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WOLF THEISS

GUIDANCE ON TAXATION OF BITCOINS AND OTHER CRYPTOCURRENCIES

Recently, the Ministry of Finance published guidance on the Austrian income and value added tax aspects of investing in the crypto space.

Given the recent meteoric rise and subsequent fall of the value of Bitcoins as well as other cryptocurrencies (such as Ethereum, Ripple and Litecoin) and given the resulting interest of the mainstream media and the public at large, it is in principle good that the Ministry of Finance has summarized (and partly reiterated) its views on the tax consequences of investing in this new asset class.

Pursuant to the guidance, the following applies regarding income tax:

- For individuals holding cryptocurrencies as non-business assets, any gains (*e.g.,* upon the conversion of Bitcoin into EUR) are tax-free if realized upon expiry of the one-year "speculation period", but are taxable if realized before that point in time (with a tax-exempt amount of EUR 440 *p.a.* applying).

- These rules shall also apply to the conversion of one cryptocurrency into another cryptocurrency (*e.g.,* conversion of Bitcoin into Litecoin). This is inconsistent, since it has long been held that the conversion of one foreign currency into another foreign currency (*e.g.,* conversion of USD into GBP) normally does not lead to a taxable event; only if the conversion gain is permanently secured (*e.g.,* by converting into EUR or into a foreign currency which is tied to the EUR) are gains realized for tax purposes and thus taxable. In our view, the same should apply to conversions between cryptocurrencies. Apart from this legal argument, there is also a practical aspect to be considered: As every trader in cryptocurrencies knows, exchange rates on the various cryptocurrency exchanges are highly disparate (even more than normal forex rates) and it remains totally unclear which exchange rate is to be used for calculating the taxable gain.

- Where an investor purchases a specific cryptocurrency at different times and then sells a portion of his/her holdings from one wallet, the investor can freely determine which portion was sold, provided that he/she can fully document the acquisition dates and the acquisition costs of the individual purchases; otherwise the FIFO (first in first out) method is to apply when calculating the taxable income.

- The rules mentioned above (taxable within one year, tax-free after one year) shall not apply if cryptocurrencies are "rented out", with "interest" being earned *pro rata temporis.* In such case, a later sale would lead to capital gains that qualify as investment income, which is taxable at a flat income tax rate of 27.5% (irrespective of the holding period). Yet again, this seems inconsistent to us: Interest is income from capital claims. Thus, only if one qualifies cryptocurrencies as capital claims (such as loans, bank deposits and bonds) could a gain from the sale of cryptocurrencies lead to investment income. Further, even if cryptocurrencies were to be qualified as capital claims, should such gains not be taxable at the flat income tax rate of 27.5% (but rather at the progressive income tax rate)?

- Further, the guidance states that income from the operation of cryptocurrency exchanges, from the operation of Bitcoin ATMs and from the mining of cryptocurrencies will normally be considered as income from an active trade or business, which is taxable at the progressive income tax rate. While we would concur with the first two cases, a more nuanced conclusion is warranted in case of cryptocurrency "mining" (a term which unluckily evokes an association with large-scale heavy industrial operations, which probably led to this classification).

- What is missing in the guidance is an explanation under which circumstances the trading of cryptocurrencies is to be considered as an active trade or business.

- What is also striking is that the Ministry of Finance does not deal with cryptoassets (such as Augur or Monaco). This seems to be an oversight, and we believe there should be no difference whether an investor sells Bitcoins or, for example, cryptographic tokens acquired in an initial coin offering (ICO).

Pursuant to the guidance, the following applies regarding value added tax:

- Following the ECJ's case law (*cf.* ECJ 22 October 2015, C-264/14 – *Hedqvist*), the exchange of fiat money into Bitcoins and *vice versa* is exempt from value added tax.

- Similarly, the mining of cryptocurrencies is not to be seen as a taxable service for lack of an identifiable recipient of the service.

- On the other hand, the supply of goods and services with Bitcoins used as consideration is to be treated in the same way as supplies of goods and services which are sold against fiat money.

In summary, the guidance issued shows that even trading with virtual assets can have real life tax consequences.

(*Niklas Schmidt/Eva Stadler*)

INCOME DERIVED FROM HUNGARIAN TRUSTS

The Ministry of Finance has published an EAS ruling dealing with the taxation of income received by an Austrian beneficiary from a Hungarian trust.

When assessing the Austrian tax consequences of a Hungarian trust distributing income to Austrian beneficiaries it has to be determined whether the trust is transparent or non-transparent for Austrian tax purposes. A trust is essentially non-transparent if its assets and income are attributable for tax purposes to itself rather than to other persons (the latter mainly depending on whether the founder/beneficiaries have a certain level of influence on the trust). In case of a non-transparent trust, only the distributions from the trust are taxable in Austria, whereas the income of the trust derived from the various foreign income sources is not taxable.

In the case at hand, the Ministry of Finance held that the concrete Hungarian trust was non-transparent. Therefore, any withholding taxes levied on the income of the trust in Hungary do not qualify as taxes on the distributions to the Austrian beneficiaries (18 July 2017, EAS 3382). As a consequence, the beneficiary cannot – based on the double taxation treaty between Austria and Hungary (***"DTT Hungary"***) – claim a tax credit in Austria for the Hungarian tax.

If Hungary, in addition, taxed the distributions from the trust to the Austrian beneficiaries, again no tax credit would be granted. The Ministry of Finance takes the view that such distributions are not covered by art. 10 of the DTT Hungary (dealing with dividends) as the beneficiaries of a trust do not hold company shares in the meaning of art. 10(3) of the DTT Hungary. Consequently, from an Austrian perspective, art. 20 of the DTT Hungary (other income) would be applicable which allocates the exclusive taxation right to Austria. The only possibility for the beneficiaries to get a tax credit for the distribution's source tax already paid in Hungary (and to avoid double taxation) would be to initiate a mutual agreement procedure according to art. 24 of the DTT Hungary.

Since art. 10(3) of the DTT Hungary follows art. 10(3) of the OECD Model Convention (***"OECD MC"***) the relevance of the EAS ruling is not limited to the interpretation of the DTT Hungary.

(*Bernhard Oreschnik*)

RULING ON CROSS-BORDER MERGER INVOLVING AN AUSTRIAN REAL ESTATE COMPANY

The Ministry of Finance has published an EAS ruling on the Austrian tax consequences of a cross-border merger of a German corporation into a Liechtenstein corporation, where the German company indirectly holds 100% of the shares in an Austrian real estate company.

The OECD MC holds in art. 13(1) that gains derived by a resident of a Contracting State from the alienation of immovable property that is situated in the other Contracting State may be taxed in that other State. This provision is applicable if the immovable property is held directly. In addition, the OECD MC provides in art. 13(4) that gains from the sale of shares in a company that owns real estate may be taxed in the Contracting State in which the real estate is located, provided that more than 50% of the shares' value is derived directly or indirectly from immovable property. This so called real estate or immovable property clause has been included in several newer Austrian double tax treaties (*e.g.,* those with Germany, Poland and Romania).

In light of this, the Ministry of Finance recently dealt with a case where a German company held 100% of the shares in an Austrian company through an intermediary Austrian partnership (not operating an active trade or business), while the assets of the Austrian company solely comprised immovable property situated in Austria (20 July 2017, EAS 3388). It was planned to merge the German company into a Liechtenstein company with retroactive effect as of 30 June 2017 (the merger date). The absorbing Liechtenstein company was incorporated as of 1 September 2017, *i.e.,* after the merger date.

The Ministry of Finance correctly held that the Austrian right of taxation in respect of the shares of the Austrian company is lost: In contrast to the double taxation treaty with Germany, the double taxation treaty with Liechtenstein (***"DTT Liechtenstein"***) does not contain a real estate clause. Therefore, gains from the sale of shares in an Austrian company held by a Liechtenstein company and exclusively owning immovable property in Austria may only be taxed in Liechtenstein (art. 13(2) of the DTT Liechtenstein). Since the Austrian right of taxation in the shares of the Austrian company is lost, the provisions of the Austrian Reorganisation Tax Act (*Umgründungssteuergesetz*) cannot grant tax neutrality in the case at hand. As a consequence, Austrian corporate income tax would fall due on the hidden reserves.

One important question here is at what point in time the DTT Liechtenstein had to be applied (and consequently at what point in time the Austrian right of taxation in the shares of the Austrian company was lost). Interestingly, the Ministry of Finance argues that this was on 30 June 2017, on the retroactive merger date. In this context it is important to note that for the DTT Liechtenstein to be applicable, residency of a taxpayer in at least one of the Contracting States is required, which in turn necessitates that such taxpayer has its legal seat and its place of effective management in that Contracting State (arts. 1 and 4 of the DTT Liechtenstein). While the Liechtenstein company had not been incorporated on the merger date (and thus could not have had its legal seat or its place of effective management in Liechtenstein), the Ministry of Finance argued that, from a tax perspective, the assets of the German company were transferred to the Liechtenstein company as of the end of the retroactive merger date. This means that for fiscal purposes, the Liechtenstein company had to be regarded as subject to comprehensive taxation in Liechtenstein as of the merger date, which also means that the DTT Liechtenstein was applicable from that point of time.

(*Melanie Dimitrov / Matthias Fucik*)

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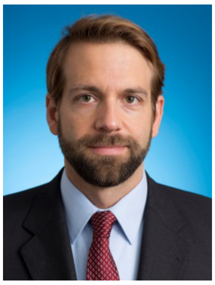

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