EAS ruling, the Austrian Ministry of Finance also dealt with art. 15(3) of the double tax treaty concluded between Austria and Germany, which in contrast to the OECD Model Convention, provides that the applicability of the 183 day rule shall not depend on the residence of the employer in the state in which the work is exercised in cases of commercial personnel leasing.

(*Matthias Fucik*)

GUIDANCE IN CONNECTION WITH COUNTRY-BY-COUNTRY REPORTING ISSUED

The Austrian Ministry of Finance recently answered questions in areas of doubt regarding the procedure of country-by-country reporting (CbCR).

The CbCR obligations have been imposed in Austria for fiscal years starting from 1 January 2016. In general, an MNE group has to provide such a report if the total turnover equalled at least EUR 750 million in the preceding fiscal year. The company obliged to submit the CbCR is: (i) the top tier company that has its legal seat in Austria; or (ii) an Austrian company assuming the obligation on behalf of the foreign top tier company for example if such company is not bound to furnish a report in its state of residence. Obviously, the latter constellation will not be prevalent in structures involving an EU-top tier company, as EU Member States will have implemented the CbCR and exchange of information requirements similarly. However, the assumption of reporting obligations bears special relevance for Austrian entities forming part of a group with a non-EU top tier company.

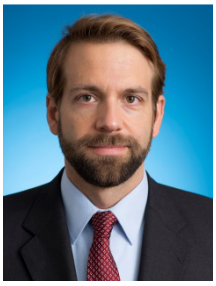
In that context, the Austrian Ministry of Finance has upon request clarified certain aspects of the CbCR obligations, including the case of voluntary CbCR abroad and the case of fiscal years in an MNE group not corresponding to the calendar year.

(*Cynthia Pfister*)

TAX CONTACTS

Should you have any questions regarding tax matters in Austria or any of our other 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, Senior Associate (Croatia)
IFTIME-BLAGEAN Adelina, Counsel (Romania)
KLEYTMAN Rebeka, Senior Associate (Bulgaria)
KYOSEVA Gergina, Associate (Bulgaria)
MIHAYLOV Atanas, Senior Associate (Bulgaria)
MYŠKA Jan, Partner (Czech Republic)
NAKO Sokol, Partner (Albania)
NASTRAN Neja, Associate (Slovenia)
NIKODEMOVA Zuzana, Senior Associate (Slovak Republic)
ORESCHNIK Bernhard, Associate (Austria)
PASZTOR Janos, Senior Associate (Hungary)
PFISTER Cynthia, Associate (Austria)
POPOVIC Tomislav, Senior Associate (Serbia)
RAZUVAIEV Mykhailo, Associate (Ukraine)
SEKOWSKA Anna, Senior Associate (Poland)
SIKORA Bartłomiej, Senior Associate (Poland)
SCHMIDT Niklas, Partner (Austria)
STADLER Eva, Senior Associate (Austria)
TOTH Alexandra, Associate (Hungary)
TWARDOSZ Benjamin, Partner (Austria)

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

www.wolftheiss.com