CHANGES IN AUSTRIA’S RUBIK AGREEMENTS WITH SWITZERLAND AND LIECHTENSTEIN

The Rubik Agreement concluded between Austria and Switzerland was repealed and the scope of the Rubik Agreement concluded between Austria and Liechtenstein was restricted with effect as of 1 January 2017.

Both the Treaty between the Republic of Austria and the Swiss Confederation on Cooperation in the Areas of Taxation and Capital Markets ("Swiss Rubik Agreement") and the Treaty between the Republic of Austria and the Principality of Liechtenstein on Cooperation in the Area of Taxation ("Liechtenstein Rubik Agreement") provided that a Swiss/Liechtenstein paying agent had to withhold tax on, inter alia, interest income, dividends and capital gains from assets booked with an account or deposit of such Swiss/Liechtenstein paying agent, if the relevant holder of the assets (i.e. in general individuals on their own behalf or as beneficial owners of assets held by a domiciliary company [Sitzgesellschaft]) was tax resident in Austria. The same applied to income from assets managed by a Liechtenstein paying agent, if the relevant holder of the assets (i.e. in general individuals as beneficial owners of a transparent structure) was tax resident in Austria. The withholding at source had the effect of final taxation, meaning that the Austrian tax authorities received all taxes due, while the Austrian resident taxpayers could retain anonymity.

The amending protocols to the agreements between the European Community and the Swiss Confederation, respectively, the Principality of Liechtenstein, regarding Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, will be applicable regarding Austria as of 1 January 2017. They provide for automatic exchange of information between the contractual parties in line with the OECD’s Common Reporting Standard (CRS). Obviously, this meant it was necessary to consider the future of the two Rubik agreements.

The Swiss Rubik Agreement was repealed with effect as of 1 January 2017. Thus, since that date there is no withholding at source in Switzerland, but rather automatic information exchange and the obligation of Austrian taxpayers to report their Swiss income.

Also as of 1 January 2017, the Liechtenstein Rubik Agreement was restricted to tax transparent structures set up before that date; the pertinent bank accounts will be exempted from automatic information exchange under CRS. All other provisions of the Liechtenstein Rubik Agreement remain in force, in particular part 4 relating to the taxation of (i) gratuitous transfers of assets by individuals or legal entities resident in Austria to non-transparent structures managed by Liechtenstein paying agents, irrespective of the location of the assets, and (ii) distributions by non-transparent structures managed by Liechtenstein paying agents to individuals resident in Austria.

(Eva Stadler)
MINISTRY OF FINANCE ISSUES GUIDANCE ON THE ALIENATION OF A PARTNERSHIP STAKE IN A TRILATERAL SETTING

On 29 October 2016, the Austrian Ministry of Finance provided interesting guidance on the tax consequences of an alienation of a participation in a Hungarian partnership by an Austrian partnership consisting of German partners.

The case revolved around an operative Austrian partnership (GmbH & Co KG) with German resident partners, with the Austrian partnership holding a participation in an operative Hungarian partnership.

From an Austrian point of view, partnerships are deemed to be transparent vehicles, meaning that capital gains emanating from the alienation are to be attributed to the German partners. The latter are entitled to the benefits under the double tax treaty between Austria and Germany. On the basis of arts. 7 and 23(1)(a) of said treaty, Austria has the sole taxation right for business profits, with Germany being obliged to exempt such income.

From a Hungarian point of view, partnerships are deemed to be non-transparent vehicles, meaning that capital gains are to be attributed to the Austrian partnership. Owing to the fact that under Austrian law, taxation takes place at the level of the (German) partners rather than at the level of the (Austrian) partnership, the double tax treaty between Austria and Hungary is not applicable (from an Austrian point of view) and can therefore not provide a shielding effect from Austrian taxation.

In this context, the Austrian Ministry of Finance stated that if the capital gains were not exempted from Hungarian taxation by virtue of the double tax treaty between Hungary and Germany, it would have to be determined whether Austria is obliged to exempt such income on the basis of the non-discrimination clause included in art. 24 of the double tax treaty between Austria and Germany. This clause requires Austria for purposes of taxation not to differentiate between the permanent establishment of a German enterprise and an Austrian enterprise. This means that insofar as Austrian partners are not subject to tax by virtue of the double tax treaty between Austria and Hungary, also German partners should be able to rely on the tax exemption.

(Cynthia Pfister)

CONSTITUTIONAL COURT RULES THAT GAMBLING MONOPOLY DOES NOT INFRINGE UPON EU LAW

On 15 October 2016, the Austrian Constitutional Court held that the Austrian gambling monopoly does not infringe upon the freedom to provide services under
art. 56 of the TFEU. Therefore, it did not repeal the gambling monopoly for violating the principle of equal treatment.

The Austrian Constitutional Court (Verfassungsgerichtshof [VfGH]) in two recent cases (VfGH 15 October 2016, G 103/2016; 15 October 2016, E 945/2016) was asked to examine the question whether the Austrian gambling monopoly infringes upon EU law and/or constitutional law.

Initially, the Austrian Supreme Court (Oberster Gerichtshof [OGH]) had brought one of the cases to the Constitutional Court by making an application for repeal of sec. 3 of the Gaming Act (Glücksspielgesetz), which lays down the gambling monopoly, and other provisions of the Gaming Act, as well as in eventu for repeal of the Gaming Act in its entirety, on grounds of unconstitutionality (OGH 30 March 2016, 4 Ob 31/16m, see our Newsletter 3/2016). Citing pertinent case law of the European Court of Justice, the Supreme Court held that the gambling monopoly represented a restriction of the freedom to provide services, which could only be justified if it pursued a legitimate aim (such as consumer protection, fraud prevention or the prevention of incitement to place excessive bets) in a consistent and systematic manner. According to the Supreme Court, this was not the case since the two concessionaires Österreichische Lotterien GmbH and Casinos Austria AG aggressively advertised gambling, and thus the gambling monopoly should be qualified as an infringement of EU law. In its view, the fact that Austrian residents (in a purely domestic case) could not directly rely on fundamental freedoms, constituted a reverse discrimination which may contravene the principle of equal treatment laid down in art. 7 of the Austrian Federal Constitution (Bundes-Verfassungsgesetz). Unfortunately, the Constitutional Court rejected the application for procedural reasons (VfGH 15 October 2016, G 103/2016).

However, in the second case the Constitutional Court decided on the merits (VfGH 15 October 2016, E 945/2016 ua): Contrary to the Supreme Court, the Constitutional Court argued that the gambling monopoly indeed serves legitimate aims in a consistent and systematic manner, as the expenditures on gambling have not increased in Austria during the last few years. The fact that the total gambling market in Austria has not grown was seen as proof that the advertising campaigns of the concessionaires do not infringe upon EU law and therefore the Constitutional Court did not repeal any of the provisions of the Gaming Act for unconstitutionality.

A repeal of the Gaming Act in its entirety would have had significant consequences on the taxation of all gaming providers that offer games of chance in Austria. It should, however, be noted that there are currently other cases pending before the Constitutional Court in which an argument has been raised that was not yet dealt with.

(Bernhard Oreschnik)
SUPREME ADMINISTRATIVE COURT RULES ON THE UTILIZATION OF TAX LOSSES OF FOREIGN GROUP MEMBERS

On 29 June 2016, the Austrian Supreme Administrative Court ruled that tax losses of foreign group members have to be calculated on the basis of an opening balance sheet set up in accordance with Austrian tax law.

Pursuant to sec. 9 of the Corporate Income Tax Act (Körperschaftsteuergesetz), affiliated companies may form a tax group (Unternehmensgruppe) by jointly filing a group taxation application with the tax authorities. The formation of a tax group results in 100% of the taxable income of each member of the group being attributed to the top-tier company in the tax group. In the case of non-resident members of a tax group, only losses of such companies are attributed (on a pro rata basis) to the top-tier company, with such losses having to be calculated according to Austrian tax rules, capped however at the amount calculated pursuant to foreign tax rules (sec. 9(6)(6) of the Corporate Income Tax Act). Ever since the latter provision was enacted, it was heavily debated which balance sheet figures should serve as the basis for the calculation of foreign income. Obviously, this is of relevance due to diverging rules on the determination of income, e.g., linear vs. degressive depreciation methods, different depreciation periods etc.

In the case at hand a German company was a member of an Austrian tax group. In the years 2005 and 2006, losses amounting to approximately EUR 750,000 per year were calculated on the basis of an opening balance sheet that complied with Austrian tax provisions. In the course of a tax audit, the competent tax office determined deviating figures for both years on the basis of an opening balance sheet that complied with German tax provisions, drafted at the time the German subsidiary became part of the Austrian tax group.

In its judgment (29 June 2016, 2013/15/0253), the Austrian Supreme Administrative Court (Verwaltungsgerichtshof) held that the wording of sec. 9(6)(6) incontrovertibly states that only Austrian tax law shall be decisive for purposes of calculating the losses of non-resident group members. Although the balance sheet figures used in the case at hand complied with German tax law, they simultaneously contradicted compulsory rules under Austrian tax law. Consequently, in order to avoid biased loss calculations and conflicts with compulsory Austrian tax law, the opening balance sheet has to be drafted based on Austrian tax rules, rather than German tax rules.

(Matthias Fucik)
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, Associate (Croatia)
IFTIME-BLAZEAN Adelina, Senior Associate (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, Associate (Hungary)
PFISTER Cynthia, Associate (Austria)
POPOVIC Tomislav, Senior Associate (Serbia)
RYCHLÝ Tomáš, Partner (Czech Republic)
SEKOWSKA Anna, Senior Associate (Poland)
SIKORA Bartłomiej, Senior Associate (Poland)
SCHMIDT Niklas, Partner (Austria)
STADLER Ewa, Senior Associate (Austria)
TOH 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