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FIRST ARBITRATION PROCEDURE UNDER A DOUBLE TAX TREATY DECIDED BY THE ECJ

On 12 September 2017, the European Court of Justice decided for the first time as an arbitral tribunal on a tax dispute between Austria and Germany (case C-648/15). The basis for this decision was the arbitration clause contained in the double tax treaty concluded between Austria and Germany.

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 related 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 double tax treaty concluded between Austria and Germany (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 request of the taxpayer involved, the ECJ acting as arbitral tribunal shall decide the case. To our knowledge, this is the only clause contained in a double tax treaty concluded by two EU Member States which provides for the ECJ as an arbitral tribunal based on art. 273 of the TFEU.

On 12 September 2017, the European Court of Justice (ECJ) decided the first dispute under this provision in favour of Austria. Even more importantly, the ECJ outlined the prerequisites for its jurisdiction as laid down in art. 273 of the TFEU. Pursuant thereto, the jurisdiction of the ECJ is subject to (i) the existence of a dispute between EU Member States, (ii) the dispute being related to the subject matter of the TFEU and the Treaty on European Union (TEU) and (iii) the submission of the dispute to the ECJ under a special agreement between the parties:

- In the case at hand, where the mutual agreement procedure provided for by the DTT was unsuccessful, the ECJ recognized a dispute between Austria and Germany.

- As regards the question whether the dispute was related to the subject matter of the TFEU and the TEU, the ECJ outlined the following: The purpose and effect of the conclusion between two EU Member States of a convention avoiding double taxation is to eliminate or mitigate certain consequences resulting from the uncoordinated exercise of their powers of taxation, which is, by its nature, capable of restricting, discouraging or rendering less attractive the exercise of the freedom of movement provided for in the TFEU. Thus, in light of the beneficial effect of the mitigation of double taxation on the functioning of the internal market, there is an objectively identifiable link of the dispute with the subject matter of the TFEU.

- Finally, the dispute was not submitted to the ECJ under an arbitration clause adopted specifically to resolve the dispute at hand, but rather pursuant to a general provision, namely art. 25(5) of the DTT. However, in light of the objective of art.

273 of the TFEU, the ECJ accepted its jurisdiction on the basis of an agreement on the referral to the ECJ of any potential dispute in predefined circumstances in a provision such as art. 25(5) of the DTT.

(*Eva Stadler*)

FORFEITURE OF TAX LOSS CARRY-FORWARDS DUE TO A SUBSTANTIAL CHANGE IN SHARE-HOLDER STRUCTURE

Pursuant to the Austrian Supreme Administrative Court, for the purposes of the provision stipulating a forfeiture of tax loss carry-forwards, whether a substantial change in a corporation's shareholder structure has taken place is to be assessed from a formal perspective (rather than from an economic one).

Initially, three individuals (H, W and X) each directly held one third of the shares in an Austrian limited liability company, which had tax loss carry-forwards. After several share transfers H indirectly held 37.5% and W indirectly held 50% of the shares in the corporation, while X ceased to be a shareholder. The competent tax office denied the utilization of the tax loss carry-forwards pursuant to sec. 8(4)(2)(c) of the Austrian Corporate Income Tax Act (*Körperschaftsteuergesetz*). Under this provision, tax loss carry-forwards cannot be utilized anymore if the identity of a corporation has substantially changed as regards its organisational, its economic and its shareholder structure.

In contrast to the prevailing opinion, the Austrian Federal Tax Court (12 January 2015, RV/7100894/2012) held that for the assessment of whether a substantial change in a corporation's shareholder structure has taken place, an economic, rather than a formal analysis is relevant, so that both direct and indirect shareholdings have to be taken into account.

Fortunately, however, the Austrian Supreme Administrative Court (13 September 2017, Ro 2015/13/0007) did not confirm this view. Rather, it stated that whether a substantial change in a corporation's shareholder structure has taken place, is to be solely determined by looking at who the direct shareholders of such corporation are.

(*Eva Stadler*)

A "HOME OFFICE" MAY CONSTITUTE A PERMANENT ESTABLISHMENT

The Ministry of Finance has published an EAS ruling dealing with the question of whether the home office of an employee resident in Austria may constitute a permanent establishment for its German employer.

In the case at hand, a German company providing advisory services on clinical risk management entered into an employment agreement with an employee resident in Austria. The main tasks of the employee included conducting advisory projects on patient security and clinical risk management in hospitals and health institutions in Italy, Austria, Germany and Switzerland, the setting up and maintaining of quality and clinical risk management systems as well as giving trainings, seminars and lectures. In order to prepare these tasks the employee was given the possibility of using a home office at his main place of abode in Austria.

It was assumed that the German employer did not have a fixed place of business in Austria, that the Austrian employee did not have the power to conclude contracts on behalf of its employer and that he was merely provided with the working equipment necessary for him to perform the office work, *e.g.,* mobile phone and personal computer. Activities performed in the home office were limited to project preparation, the creation of quotes using templates, the assessment of preventive measures, the development of individual solution strategies for the avoidance of patient injuries, as well as research activities and publications. Activities related to personal contacts with clients as well as trainings were performed either at the clients' facilities or at the employer's seat in Germany. The Austrian employee was free to decide the place to perform all preparatory tasks.

The question raised in this particular case was whether the German employer was subject to limited tax liability in Austria: If the home office of the employee qualified as a permanent establishment (PE) for the employer, then the profits attributable to such PE would be taxable in Austria.

In several cases, the Austrian Ministry of Finance and the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*) have ruled that generally a PE can also be established at the private home of an employee. Para. 18 of the OECD Model Commentary 2017 on art. 5 of the OECD Model Tax Convention specifies that a home office of an individual employee may constitute a PE for the enterprise if such home office is at the disposal of the enterprise. Whether this is the case is subject to review in each individual case, as the assessment is mostly dependent on the facts. Therefore, in the case at hand, it had to be determined whether the tasks performed at the home office of the employee in Austria occur on a continuous basis during an extended period of time or just occasionally. According to para. 12 of the above mentioned OECD Model Commentary, if the home office is used merely in an intermittent or incidental manner and with interruptions, it is not likely to be regarded as a place of

business at the disposal of the employer and therefore will not establish a PE for the enterprise of the employer.

The EAS further mentions that evidence against the existence of a PE may also be derived if the employee does not claim deductions related to business expenses of the home office or if the employer does not require the employee to provide the home office for the disposal of the employer.

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