



Downturn planning: general Austrian tax points

This briefing summarises the typical tax subjects arising in downturn planning: avoiding unnecessary cash-outs in the form of tax payments, reducing taxable profits for the tax year 2009 in combination with the carry-over of tax losses to other years, how to avoid losing deferred tax assets, the secondary liability risks that may arise if counterparties are unable to pay their tax debts, tax aspects involved in restructurings and some possible legislative changes triggered by the financial crisis.

Introduction

This briefing sets out in general terms some potentially relevant tax points that may arise in the current economic climate for corporate taxpayers located in Austria. In these times of uncertainty and global recession, managing cash and protecting valuable assets are clearly of primary importance and should include carefully controlling tax payments as well as the value of deferred tax assets.

Making reduced tax payments

Corporate income tax in respect of profits realised in a financial year is normally levied on the basis of a preliminary assessment issued during the financial year ('pay as you earn'); the final amount of tax due is established after the tax return for the year has been filed and reviewed, which in principle will be in the calendar year following the financial year. This preliminary assessment is to be paid quarterly on 15 February, 15 May, 15 August and 15 November.

In the case of start-up companies the preliminary assessments are based on estimates of the profits expected in the current financial year. For other taxpayers, the preliminary assessments are based on the final amount of tax due in the preceding financial year, but increased by 4 per cent. These average taxable profits of the preceding year, which by law constitute the basis of the preliminary assessments, may no longer provide a realistic estimate of 2009 taxable profits, given rapidly changing markets. Taxpayers should consider requesting an adjustment

of taxable income for the financial year 2009 and filing objections against preliminary assessments or ex officio reductions. Requests for an adjustment of taxable income must be well-reasoned and prima facie evidence for the expected amount of profits to be realised in the current financial year must be furnished (eg filing an interim balance sheet or evidence for bad debt losses). Requests for an adjustment of taxable income with immediate effect from 2009 can also be made later in the year 2009, but only up to 30 September. Statutory interest will be paid by the tax authorities on tax overpayments; the rates may be attractive compared with market rates (2 per cent above the base rate).

There are no mechanisms that allow deferral of tax payments in anticipation of tax refunds of whatever nature. In individual cases the collector of taxes may be asked to grant an extension of the payment deadline or allow payment in a number of instalments, but these will not be granted as a matter of standard practice.

Reducing taxable profits for 2009

Typical ways that could be considered to reduce taxable profits for 2009 without restructuring the taxpayer's operation would be to:

- take devaluation losses on assets (whether this is possible depends on the method of valuations applied by the taxpayer and the type of asset);
- use the accelerated depreciation relief facility for movable long-term assets acquired in 2009 and 2010 introduced by the Economic Recovery Act 2009

(Konjunkturbelebungs-gesetz 2009), which grants an immediate depreciation of 30 per cent of the acquisition costs in the first year;

- build non-taxable reserves from the taxpayer's profits for the purpose of envisaged investments (eg non-taxable transfer of hidden reserves of a disposed asset to a newly acquired long-term asset); however, this is not available for corporate taxpayers (special rules apply for shares sold by Austrian private foundations); and
- consider towards the end of the year whether tax provisions can be made for restructuring and re-organisation costs that will be incurred in later years on the basis of decisions taken during 2009 (there are restrictions on provisions for costs that are self-incurred without external delegation).

By considering these steps and the likely effect of loss carry-forward rules and their limitations on the amount, it should be possible to estimate 2009 taxable profit and evaluate whether the preliminary assessment of income tax for 2009 should be challenged.

Tax losses

In principle, tax losses can be carried forward without time limit. As a rule, loss carry-forwards can be set off against only 75 per cent of the current year's income. However, excess losses can be carried forward to subsequent tax years. This 75 per cent limitation does not apply to losses and profits resulting from insolvency and liquidation proceedings or from the sale of businesses, partial business divisions and certain kinds of legal acquittals. The Austrian tax regime does not provide for a carry-back of losses.

Groups of companies should consider carefully whether their corporate and tax structures may result in tax losses being made in one part of the group (no cash benefit) while taxable profits are realised in other parts of the group (actual cash tax payments). If that would be the case, dismantling such structures should be considered, taking into account the group's medium-term outlook. This mismatch may particularly happen if, as a result of prior-year tax planning, group functions have been separated on a low-risk to fixed-income basis (eg group services remunerated on a cost-plus basis).

Realised losses will reduce the available equity amounts on the tax balance sheet and this may lead to non-deductibility of interest due on related-party debt based on thin capitalisation practice, if thin capitalisation tests are applied on a dynamic (rather than static upon inception of the debt) basis. These effects should be monitored during the financial year.

Tax losses may be valuable assets going forward (deferred tax assets). Under fiscal unity schemes such as the Austrian group tax regime, tax losses in principle belong to the group parent. When a tax group is established, a group member's losses resulting from periods before the formation of the tax group may be offset only against subsequent taxable profits of this group member. The 75 per cent offset limit for loss carry-forwards does not apply to group members, but to the group parent. Unlike group members, the group parent may also offset losses resulting from periods before the formation of the tax group against the group's profits.

In addition, it is possible to use the tax losses of foreign group members directly held by Austrian group members. This use of foreign tax losses will be recaptured when the foreign group member earns profits against which the foreign loss carry-forwards can be offset or the foreign group member leaves the tax group. Hence, the use of foreign losses in Austria is of a temporary nature only.

To plan for potential future divestments of loss-making group companies, it is important to ensure that the divested company's tax losses that were used within a tax group are not subject to a loss recapture upon leaving the group. This may generally be the case if a three-year minimum holding period (as a member of the tax group) is not met (for domestic group companies; for foreign group companies there is no time limit for recapture).

Restructurings that lead to changes of control over entities with tax losses may lead in certain situations (eg a substantial change of the shareholders, for substantial change in the organisation or substantial change in the economic structure) to those losses no longer being available for compensation. However, the loss carry-forward is not lost if the change is made on the occasion of a re-organisation of the taxpayer for the purpose of saving a substantial part of the jobs. Further, loss carry-forwards may be lost due to corporate

re-organisations such as mergers or spin-offs, if the assets to which the losses belong materially no longer exist on the effective date of the re-organisation.

Also in the case of certain holding, financing and portfolio investment activities, there may be baskets of taxable result that prevent compensation of profits with losses in another basket.

Liability for unpaid taxes due from others

Given the economic climate, it is not unlikely that some taxpayers will default on their tax obligations. Austria's tax laws contain a number of secondary liability rules under which parties other than the taxpayer itself can be held liable for unpaid taxes.

These are some of the rules that may apply:

- general tax liability provision: liability of the members of the taxpayer's board of directors for the taxpayer's unpaid taxes in the case of a culpable negligence of their duties over the payment of taxes due;
- there is generally no negligence of duties if the tax was already uncollectable at the due date; an exception applies to wage withholding tax and capital gains tax;
- the members of the taxpayer's board are not liable for VAT resulting from adjustments of input VAT in the course of insolvency proceedings; but the liquidator may be liable;
- group members are liable for taxes to be paid by the group parent but resulting from the group members' business, such as VAT (corporate income tax is not included);
- the liquidators, heirs etc of a company are liable for its unpaid taxes if they were aware of the debt but did not file a respective notification with the tax office within three months; and
- the purchaser of a business is liable for taxes resulting from the business, such as VAT (corporate income tax is not included), as well as for withholding taxes (eg wage withholding taxes and capital gains tax arising from the beginning of the calendar year before the transfer of the business); the liability is dependent on knowledge of the debt at the time of transfer of the business by the purchaser and limited to the amount of assumed assets.

Restructurings

Companies in financial distress may be forced to restructure their outstanding debt or sell off assets (including subsidiaries with underlying business operations). These types of restructuring may have a substantial tax effect and should therefore be carefully considered.

Profits realised by restructuring indebtedness are in many cases in principle considered taxable (eg profits resulting from merging assets and liabilities; so-called confusion profits). This also includes the profit realised as a result of the buy-back by a debtor of outstanding debt at a discount. To the extent that the relevant taxpayer has sufficient tax losses available there should not be any actual tax payable. Care should be taken that available tax losses are not lost as a result of restructurings of the business in combination with a change in beneficial owners.

Any excess profit resulting from a waiver of indebtedness by a third party creditor of a company results in a taxable increase of the company's profit. This may cause further liquidity problems at the level of a company in financial crisis if the company does not have sufficient loss carry-forwards available. The waiver of indebtedness by a shareholder of the company is taxable to the extent that the receivable is not recoverable.

Selling substantial (more than 10 per cent) shareholdings in operating foreign subsidiaries existing for a minimum holding period of one year in most cases does not give rise to taxable profits or tax-deductible losses as a result of the application of the international participation exemption. Losses realised on the liquidation of a foreign subsidiary are tax deductible to the extent that they exceed the previous five years' tax-free dividends. By contrast, the alienation of substantial domestic shareholdings is not exempt from corporate income tax, since the national participation exemption (for dividends) does not extend to capital gains and liquidation proceeds. The regime of the international participation exemption offers the taxpayer the possibility of opting for taxation of capital gains and in return benefiting from the tax deductibility of capital losses and write-downs.

The sale of business assets would normally trigger a realisation of a taxable result. As Austria does not apply a schedular system, capital gains or losses can normally be offset against trading losses or profits in the same financial year. However, losses and profits resulting from shareholdings primarily aimed at obtaining tax advantages or from operations mainly focused on the management of intangible assets or industrial leasing of assets may not be offset against losses or profits resulting from other business activities. This limitation is not applicable, for example, to losses and profits resulting from insolvency and liquidation proceedings or from the sale of businesses, partial business divisions and certain kinds of legal acquittals.

Legislative changes

There are general discussions on legislative measures to support business through these difficult financial times. On 11 March 2009 the Economic Recovery Act 2009, aiming at stimulating investments by granting a depreciation relief facility for movable long-term assets acquired in 2009 and 2010, was passed by the Austrian parliament.

Further tax incentives were implemented by the Austrian Tax Reform Act 2009, such as:

- a decrease of the income tax and wage tax rate for individuals;
- an extension of tax allowances for invested profits to individual entrepreneurs under the obligation to draw up balance sheets and no requirement to invest profits up to €30,000; and
- tax deductibility of charitable donations and foreign aid.

Due to the ongoing difficult financial and economic situation the Austrian parliament is considering additional legislative activities for further stimulation of the economy.

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