

THE PRIVATE WEALTH
AND PRIVATE
CLIENT REVIEW

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THE LAWREVIEWS

AUSTRIA

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I INTRODUCTION

Austria is a small but wealthy jurisdiction in the middle of Europe. As a member of the European Union, the Schengen Area and the Eurozone, it provides an attractive environment for wealthy people from Austria and abroad.

According to an analysis by the Austrian Chamber of Commerce, more than 50 per cent of Austrian businesses are organised as family businesses under the EU definition. They account for almost two-thirds of all Austrian employees and 57 per cent of sales in Austria. Many of these families developed their Austrian local businesses into international players and continue to look for suitable solutions, not only for further evolving their business, but also for passing their wealth or enterprises on to the next generation.

High net worth individuals from abroad are mainly attracted by Austria's natural beauty and cultural richness. In the Mercer Quality of Living Ranking, Austria's capital city, Vienna, has been ranked number one for the last nine consecutive years and its political stability and security appeal to people from abroad. In addition, Austria has introduced a citizenship and residency by investment scheme, which further entices non-Austrians looking to relocate.

The challenge of the rather high personal income tax rates requires structuring and planning on the part of advisers. Austrian structures often include an Austrian private foundation, which in particular caters to the individual's wish for predictability and stability in relation to asset management and succession.

II TAX

i Personal income tax

General

Any individual having a permanent home or his or her habitual abode in Austria is deemed to be an Austrian tax resident.² There is no concept of domicile in Austria.

Individuals have a permanent home in Austria if they have a dwelling at their disposal that they (are going to) use as a residence.³ The dwelling does not have to be the individual's primary residence, but it must be suitable for living considering the individual's personal circumstances. The individual does not have to use the home continuously but at least

1 Paul Doralt is a partner and Katharina Binder is an associate at DORDA.

2 Section 1(2) of the Austrian Income Tax Act.

3 Section 26(1) of the Austrian Federal Fiscal Procedures Act.

recurrently to establish a permanent home for Austrian taxation purposes. Exemptions apply for individuals with vacation homes if they do not use them for more than two months per year.⁴

Individuals have their habitual abode or habitual residence in Austria if they stay in Austria not only temporarily (e.g., holiday, business trip, family visit) but for a longer period of time. In any case, after a six-month stay, they become retroactively resident for Austrian income tax purposes.

Austrian-resident individuals are subject to national federal income tax. They are taxable on their worldwide income, whether received in cash or in kind.⁵ No local income taxes are levied. Non-resident individuals pay tax on their Austrian-source income.⁶

Income tax is levied on an individual's income from seven sources:⁷

- a* agriculture and forestry;
- b* self-employment;
- c* trade and business;
- d* employment;
- e* investment;
- f* rent, lease payments and royalties; and
- g* other specified income, such as certain annuities and capital gains upon the disposal of certain privately held assets, in particular real property.

Income not covered by these categories is not taxable.

Austria generally taxes income at a progressive tax rate, ranging from 25 per cent to 50 per cent (55 per cent for income exceeding €1 million in the calendar years 2016 to 2020).⁸ Investment income (i.e., interest from bonds, dividends on stocks, capital gains from securities and income from derivatives) drawn in Austria is generally subject to a special flat rate tax of 27.5 per cent;⁹ interest from savings accounts and current accounts is taxed at a flat rate of 25 per cent. Income from a sale of private real property is subject to 30 per cent property gains tax.¹⁰

ii Wealth tax

Austria does not levy general wealth tax. Owners of Austrian real property are subject to property tax based on the property's historically assessed uniform value,¹¹ which is generally substantially lower than its actual fair value. The property tax is levied by the local municipality at a basic federal rate of 0.2 per cent multiplied by a municipal coefficient of up to 500 per cent.¹²

4 Austrian Secondary Residence Regulation.

5 Unlimited tax liability, Section 1(2) of the Austrian Income Tax Act.

6 Limited tax liability, Section 1(3) of the Austrian Income Tax Act.

7 Section 2(3) of the Austrian Income Tax Act.

8 Section 33(1) of the Austrian Income Tax Act.

9 Section 27a of the Austrian Income Tax Act.

10 Section 30a(1) of the Austrian Income Tax Act.

11 Section 12 of the Austrian Property Tax Act.

12 Sections 19ff of the Austrian Property Tax Act.

iii Gift and succession taxes

Austria levies currently neither gift nor inheritance tax. There are, however, notification obligations for certain gifts if the donor or the donee has their permanent home or habitual abode in Austria.¹³

Gratuitous transfers of real property located in Austria or transfers of, or the consolidation of, a substantial shareholding (at least 95 per cent) in a company owning real property in Austria (whether *inter vivos* or *mortis causa*) are subject to real estate transfer tax based on the property's land value.¹⁴ A property's land value being the lowest of (1) three times the value of the land as assessed under the Austrian Land Valuation Regulation plus the value of the building; (2) the property's standardised value based on average property values published by Statistics Austria; or (3) the property's fair market value.¹⁵ Austrian real estate transfer tax on gratuitous transfers is levied in tiers: the first €250,000 of land value is taxed at 0.5 per cent, the subsequent €150,000 at 2 per cent and any exceeding land value at 3.5 per cent. Special provisions apply for only partially gratuitous transfers.¹⁶ In addition, a 1.1 per cent fee falls due for the registration of a new owner in the Austrian land register.¹⁷

iv Cross-border structuring

Double taxation treaties

Austria has entered into about 90 income tax and capital gains tax treaties, including treaties with the UK and the US. They generally follow the Organisation for Economic Co-operation and Development (OECD) model, except for some of the older agreements, such as the ones with Brazil, France or Japan, which substantially deviate from the OECD model.

Before Austria abolished its gift and inheritance taxes in 2008, it entered into very few inheritance and gift double taxation treaties, which generally follow the OECD Model Estate and Gift Tax Treaty, among them an agreement with the US.

Pre-entry tax planning

Pre-entry income and capital gains tax planning is generally not required. Financial assets held by a newly established Austrian tax resident receive a step-up in basis to the fair market value at the time such individual becomes tax resident in Austria.¹⁸ Any Austrian capital gains tax payable in the event of a disposal will be based on the step-up basis.¹⁹ It is, therefore, advisable to keep a record of the assets' fair market value at the time of entry into Austrian tax residence.

In addition, Austria implemented a preferential tax regime for artists, scientists and sportspeople, whose relocation to Austria is in the public interest of Austria.²⁰

13 Austrian Gift Notification Act.

14 Sections 1 and 4 of the Austrian Real Estate Transfer Tax Act.

15 Section 4(1) of the Austrian Real Estate Transfer Tax Act.

16 Section 7(1)(2)(a) of the Austrian Real Estate Transfer Tax Act.

17 Fee Item 9(b) of the Austrian Court Fees Act.

18 Section 27(6)1(e) of the Austrian Income Tax Act.

19 Section 27a(3)(b) of the Austrian Income Tax Act.

20 Section 103 of the Austrian Income Tax Act.

Exit tax

If an individual ceases to be an Austrian tax resident, Austria taxes any increases in value of the individual's assets accrued during such individual's tax residency in Austria.²¹ As long as the individual moves to an EU or EEA country, it may apply for a non-imposition of this tax liability until its actual disposal of the assets.²² If the new country of residence is neither a member of the EU nor of the EEA, the tax liability may be paid in even instalments over the next five years.²³

v Regulatory issues

The Austrian Federal Fiscal Procedures Act incorporates the substance-over-form principle as a general anti-abuse provision into Austrian tax law.²⁴ It allows Austrian tax authorities to disregard transactions or structures that have been mainly implemented for the purpose of avoiding or reducing the tax burden and appear unreasonable, contrary to the goal and purpose of the tax provision concerned.²⁵

In addition, Austrian law provides for several more specific anti-abuse provisions, such as the 'actual place of management' test for corporate taxation, controlled foreign corporation (CFC) rules, or substance requirements in the context of the participation exemption regime.²⁶

Register of Beneficial Owners

Implementing the Fourth EU Anti-Money Laundering Directive, Austria also established a Register of Beneficial Owners. Austrian legal entities, including private foundations, are obliged to disclose and submit the details of their (ultimate) beneficial owners to this register and keep it updated at any time.²⁷

Since January 2020, the Austrian Register of Beneficial Owners is of public record and must be monitored and confirmed or updated by the entity on an annual basis.

EU Reporting Act

Austria implemented the European DAC 6-directive, which obligates taxpayers and tax intermediaries to report potentially aggressive cross-border tax structuring arrangements to the tax authorities into Austrian domestic law as the EU Reporting Act.²⁸ It applies from 1 July 2020²⁹ onwards and defines cross-border arrangements as reportable, if they bear a risk of (1) tax-avoidance, (2) circumventing the common reporting standard, or (3) preventing the identification of the economic owner.³⁰ The Austrian EU Reporting Act distinguishes

21 Section 27a(3)(b) of the Austrian Income Tax Act.

22 Section 27(6)1(a) of the Austrian Income Tax Act.

23 Section (6)(6) of the Austrian Income Tax Act.

24 Section 22 of the Austrian Federal Fiscal Procedures Act.

25 Section 22 of the Austrian Federal Fiscal Procedures Act as will be implemented under the Austrian Annual Tax Act 2018.

26 Sections 10 and 11 of the Austrian Corporate Income Tax Act and Section 94 of the Austrian Income Tax Act.

27 Sections 1 and 3(3) of the Austrian Beneficial Ownership Register Act.

28 Section 1 of the Austrian EU Reporting Act.

29 Section 27 of the Austrian EU Reporting Act.

30 Section 4 of the Austrian EU Reporting Act.

between structures that are subject to mandatory reporting and structures that are subject to reporting only if the main advantage or one of the main advantages is the obtaining of a tax advantage (main benefit test).³¹

Attorneys, tax advisers, notaries and public accountants are generally exempt from reporting unless their client has released them from their professional confidentiality obligation.³² These intermediaries must notify their client and other intermediaries involved of the applicable exemption because the reporting obligation then passes on to them.³³

Each breach of the intermediary's reporting obligation is punishable with a fine of up to €50,000 in case of intent, and a fine of up to €25,000 in case of gross negligence.³⁴

vi Issues impacting entrepreneurs as holders of active business interests

General

In relation to interests held by Austrian or foreign individuals in Austrian enterprises, Austrian tax law differentiates between transparent and opaque business structures. Enterprises in the form of partnerships are generally regarded as transparent and Austria looks at the individual partners when it comes to assessing the applicable tax liability. By contrast, corporations are regarded as opaque and a corporation is subject to Austrian corporate income tax on its worldwide income if it has either its statutory seat or its place of effective management in Austria.³⁵

An Austrian branch of a foreign corporation is subject to Austrian corporate income tax if it qualifies as a permanent establishment. If the individual held its business interest in Austria via a foreign corporation, that foreign corporation would thus become subject to Austrian corporate income tax with all income attributable to the permanent establishment in Austria.

Corporate income tax is levied at a rate of 25 per cent.³⁶

III SUCCESSION

i Introduction to the Austrian succession regime

Testamentary freedom and its limits

Under Austrian law, the principle of testamentary freedom applies and an individual is generally not restricted in his or her disposition over his or her estate during their lifetime. An individual's estate for succession thereby comprises all of his or her rights and obligations at the time of his or her death, whether in his or her sole name or in a co-ownership.

The most important limit to the testamentary freedom is the Austrian forced heirship regime (see below). In addition, if a married couple enters into a testamentary contract, or if an individual makes a gift on death, a quarter of the individual's estate must by law remain clear of any such dispositions as well as claims of forced heirship.³⁷

31 Sections 5 and 6 of the Austrian EU Reporting Act.

32 Section 11(1) of the Austrian EU Reporting Act.

33 Section 11(2) and (3) of the Austrian EU Reporting Act.

34 Article 1 Section 49b of the Austrian Financial Criminal Act.

35 Section 1 of the Austrian Corporate Income Tax Act.

36 Section 22 of the Austrian Corporate Income Tax Act.

37 Section 1253 of the Austrian General Civil Law Code.

Forced heirship

Under the Austrian forced heirship rules, the individual's children, spouse and registered civil partner are entitled to forced heirship claims amounting to half of their statutory share in the estate.³⁸ The forced heirship claim is generally a cash claim³⁹ against the testamentary heir or heirs, which is calculated on the basis of the total fair value of the deceased's assets⁴⁰ and due one year after the individual's death.⁴¹ Gifts made by the individual to family members entitled to claims of forced heirship prior to his or her death are taken into account for the calculation of forced heirship claims and may also result in clawbacks of lifetime gifts.⁴²

Same-sex marriage

In Austria, same-sex marriages have been allowed since 1 January 2019.⁴³ It is possible for same-sex couples to adopt children and same-sex spouses have the same inheritance rights as opposite-sex couples.

Statutory inheritance rules

If an individual dies intestate, family members of the deceased individual share the estate based on a modified per capita system.⁴⁴ Under these rules, the spouse or registered civil partner is entitled to one-third, while all of the individual's children share two-thirds, of the estate's value.⁴⁵ If the deceased leaves no children behind, the spouse or registered civil partner is entitled to two-thirds of the estate if the parents of the deceased individual are still alive.⁴⁶ If one or both parents are already deceased at the time of the individual's death, their share in the remaining third of the estate is also passed to the spouse or registered civil partner.⁴⁷

If the individual leaves neither valid instructions for the disposition of his or her estate nor statutory heirs, the estate passes to the individual's life companion, provided that the life companion lived with the deceased in a shared household for three years prior to the deceased individual's death.⁴⁸

Austrian law bestows the same statutory inheritance rights on illegitimate and adoptive children to their adoptive parents' estates as on natural legitimate children.⁴⁹ In addition, adoptive children keep their statutory inheritance rights to the estates of their natural parents.⁵⁰ Adoptive children, however, have no statutory inheritance rights to the estate of other members of their adoptive family.

38 Sections 757 and 759 of the Austrian General Civil Law Code.

39 Section 763 of the Austrian General Civil Law Code.

40 Sections 778 and 779 of the Austrian General Civil Law Code.

41 Section 765(2) of the Austrian General Civil Law Code.

42 Sections 780ff of the Austrian General Civil Law Code.

43 Section 44 of the Austrian General Civil Law Code.

44 Sections 727ff of the Austrian General Civil Law Code.

45 Section 744(1) of the Austrian General Civil Law Code.

46 Section 744(1) of the Austrian General Civil Law Code.

47 Section 744(1) of the Austrian General Civil Law Code.

48 Section 748(1) of the Austrian General Civil Law Code.

49 Section 197 of the Austrian General Civil Law Code.

50 Section 199 of the Austrian General Civil Law Code.

Nursing bequest

The nursing bequest is a legal bequest intended to compensate for the care services provided by close relatives to the deceased in the three years preceding his or her death. The prerequisite is that the relative must have provided care services for a total of at least six months to a not insignificant extent⁵¹ (more than 20 hours per month on average).

A nursing bequest can be received by⁵²

- a* all persons eligible as statutory heirs of the deceased (spouses, registered partners, children, grandchildren and great-grandchildren, parents, siblings, etc.);
- b* spouses, registered partners and cohabiting partners of persons eligible as statutory heirs; as well as
 - the children of these people;
 - the life partner of the deceased; and
 - the children of this life partner.

The amount of the bequest depends on the type, duration and scope of the services as well as on the benefit procured (in particular the expenses saved).⁵³ The value of the estate is not to be taken into account. The carer is not entitled to this bequest if he or she has received payment for his or her nursing services. The nursing bequest is generally due in addition to any other benefits from the estate, unless the deceased ordered otherwise.⁵⁴

Formal requirements of a last will and testament

Under Austrian law, an individual may make a valid will either in writing, orally or publicly.⁵⁵

A valid will in writing can either be entirely handwritten and signed⁵⁶ or a printed document, where he or she, in front of three independent and simultaneously present witnesses, adds a handwritten solemn declaration that the document contains his or her last will and testament.⁵⁷ The witnesses must then also add their handwritten signatures indicating their personal details and their function as witnesses.⁵⁸ Outside the court, an oral will can be validly made only in life-threatening situations. It requires two independent witnesses and is valid for three months.⁵⁹ A public will is validly made in front of the court or an Austrian public notary. Individuals between 14 and 18 years of age may only make public wills.⁶⁰

Administration of the estate and transfer to the heirs

Under Austrian law, all heirs generally administer the estate jointly.⁶¹ It is possible to appoint a special administrator or executor for the estate, usually based either on the testator's will or by joint application of the heirs.

51 Section 677(1) of the Austrian General Civil Law Code.

52 Section 677(3) of the Austrian General Civil Law Code.

53 Section 678(1) of the Austrian General Civil Law Code.

54 Section 678(2) of the Austrian General Civil Law Code.

55 Section 577 of the Austrian General Civil Law Code.

56 Section 578 of the Austrian General Civil Law Code.

57 Section 579(1) of the Austrian General Civil Law Code.

58 Section 579(2) of the Austrian General Civil Law Code.

59 Section 584 of the Austrian General Civil Law Code.

60 Section 569 of the Austrian General Civil Law Code.

61 Section 810(1) of the Austrian General Civil Law Code.

The deceased's assets pass to the heirs and successors by universal succession and to the legatees by singular succession based on a respective decree issued by the estate court after the estate proceeding has been completed. An heir may accept his or her share in the estate either unconditionally, assuming liability for the deceased's debts regardless of the value of his or her inherited share in the estate,⁶² or conditionally, assuming liability for the deceased's debts only up to the value of his or her inherited share in the estate based on an inventory and appraisal.⁶³

ii Cross-border scenarios

EU Succession Regulation

Austria implemented the EU Succession Regulation, under which the distribution of a person's estate is generally governed by the law of the country, where the deceased had his or her last habitual abode, regardless of whether it is an EU country or not.⁶⁴ An individual may also validly opt for the application of the inheritance regime of his or her nationality in his or her last will.⁶⁵ The respectively applicable law governs the distribution of movable and immovable property.

Recognition of wills

In relation to wills, Austria adopted the Hague Testamentary Dispositions Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions 1961 (the HCCH Convention). Under its rules, a will is valid and thus recognised in Austria if its form complies with the internal law of:⁶⁶

- a the place where the testator made it;
- b a nationality possessed by the testator, either at the time when he or she made the disposition, or at the time of his or her death;
- c a place in which the testator had his or her permanent home either at the time when he or she made the disposition, or at the time of his or her death; or
- d so far as immovables are concerned, the place where they are situated.

IV WEALTH STRUCTURING AND REGULATION

i Wealth structuring vehicles used in Austria

Austrian private foundation

The most commonly used vehicle for wealth structuring in Austria is the private foundation, a legal entity designed as managed property without an owner or a shareholder. It may be set up for charitable purposes or private purposes but it may not pursue commercial activities.⁶⁷

The founders can be individuals or legal entities who must contribute at least €70,000 as the foundation's capital.⁶⁸ It is possible for the founder to be a beneficiary. A management

62 Sections 800 and 801 of the Austrian General Civil Law Code.

63 Sections 800 and 802 of the Austrian General Civil Law Code.

64 Article 21 of the EU Succession Regulation.

65 Article 22(1) of the EU Succession Regulation.

66 Article 1 of the Hague Testamentary Dispositions Convention.

67 Section 1(2)(1) of the Austrian Private Foundation Act.

68 Section 4 of the Austrian Private Foundation Act.

board, consisting of at least three members, two of whom must have their habitual abode in the European Economic Area, is the executive body of the private foundation.⁶⁹ Neither beneficiaries nor their close family members or personal advisers bound by instructions may be part of the managing board.⁷⁰ The private foundation's annual accounts are not publicly disclosed but must be audited by a certified public accountant.⁷¹

Trusts

There are no trusts under Austrian law. Austria has neither ratified the HCCCH Convention nor the Law Applicable to Trusts and on their Recognition (the Hague Trust Convention).

ii Legal and tax treatment

Taxation of an Austrian private foundation

Austria recognises private foundations as separate legal entities. Gratuitous contributions to Austrian private foundations and comparable foreign entities are subject to 2.5 per cent foundation contribution tax on the fair market value of the assets contributed.⁷² If not all of the statutorily required information is disclosed to the tax authorities or certain other conditions are not met, the tax rate is increased to 25 per cent.⁷³ Contributions of Austrian real property are subject to real estate transfer tax (see above) plus a 2.5 per cent foundation contribution tax equivalent and land register fees of 1.1 per cent based on the property's land value.⁷⁴

In relation to their income, Austrian private foundations are treated like corporations under the Austrian Corporate Income Tax Act and, therefore, subject to the common corporate income tax rate of 25 per cent on their worldwide income; dividends received by a private foundation are, however, usually tax-exempt.⁷⁵ A withholding tax of 27.5 per cent is generally levied on distributions to beneficiaries,⁷⁶ but double tax treaties typically grant relief if the beneficiary is a non-Austrian tax resident.

As long as the private foundation complies with all applicable disclosure requirements vis-à-vis the Austrian tax authorities (i.e., beneficial ownership, statutes), Austria grants a relief from double taxation otherwise levied on the foundation's non-business income. To this end, Austria levies a 25 per cent 'interim tax' on the private foundation's investment income (interest and capital gains from securities) and income derived from the disposal of real property on a taxable basis effectively reduced by the amount distributed to the beneficiaries in that tax year.⁷⁷ In addition, a rollover relief is granted for capital gains from the disposal of substantial participations if the private foundation acquires other substantial participations within 12 months.⁷⁸

69 Section 15(1) of the Austrian Private Foundation Act.

70 Section 15(2), (3) and (3a) of the Austrian Private Foundation Act.

71 Section 20 of the Austrian Private Foundation Act.

72 Section 2 in connection with Section 1(5) of the Austrian Foundation Entry Tax Act.

73 Section 2 of the Austrian Foundation Contribution Tax Act.

74 Section 7(2) of the Real Estate Transfer Tax Act and Fee Item 9(b) of the Austrian Court Fees Act.

75 Sections 1, 10 and 22 of the Austrian Corporate Income Tax Act.

76 Section 27(5)(7) of the Austrian Income Tax Act.

77 Section 13 of the Austrian Corporate Income Tax Act.

78 Section 13(4)(4) of the Austrian Corporate Income Tax Act.

Taxation of trusts

Depending on their individual set-up, foreign trusts and comparable vehicles are taxed in Austria based on their qualification as either a transparent or opaque entity. To determine the applicable regime, the Austrian tax authorities look in particular to the settlor's and the beneficiary's controlling influence and their rights within the framework of the trust as well as to their rights to the trust's assets.⁷⁹

iii Advantages of an Austrian private foundation

Austrian private foundations are primarily established for purposes of succession planning, in particular if the founder's assets shall not be broken up between his or her heirs. This is especially of interest to a founder who is the owner of an active enterprise, which, in future, could be controlled by the private foundation as a common representative of the next generation. As the beneficiaries of the private foundation, the heirs would commonly form an advisory board that may guide the management board in its executive decisions.

In addition, and on a more general note, the private foundation's financial statements remain undisclosed to the public. The private foundation, therefore, grants the most possible privacy to the founder and the beneficiaries while still being a viable asset-pooling and -holding vehicle.

V CONCLUSIONS AND OUTLOOK

Austria is a wealthy and politically stable jurisdiction that will continue to appeal to people of sizeable wealth.

79 Austrian Supreme Administrative Court, 20 September 1988, 87/14/167; EAS 2378, EAS 2804.

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Paul Doralt joined DORDA in 2006. He is a licensed attorney and licensed tax adviser with extensive experience in tax law, especially in M&A and corporate tax law. He also focuses on foundation law as well as structured financing. Paul is recognised as a go to adviser for complex international tax matters. He is also the official representative of the Austrian bar when it comes to commenting new draft tax laws.

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