Austria

Non-profit formation

Two specific legal forms are prescribed for non-profits, associations and foundations, each with its own legal framework.. Foundations can be divided into public foundations established in accordance with the Austrian federal law on foundations, which possess permanent assets dedicated to the pursuit of stated charitable purposes or the public benefit, and private foundations established either for the mere pursuit of a charitable purpose specified by the founder, who provides the funds to set up the charity, or private foundations established for self-interest of the founder, which can also pursue charitable purposes. Private charities acquire legal personality by registration in the register of companies. There are currently plans for a new electronic register that would be openly available to the general public for the purposes of transparency and building public trust.

Governance and charitable purposes

The Federal Fiscal Code sets out the conditions for tax exemption afforded to charitable, benevolent and ecclesiastical organisations. If these conditions are met for the whole fiscal year, tax-exempt status is enjoyed and no tax returns need to be filed. However, an otherwise exempt organisation may be subject to limited tax liability if the NGO receives income from which tax is withheld at source (withholding tax on interest and dividends for example). Structures can be implemented which avoid such a withholding tax at source. NGOs which own a business will not qualify for tax exemption, and will lose tax exemption not only on the income of the relevant enterprise or business but also on any other income. It is therefore recommended that NGOs run these businesses in the form of a GmbH (company with limited liability), since obtaining dividend income from such companies would not jeopardize their tax exempt status.

Taxation

At present, there is no procedure for registering a non-government organisation (NGO) as a 'not-for-profit' in order to receive exemption from income tax, or as an organisation liable for tax-exemption. Since August 2008 Austria has abolished any gift or inheritance tax and the details are explained below under donor reliefs. Generally, Austrian tax laws take an activity-oriented approach: therefore, an organisation otherwise regarded as a recognised charity may still have some, or even all, of its activities regarded as business activities comparable to the operations of a commercial for-profit and be taxed accordingly. Thus the officers or trustees of a non-profit must ensure the activities of organisation are non-taxable, qualified charitable purposes, particularly as each fiscal year may be reviewed differently by the tax authorities. NGOs are able to utilise any organisational structure normally available to corporate bodies, and thus all legal entities can potentially be suitable recipients of charitable gifts on a tax-exempt or concessionary basis, if its stated business objectives are exclusively not-for-profit.

Donor reliefs

Introduction

As per August 1, 2008 there is no more gift or inheritance tax levied in Austria since the Gift and Inheritance Tax Act was abolished in Austria. By abolishing gift and inheritance tax the government followed a Supreme Court decision which found it unconstitutional that there is a different tax treatment in regard of the accrual of real estate where gift or inheritance tax is levied upon the fiscal value which is lower than the fair-market value, and other assets where such tax is levied upon the fair-market value of such assets. The Supreme Court did not explicitly held that the whole Gift and Inheritance Tax Act is unconstitutional, the court was just aiming at this specific regulation and set a time frame until the end of July 2008 to make it possible for the government to amend these regulations. The government refrained from doing so and abolished the Gift and Inheritance Tax Act at all.

This Gift and Inheritance Tax Act was substituted by the **Gift Reporting Act**, which only obliges the taxpayer to report gifts made inter vivos or causa mortem to the tax administration but **no tax is levied**. So from August 1, 2008 on no more tax is levied upon gifts or accruals.

Details of the Gift Reporting Act

What is the purpose of that Act?

The Gift Reporting Act was designed to inform the tax administration whenever assets are gifted inter vivos or causa morten. As mentioned above there is no gift tax or inheritance tax levied anymore but especially making gifts should not be misused to avoid taxation on income. A typical example for a misuse of making gifts would be when a car dealer is gifting a car and at the same time receives cash declared as gift by the customer.

What has to be reported?

The reporting obligation aims at gifts inter vivos or endowments inter vivos with a certain purpose. A reporting obligation comes into existence if at least one taxpayer, resident in Austria, is involved and the following assets are gifted:

- Cash
- Claims
- Shares
- Enterprises
- Movable tangible assets
- Intangible assets

Not included is

- Real estate, which is due to a separate tax treatment

<u>Exemption from the reporting obligation</u>

The following transfers are exempt from the reporting obligation:

- Gifts between relatives up to an amount of € 50.000,-- within one year since the last gift or
- gifts between other unrelated parties up to an amount of € 15.000,-- within five years whereby gifts made before August 1, 2008 are not taken into consideration.
- Endowments made to private foundations which fall under the regime of the Foundation Entrance Fee Act.
- Out of the pocket gifts up to fair-market value of € 1.000,-- and as well as
- equipment of a house including clothing
- certain gifts in the meaning of Sec. 15 of the former Gift and Inheritance Tax Act (e.g. subsidies from public corporate bodies)
- endowments to benevolent institutions or parties, gift made between couples required for the acquisition or establishment of a household,
- gifts causa mortem in the meaning of Sec. 2 of the former Gift and Inheritance Tax Act

The meaning of relatives is defined according to Sec. 22 of the Federal Tax Code:

Relatives include the following persons:

- Couples even if the marriage is already divorced
- Relatives in direct line: parents, children, (grand)grand-parents, (grand)grand-children
- Other relatives: siblings, uncles, aunts, nephews, nices, cousins
- Relatives-in-law: parents-in-law, children-in-law, siblings of couples (steph-children, adopted children, foster children and their parents
- Partners in life as well as their children and grand-children

The value of the gift is either the obvious value in case of e.g. savings accounts or stocks or an estimated fair-market value whereby an evaluation or an expertise is not required.

Who is obliged to report?

Burden of reporting is put both on the donor as well as the donnee. Furthermore those legal representatives, like notaries or lawyers, who either support the taxpayer in setting up a document giving proof of this gift or transfer of the asset or which were given the order by the taxpayer to file such a report.

Such a report has to be filed with the tax authorities within three months after the gift was made. A safe harbor rule is to file such a report with the tax administration three weeks after a gift was promised, irrespective when the transfer of the asset, promised to be gifted, is executed.
There is a legal obligation to report such a gift in electronic form unless it is a undue hardship for the taxpayer. In such a case a form has to be filed.

Consequences of neglecting the reporting obligation:

The consequence of neglecting the reporting obligation is that in case of a tax audit the burden of proof is put on the shoulders of the taxpayer. The tax payer in such a case has to give proof to the tax administration that a possible increase in its net wealth was in fact caused by a gift.
This is considered to be a tax fraud. Law foresees a fine of up to an amount of 10 % of the fair-market value of the non-reported gift.

Gifts of real estate:

Although there is no gift and inheritance tax levied upon the gift or inheritance of real estate a 3.5 % land transfer tax is levied in case of a transfer of real estate without consideration either in the form of a gift inter vivos or as an accrual.

This 3.5 % land transfer tax is levied upon a certain value. This value is three-times the fiscal value, whereby the percentage is reduced to 2 % in case of close relatives. Close relatives are couples, parents, children, grand-children, step children, adopted children or parents-in-law. An allowance of € 365.000,-- is granted if the transfer of real estate happens in connection with the gifting of an enterprise. This allowance is only granted when the donor is no longer capable to work or has passed 55 years of age.

Exemptions:
Such transfers of real estate are exempt under the following conditions:

- Gifting real estate between couples provided that the real estate constitutes the main residence of the couple and does not exceed 150 m² of living space
- Endowment of real estate to foundations as long as such an endowment is due to the foundation entrance fee
- Endowment of real estate by public corporate bodies

The obligation to pay tax comes into existence when the acquisition is realized.

Gifts inter vivos:	Contractual date
Gifts causa mortem:	Death of deceased

A tax return has to be filed within 45 days after the end of the month when the obligation to pay such taxes came into existence.

The new Foundation Entrance Fee

Under the old Gift and Inheritance Tax Act any endowment which was made to an Austrian private foundation was due to a one-time flat 5 % gift tax.

Together with the new Gift Reporting Act the Foundation Fee Entrance Act came into existence and foresees that any endowment to an Austrian Private Foundation is due to now only 2.5 % tax. Those exemptions which were defined in the old Gift and Inheritance Tax Act stay valid, that means that a gift causa mortem in favor of an Austrian private foundation

which consists of capital investments like bonds, stocks, etc, whereby income of such investments is due to a final withholding tax, is not due to such a 2.5 % entrance fee.

Under certain circumstances this entrance fee is 25 %. This will be the case when a foreign foundation or a similar structure is not comparable to an Austrian private foundation or when not all documents of such a foundation are disclosed to the Austrian tax administration or when there is not a mutual administration assistance existing with the relevant state where the foundation has its seat. If just one of these conditions are met, a 25 % tax is applied. This higher tax bracket is especially aiming at foundations or other similar structures outside of the European Union because outside of the European Union only Norway has such a provision in regard of mutual administrative assistance in the tax treaty with Austria or when the Double Taxation Treaty with the relevant country where the foundation has its seat does not include a clause in regard of mutual administrative existence between the tax authorities.

Major improvements for beneficiaries of Austrian private foundations

Payments to beneficiaries of the Austrian Private Foundation are generally due to a 25 % withholding tax. Such a tax was also levied upon the payment of substance, which the foundation has received from the settlor made to the beneficiaries. From August 1, 2008 on any substance paid to the beneficiary of a foundation which was contributed after July 31, 2008 is no longer due to such a tax.

What is a tax exempt payment of endowed assets?

Payments from a foundation are considered to be tax exempt payments of substance as soon as they exceed a significant value as laid down in the Foundation Entrance Fee Act. The significant value at the begining of a fiscal year is defined as follows:

Net earnings for the previous year
+ Retained earnings
+ Hidden reserves of the endowed assets

Only if the payment effected by the foundation does exceed this significant value it is a tax exempt payment of substance in so far. Such a tax exempt payment of substance to a beneficiary is only possible for payments of substance which was endowed to the foundation after July 31, 2008.

Example:
In December 2008 € 100.000,-- were endowed to the foundation. In December 2010 € 30.000,-- are paid to the beneficiary of the foundation. The net earnings of the foundation between December 2008 and December 2010 were € 10.000,--.

That means that € 10.000,-- of the total amount of € 30.000,-- are due to a flat 25 % withholding tax in case of a beneficiary resident in Austria whereas € 20.000,-- are tax exempt. Furthermore the evidence account for calculating the significant value is reduced from € 100.000,-- to € 80.000,--.

Please note that such a tax would not be levied in case of non-resident beneficiaries, more than 95 % of the more than 80 tax treaties Austria has with other countries foresees the allocation of the taxation rights to the country where the non-resident beneficiary is resident in.

Are payments from foreign foundations due to income tax in Austria ?

Contrary to the situation before the Gift Reporting Act came into force payments made by foreign foundations or similar structures to beneficiaries resident in Austria are considered to be capital investment income. Capital investment income achieved by a taxpayer resident in Austria is usually due to a 25 % final withholding tax. Since the application of such a final withholding tax in case of payments from foreign foundations or similar structures is not possible the recipient of such a payment has to file a tax return whereby the amount received is exposed to a special tax bracket of 25 % or, upon request, is exposed to 50 % of the average income tax bracket applicable to the total income of the taxpayer.

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Philanthropy Impact: www.philanthropy-impact.org

Philanthropy Impact (incorporates EAPG, Philanthropy UK and the Philanthropy Advisors Forum). It was launched on 3 December 2012.