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Tax Treaty Case Law around the Globe 2021

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Tax Treaty Case Law around the Globe 2021

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Editor(s):	Georg Kofler et al.
Date of publication:	September 2022
ISBN:	978-90-8722-787-6 (print), 978-90-8722-788-3 (ePub), 978-90-8722-789-0 (PDF)
Type of publication:	Book
Number of pages:	324
Terms:	Shipping fees apply. Shipping information is available on our website
Price (print/online):	EUR 85 | USD 102 (VAT excl.)
Price (eBook: ePub or PDF):	EUR 68 | USD 82 (VAT excl.)

Order information
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Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

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ISBN 978-3-7073-4547-6 (Print, Linde)
ISBN 978-90-8722-787-6 (Print, IBFD)
ISBN 978-3-7094-1233-6 (E-Book-PDF, Linde)
ISBN 978-90-8722-789-0 (E-Book-PDF, IBFD)
ISBN 978-3-7073-1234-3 (E-Book-e-Pub, Linde)
ISBN 978-90-8722-788-3 (E-Book-ePub, IBFD)
ISSN 2468-2799 (Print, IBFD)
ISSN 2590-1206 (Electronic, IBFD)
NUR 826
www.ibfd.org

© Linde Verlag Ges.m.b.H., Wien 2022
1210 Wien, Scheydgasse 24, Tel.: 01/24 630
www.lindeverlag.at

Contents

Preface V

List of Contributors XI

Part I: Personal and Substantive Scope

Georg Kofler
Austria: Supreme Administrative Court on a Hybrid "Sandwich Structure" 3

Michael Dirkis
Australia: Testing the Tax Treaty Residency Tie-Break Rules for Individuals... 13

Pierre Burg
France: Concept of Habitual Abode 23

Pierre Burg
France: Limited Tax Liability and Residence 29

Pasquale Pistone/Sergio Messina
Italy: Tiziano Ferro v. Agenzia delle entrate – Language (and Conceptual) Discrepancy? 35

Ashrita Prasad Kotha
India: The Dividend Distribution Tax: Entitlement to Treaty Protection? 49

Part II: Business Profits and Permanent Establishment

Søren Friis Hansen
Denmark: Did an employee's Home Office constitute a Permanent Establishment? – Article 5 (1) of the Denmark/Germany Tax Treaty.......... 63

Søren Friis Hansen
Denmark: Taxation of Income from Independent Personal Services? – Article 14 of the Denmark/China Tax Treaty 67

Daniel Gutmann
France: Concept of the Permanent Establishment 71

Billur Yalti
Turkey: Taxation of Digital Advertising Services Income 81

Philip Baker
United Kingdom: Royal Bank of Canada v The Commissioners for Her Majesty's Revenue and Customs (HMRC) 91

Jonathan Schwarz
United Kingdom: Irish Bank Resolution Corporation Ltd v HMRC 99

Adolfo Martín Jiménez
Spain: The Limits to the Interpretation of Tax Treaties in light of later Commentaries to the OECD MC: the Spanish Supreme Court Stryker Case 107

Part III: Associated Enterprises

Eivind Furuseth
Norway: Associated Enterprises (OECD MC Article 9) 119

Yariv Brauner
United States: United States Tax Court, The Coca-Cola Company & Subsidiaries, Petitioner v. Commissioner of Internal Revenue, Respondent 155 T.C. No. 101 129

Part IV: Passive Income

Moritz Seiler/Michael Beusch
Switzerland: Beneficial Ownership and Dynamic Interpretation of Tax Treaties 139

Danil V. Vinnitskiy
Russia: Beneficial Owner/“Actual Owner” and Thin Capitalization 149

Adolfo Martín Jiménez
Spain: The Never-Ending Story of Beneficial Owner: The Colgate Case 161

Part V: Employment Income

Alexander Rust
Germany: Taxation of a severance payment 173

Alice Fadda/Raphaël Gani
Switzerland: Distinction between Public and Private Pensions Income under the Swiss and Thailand Tax Treaty 181

Karolina Tetłak
Poland: Withholding tax on the payment of “match sums” to foreign football federations 189

Yariv Brauner
United States: United States Tax Court, Baturin v. US, 153 T.C. No. 101 199

Part VI: Methods to Avoid Double Taxation

Ivan Lazarov

Bulgaria: Credit of tax levied not in accordance with the convention – Decision No 409/2020 and of the Supreme Administrative Court 209

Ana Paula Dourado
Portugal: Income from Employment and the Burden of Proof 217

Part VII: Non-discrimination, Mutual Agreement and Mutual Assistance

Michael Dirkis
Australia: Facing Its Fears in Respect of the Non-Discrimination Article 223

Luc De Broe/Caroline Kempeneers
Belgium: Increased Attention to Taxpayer Rights in MAPs in Belgian Case Law 233

Ana Paula Dourado
Portugal: Discrimination of Permanent Establishments 249

Luís Eduardo Schoueri/Renan Baleeiro
Brazil: Tax Treaty Issues under the Volvo Case 253

Alexander Rust
Germany: Interpretation of the European Arbitration Convention 271

Part VIII: The Interaction between Domestic Anti-avoidance Rules and Double Taxation Treaties

David G. Duff
Canada: Capital Gains on the Sale of Shares – Alta Energy Luxembourg S.A.R.L. v. The Queen 279

Ilan Benshalom
Israel: Prosol Holdings S.A. v. Assessor Tel Aviv 5 49525-02-141 289

Mirna Screpante
Argentina: Shall the substance over form principle (domestic GAAR) apply to deny treaty benefits arising from Article 22(4) of the OECD MC? 297

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Part I: Personal and Substantive Scope

Austria: Supreme Administrative Court on a Hybrid “Sandwich Structure”[1]

Georg Kofler

I. Introduction

II. Facts of the Case

III. The Court’s Decision

IV. Comments on the Court’s reasoning
A. Austrian Source Taxation of X GmbH’s Distributions?
B. Austrian Residence Taxation of X GmbH’s Distributions?
C. Relief in Austria for Foreign Residence-Based Taxes?
D. Taxation of a Subsequent Profit Distributions from the Slovak K.S. to the Taxpayer?

1 AT: VwGH [Supreme Administrative Court], 15 Oct. 2020, Ro 2019/13/0007.

I. Introduction

In the past couple of years, various cross-border hybrid "sandwich structures" have been scrutinized by the tax administration as well as the courts in Austria.[2] One such structure, the so-called "K.S. model", involves the interposition of a commercially active Slovak "komanditná spoločnost" (K.S.), which is viewed as "intransparent" and a resident taxpayer by the Slovak Republic but is considered as comparable with an Austrian limited partnership and hence treated as "tax transparent" from an Austria tax perspective.[3] Simplified, under the "K.S. model", an Austrian individual shareholder of an Austrian corporation (e.g. a "GmbH") transfers those shares[4] as an equity contribution to a Slovak K.S. that subsequently receives dividends from that Austrian corporation.[5] If successful, this structure would effectively transform taxable domestic dividends into exempt foreign business income.[6] However, it raises a number of questions from the perspective of the Austrian domestic tax system as well as from the perspective of the bilateral tax treaty between Austria and the Slovak Republic.[7] First, will a dividend paid from the Austrian corporation to the K.S. be exempt from Austrian source taxation under the Austrian implementation of the Parent Subsidiary Directive (PSD)? Second, will the Austrian shareholder be exempt from Austrian residence taxation of the undistributed income of the Slovak K.S. under Articles 7 and 23 of the tax treaty? Third, will the Austrian shareholder be taxed on any subsequent

2 For a detailed analysis of the administrative practice on hybrid entities in the Austrian Ministry of Finance's "Express Answer Service" (EAS), *see* G. Kofler & H. Moshammer, *Zurechnungskonflikte bei Personengesellschaften*, 23 Steuer und Wirtschaft International 2013, pp. 6-17. *See* also specifically with regard to a Slovak "komanditná spoločnost" EAS 2783 (23 Oct. 2006), EAS 3010 (18 Dec. 2008), EAS 3018 (18 Nov. 2008) and EAS 3125 (18 Mar. 2010). Similar hybrid structures involving a Hungarian "betéti társaság" (B.T.) were addressed in EAS 3303 (23 Nov. 2012) and EAS 3304 (23 Nov. 2012), and hybrid Romanian entities were at issue in EAS 3040 (11 Feb. 2009) and EAS 3217 (18 April 2011).

3 EAS 2694 (6 Feb. 2006); EAS 2783 (23 Oct. 2006); EAS 3018 (18 Nov. 2008).

4 It should be noted in passing that a straightforward transfer of shares would trigger exit taxation under § 27(6) EStG (before 2012: § 31(2) EStG) if Austria lost its right to tax the capital gains (*see*, e.g., EAS 3125 (18 Mar. 2010)).

5 *See*, e.g. R. Beiser, *KESt-Ersparnis durch slowakische KS?*, 28 Recht der Wirtschaft 2010, p. 426; R. Beiser, *BFH bestätigt Durchgriff durch ausländische Personengesellschaften*, 29 Recht der Wirtschaft 2011, p. 691. *See* also the discussions in T. Stradinger, *SWI-Jahrestagung: Anteilsübereignung an (hybride) Ost-Personengesellschaften*, 21 Steuer und Wirtschaft International 2011, p. 347, and in D. Auer & A. Miladinovic, *SWI-Jahrestagung: Zuordnung einer Beteiligung zur Betriebsstätte im DBA-Recht*, 29 Steuer und Wirtschaft International 2019, p. 234.

6 As for the treatment in the Slovak Republic, a qualifying dividend received by the Slovak K.S. is exempt in the Slovak Republic (following the Parent Subsidiary Directive). Moreover, dividends paid by the K.S. to the Austrian taxpayer were exempt from withholding taxation in the Slovak Republic in the past (until 2017) and are now taxed at a rate of 7 % (since 2017).

7 In relation to the Slovak Republic, the "old" treaty with the Czechoslovakia (ČSSR) (Federal Gazette 1979/34, as amended) still applies (*see* the exchange of notes to that effect in Federal Gazette 1994/1046). It largely follows the *OECD Model* Tax Convention on Income and Capital (11 April 1977), Models IBFD. The treaty, though amended by the *OECD Multilateral Convention* (MLI), Models IBFD, does not include provisions similar to Article 1(2), (3) or the new wording of Article 23A(1), 23B(1) *OECD Model Tax Convention on Income and Capital* (21 Nov. 2017), Models IBFD.

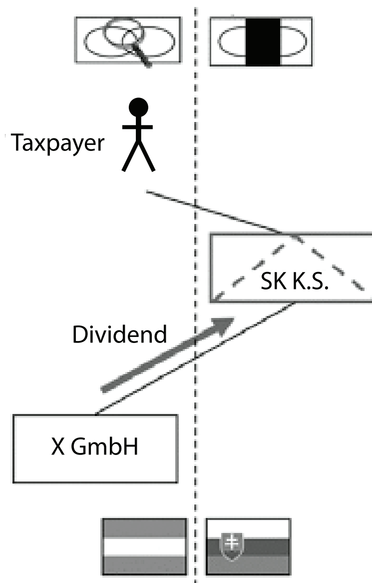
profit distribution by the Slovak K.S., or will it be treated as a tax-free withdrawal? Some of those issues have been addressed in a recent line of case law by the Federal Fiscal Court (BFG) as well as the Austrian Supreme Administrative Court (VwGH), specifically regarding the allocation of a holding in an Austrian corporation to a Slovak K.S.[8]

II. Facts of the Case

The facts in the 2020 decision[9] by the Austrian Supreme Administrative Court can easily be summarized and simplified. The Austrian individual taxpayer was (effectively) the only shareholder in the Austrian X GmbH and the Slovak K.S. The Slovak K.S.'s business was in the real estate sector (letting and trading real estate) whereas X GmbH's business consisted of its holding and asset management functions. X GmbH held a 25 % share in Swiss Y Holding AG that it sold in 2014 and subsequently purchased securities. In 2007, the taxpayer transferred her stake in X GmbH (as an equity contribution) to the Slovak K.S. (declaring income based on the Austrian exit tax rules and applying for deferred taxation). Subsequently, X GmbH made several profit distributions to the Slovak K.S., including a distribution in kind of the securities in 2015 and a number of cash dividends between 2009 and 2015 without deducting withholding tax (relying on § 94a EStG and its successor, § 94(2) EStG). In 2016, the Slovak K.S. sold the securities to the taxpayer, clearing the purchase price with the taxpayer's rights to profits.

8 The focus of this note is the 2019/13/0007 (15 Oct. 2020) decision (for taxable years 2007-2016, appeal from AT: BFG [Federal Tax Court], 10 Oct. 2018, RV/7101777/2015, unpublished). A previous decision by the Austrian Supreme Administrative Court (VwGH) on a hybrid sandwich structure was VwGH, 18 Oct. 2017, Ro 2016/13/0015 (appeal from AT: BFG [Federal Tax Court], 28 Jan. 2016, RV/7102307/2010), with a continued procedure at the level of the Federal Fiscal Court (BFG) (for taxable year 2007: BFG, 15 July 2018, RV/7105347/2017, not appealed) and a subsequent decision by the same court (for taxable years 2009-2011: AT: BFG [Federal Tax Court], 6 July 2020, RV/7101779/2017, not appealed). For detailed analyses of these decisions, *see* N. Zorn, *VwGH: Zuordnung einer Beteiligung zur Betriebsstätte im DBA-Recht*, 36 Recht der Wirtschaft 2018, p. 254; D. Auer & A. Miladinovic, *supra* n. 4 , at 234; N. Zorn, *VwGH: Einkünfte aus Beteiligung an slowakischer k.s.*, 38 Recht der Wirtschaft 2020, p. 949; K. Dziurdź, *Zurechnung von Beteiligungen und der funktionale Zusammenhang*, 30 Steuer und Wirtschaft International 2020, p. 521; M. Lang, *Neue VwGH-Rechtsprechung zur abkommensrechtlichen Behandlung hybrider ausländischer Gesellschaften*, 31 Steuer und Wirtschaft International 2020, p. 642; M. Deichsel, *Steuerliche Behandlung der von einer österreichischen GmbH an eine slowakische k.s. erfolgten Gewinnausschüttungen*, 19 Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht 2020, p. 400; M. Hummer & J. Höhfurtner, *Aktuelles BFG-Erkenntnis zur slowakischen Komanditná Spoločnost*, 31 Steuer und Wirtschaft International 2021, p. 133; H. Loukota, *Aktuelle BEPS-konforme VwGH-Judikatur zu hybriden Personengesellschaften*, 31 Steuer und Wirtschaft International 2021, p. 181.

9 *See* 2019/13/0007 (15 Oct. 2020) (for taxable years 2007-2016, appeal from RV/7101777/2015 (10 Oct. 2018), unpublished).



III. The Court's Decision

The main issue addressed by the BFG as well as the VwGH was whether the shares in the Austrian X GmbH were "effectively connected" with K.S.'s active business in the Slovak Republic. Both courts concluded that this was not the case, so neither Articles 7 and 23(2) nor any other provision would restrict Austria's domestic right to tax the dividends paid by X GmbH in the hands of the Austrian taxpayer.

Before addressing the VwGH's decision, two (more or less) implicit assumptions should be brought to light. First, the entity qualification of the Slovak K.S. is based on Austrian tax law (comparability analysis under the so-called Typenvergleich), i.e. the K.S. is treated as comparable with an Austrian limited partnership and hence as tax transparent from an Austrian perspective.[10] This determination is neither influenced by the list of qualified entities in the Parent-Subsidiary-Directive[11] nor by the qualification under foreign (tax) law.[12] Second, the fact that the Slovak K.S. is treated as non-transparent and as a resident taxpayer by the Slovak Republic does not mean, for purposes of the tax treaty, that Article 7(1) would

10 *See* also, e.g., EAS 2694 (6 Feb. 2006); EAS 2783 (23 Oct. 2006); EAS 3018 (18 Nov. 2008).

11 *See* also EAS 2683 (21 Dec. 2005), EAS 3018 (18 Nov. 2008) and, although in a different context, 2019/13/0007 (15 Oct. 2020), paras. 44, 45.

12 *See*, e.g., EAS 2248 (3 Mar. 2003); EAS 2375 (21 Nov. 2003); EAS 3018 (18 Nov. 2008); EAS 3040 (11 Feb. 2009); EAS 3217 (18 April 2011); EAS 3304 (23 Nov. 2012).

prevent taxation of the respective income share in the partner's state, i.e. Austria.[13] This reflects the VwGH's view that a tax treaty does not generally contain rules that determine the subjective attribution of income to a taxpayer and that this attribution is rather a matter to be determined under the domestic law of the source state.[14] Third, the VwGH implicitly confirmed that the Slovak K.S., though non-transparent from a Slovak perspective, is treated as merely conveying a "regular" permanent establishment to the Austrian partner and that the K.S., which is a single entity under the tax law of the Slovak Republic, can hence be "compartmentalized" into several spheres from that perspective. This latter view makes it therefore decisive if a certain asset can be attributed to the permanent establishment conveyed to the Austrian taxpayer by the Slovak K.S. (or if, conversely, that asset must be treated as being held by the Austrian taxpayer directly[15]).

Moreover, and although not disputed in the case, the VwGH implicitly acknowledged that Austria has a dual position in this hybrid "sandwich structure". It is the source state of the dividend as well as the residence state of the taxpayer. Regarding Austria's position as a source state, the VwGH, in passing, confirmed that Austria is barred from levying a withholding tax on the dividend based on Austria's implementation of the EU's Parent Subsidiary Directive (PSD). This is because the Slovak K.S. is a listed legal form in the PSD[16] and hence exempt from withholding taxation in Austria[17] if the other relevant conditions are met (e.g. a 10% equity stake).[18] Switching the perspective back to Austria's position as the taxpayer's residence state, however, the VwGH confirmed that the PSD does not prohibit taxation (via assessment) of the dividend income on the level of the individual shareholder on a residence basis.[19]

The VwGH's decision then focused on the bilateral tax treaty between Austria and the Slovak Republic. Here it was decisive for the court to determine whether the holding in X GmbH had an "effective connection" ("tatsächliche Zugehörigkeit") with the business activities of the Slovak K.S.[20] Already in 2017 and without even mentioning the Authorized OECD Approach, the VwGH came to this approach based on the systematic context of Articles 7, 10(4), and 13(2) which

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13 This assumption is also in line with OECD guidance. *See*, e.g. paras 125-129 and Example 16 in OECD, *The Application of the OECD Model Tax Convention to Partnerships*, Issues in International Taxation No. 6 (Paris: OECD, 1999) (the "OECD Partnership Report"), Art. 1(6.1) OECD Model Conventions before the 2017 Update, and the "saving clause" in Art. 1(3) of the *OECD Model* (2017).

14 *See* 2019/13/0007 (15 Oct. 2020), para. 49.

15 *See* Zorn, (2018), *supra* n. 7, at 256).

16 Annex I Part A lit y of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2011] OJ L 345, p. 8, as amended.

17 I.e., § 94(2) EStG (before April 2012: § 94a EStG).

18 2019/13/0007 (15 Oct. 2020), paras 43, 47,

19 Id., paras. 44-45.

20 Id., paras. 35-36, referring to AT: VwGH [Supreme Administrative Court], 18 Oct. 2017, Ro 2016/13/0015.

demonstrates that only if a holding has such "effective connection" ("tatsächliche Zugehörigkeit") to a permanent establishment could the respective dividends be taxed under Article 7 of the treaty.[21] Moreover, the VwGH clearly viewed this question of attribution of assets and income to a permanent establishment as one of autonomous treaty interpretation so that no recourse to domestic law under Article 3(2) of the tax treaty is warranted. That also means that the domestic law criteria for the attribution of assets to a business, such as the categorization as "necessary" or "voluntary" business property, are not dispositive.[22] In the concrete case, the VwGH (just as the BFG before) found that no such "effective connection" between the holding in X GmbH and K.S.'s business existed and that the mere strengthening of credit-worthiness is not sufficient to establish one.[23] Hence, implicitly viewing the dividend paid by the Austrian GmbH as having been received directly by the Austrian shareholder, Austria is not restricted (by Article 23(2) of the tax treaty) in taxing the dividend income K.S. receives from X GmbH.[24] This taxation on a residence-basis is also not a prohibited withholding taxation within the meaning of the PSD.[25]

There are also some interesting further "takeaways" from the VwGH's analysis. First, the court already confirmed in its 2017 decision that the domestic deeming provision of § 2(4) EStG, which deems all income from a commercial partnership ("Mitunternehmerschaft") as income from a "business", is not relevant for the tax treaty analysis.[26] Hence, § 2(4) EStG can certainly not be read as meaning that any asset owned by the K.S. would automatically have to be considered a business asset attributable to a permanent establishment under tax treaty law.[27] Second, the taxpayer had argued that the "effectively connected requirement" was only developed by the court in 2017[28] and that, previously, the tax administration's general guidance had accepted the domestic law qualification as "necessary" business property[29] and even as "voluntary" business property.[30, 31] The court did not enter into the substance of that challenge but merely noted that general administrative guidance does not trigger good faith protection of the taxpayer.[32] Third, the court held that

21 *See* 2016/13/0015 (18 Oct. 2017).
22 2019/13/0007 (15 Oct. 2020), paras. 36-37 and 39, referring to 2016/13/0015 (18 Oct. 2017).
23 2019/13/0007 (15 Oct. 2020), paras. 37, 38.
24 Id., para. 35.
25 Id., paras. 44-45.
26 *See* 2016/13/0015 (18 Oct. 2017), referring to German case law; possibly *contra* EAS 2248 (3 March 2003) ("all-or-nothing" for purposes of Article 7).
27 *See* also Lang, *supra* n. 7, at 648-649.
28 *See* 2016/13/0015 (18 Oct. 2017).
29 EAS 2931 (7 Feb. 2008); EAS 3010 (18 Dec. 2008); EAS 3018 (18 Nov. 2008).
30 *See* also AT: BFG [Federal Tax Court], 28 Jan. 2016, RV/7102307/2010; but *contra* already EAS 3010 (18 Dec. 2008), EAS 3018 (18 Nov. 2008) and EAS 3317 (8 April 2013).
31 Note that the current administrative guidance is in line with the new case law (e.g., EAS 3403 (8 June 2018); EAS 3421 (25 März 2020); para. 433 of the Austrian Corporate Tax Guidelines ("KStR 2013"), as amended in 2019).
32 *See* 2019/13/0007 (15 Oct. 2020), paras 39-40.

the Austrian exit tax was not triggered by the transfer of shares by the Austrian individual, non-business shareholder since the holding in X GmbH did not become "effectively connected" with the Slovak K.S. (under Article 13(2)) and, therefore, Austria did not lose its right to tax the capital gains (Article 13(4)).[33]

IV. Comments on the Court's reasoning

A. Austrian Source Taxation of X GmbH's Distributions?

As for the Austrian source taxation of X GmbH‘s distributions, the VwGH clearly found that the withholding tax exemption for cross-border intercompany dividends under domestic law, which is based on the EU's Parent Subsidiary Directive (PSD), applies because the Slovak K.S. has a legal form listed in the PSD[34] (and the other conditions, such as a sufficient equity holding, were fulfilled).[35] This confirms that the exemption from Austrian withholding taxation applies irrespective of the hybridity of the recipient[36] and irrespective of whether the holding is "effectively connected" with a permanent establishment of the K.S. in the Slovak Republic.[37]

Given that the withholding tax exemption for cross-border intercompany dividends applied, the VwGH did not have to address the questions if and how a tax treaty would potentially modify Austrian source taxation in a hybrid "sandwich structure". Generally, Article 10 (and any limit to source taxation) would not have applied in the present case since, from an Austrian perspective, the distribution is not cross-border but rather from an Austrian GmbH to an Austrian shareholder.[38] Absent a specific clause along Article 1(2), (3) OECD MC 2017, this view

33 Id., para. 50.

34 *See* Annex I Part A lit y of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2011] OJ L 345, p. 8, as amended.

35 As for hybrid entities, that view was generally shared with regard to Article 5 of the Parent Subsidiary Directive (*see*, e.g. para. 3.3.5.2., of the Report from the Commission to the Council in accordance with Article 8 of Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM(2009)179) as well as the "old" § 94a EStG (which referred to a recipient "company"; *see*, e.g. EAS 2783 (23 October 2006)) and the "new" § 94 Z 2 EStG (although doubts might have existed as that provision now refers to a recipient "corporation" and could have been read as requiring comparability under the so-called "Typenvergleich" with a corporation under Austrian law). *See,* for that discussion and further references, D. Aigner, G. Kofler, H. Kofler and M. Tumpel, *Grenzüberschreitende Gewinnausschüttungen und hybride Gesellschaften in § 10 Abs 2 KStG und § 94 Z 2 EStG*, in: Kammer der Wirtschaftstreuhänder (ed.), *Personengesellschaften und andere Mitunternehmerschaften sowie ihre Gesellschafter*, GedS Bruckner (Vienna: Linde Verlag, 2013), p. 355).

36 *See* 2019/13/0007 (15 Oct. 2020), paras. 43, 47; for critical perspectives *see*, however, Beiser, (2010), *supra* n. 4, at 426-427, and the comments by H. Jirousek in Stradinger, *supra* n. 4, at 347-348.

37 *See* 2019/13/0007 (15 Oct. 2020), paras. 43, 47; RV/7101779/2017 (6 July 2020).

38 RV/7101779/2017 (6 July 2020); *see* also Example 16 in the *OECD Partnership Report* (majority opinion), *supra* n. 12.

confirms the decisiveness of the source state's perspective on who the recipient of the dividend is, therefore, the fact that K.S. is a resident of the Slovak Republic has no bearing on Austrian taxation.[39] However, Austria would be barred from levying a withholding tax on the dividend by Article 7 if the holding was effectively connected with K.S.'s business in the Slovak Republic.[40]

B. Austrian Residence Taxation of X GmbH's Distributions?

As for the taxpayer's taxation of the dividend income on a residence-basis, the VwGH's case law on Articles 7(2) and 23(2) of the treaty requires distinguishing between two situations depending on whether a treaty-autonomous "effective connection" between the holding and the permanent establishment exists:

- First, if the holding in X GmbH is "effectively connected" with a permanent establishment of the K.S. in the Slovak Republic, Article 7 applies to the respective dividends, and Austria will exempt this income under Article 23(2)(a) (subject to progressivity).[41] This view also rejects the alternative reading of the treaty that would apply Article 10(1) to the undistributed income of the K.S.[42]
- Second, if the holding in X GmbH was not attributable to a permanent establishment in the Slovak Republic (e.g. because there is no such "effective connection" or if the K.S. was engaged in mere passive asset management), the dividend income will be directly and without restriction taxed at the level Austrian shareholder level under Article 21(1)[43] (as Article 10(1) does not apply for lack of a cross-border situation[44]).

The principal focus in hybrid "sandwich structures" is therefore on the "effective connection" between an asset (i.e. the shareholding) and a permanent establishment. To determine such a connection, case law focuses on the function and use of the asset in the business and the permanent establishment,[45] and administrative practice in Austria relies on the guidance of the Authorized OECD Approach

39 See for that conclusion also Lang, supra n. 7, at 644.

40 EAS 2783 (23 Oct. 2006); EAS 3168 (21 June 2010).

41 *See* RV/7101779/2017 (6 July 2020), and likewise from administrative practice, e.g., EAS 231 (4 Feb. 1993); EAS 1228 (24 July 1998); EAS 2683 (21 Dec. 2005); EAS 3018 (18 Nov. 2008); EAS 3040 (11 Feb. 2009); EAS 3217 (18 April 2011); EAS 3303 (23 Nov. 2012); *see* also para. 135 and Example 18 in the *OECD Partnership Report*, *supra* n. 12.

42 See, e.g., H.-J. Aigner & D. Aigner, Sind Entnahmen aus Personengesellschaften abkommensrechtlich „Dividenden"?, 10 Steuer und Wirtschaft International 2000, p. 254; M. Lang, Personengesellschaften und Doppelbesteuerungsabkommen, in: R. Bertl et al., (eds.), Die Personengesellschaft im Unternehmens- und Steuerrecht (Vienna: Linde Verlag, 2013), pp. 247-248; Lang, supra n. 7, at 659-650. Rejecting that position, e.g., para. 137 in the OECD Partnership Report, supra n. 12.

43 Lang, *supra* n. 7, at 647; Loukota, *supra* n. 7, at 190.

44 RV/7101779/2017 (6 July 2020); *see* also, e.g., EAS 3018 (18 Nov. 2008), EAS 3304 (23 Nov. 2012); possibly *contra* RV/7101777/2015 (10 Oct. 2018).

45 *See* RV/7102307/2010 (28 Jan. 2016,); 2016/13/0015 (18 Oct. 2017).

and the corresponding concept of "economic ownership".[46, 47] For example, an "effective connection" was accepted by Austrian courts when a K.S. and an Austrian GmbH were active in the same business sector (marketing under the same branding)[48] but declined when this was not the case.[49] In any event, the mere "strengthening" of the balance sheet or the creditworthiness is not sufficient to create an "effective connection".[50]

C. Relief in Austria for Foreign Residence-Based Taxes?

The VwGH's decision also addressed an interesting "side topic". In the concrete case, the Slovak K.S. had received interest-bearing securities as an in-kind distribution from X GmbH (in 2015), and these distributed securities were directly attributed to the Austrian taxpayer from Austria's tax perspective (and taxed as a dividend).[51] However, the K.S. as the legal owner of those securities had earned interest income from the securities (before selling them to the taxpayer in 2016) that was taxed in the Slovak Republic at a rate of 23%,[52] and that same interest was likewise taxed in Austria (as income of the Austrian taxpayer). It remained undisputed before the VwGH that, indeed, the Slovak Republic was not restricted in taxing all of the K.S.'s income on a residence basis, including the interest (Article 7(1)).[53] This raised the question if Austria is under an obligation to give treaty relief for the Slovak corporate level tax on the K.S.'s (domestic or foreign) interest income under Article 23(2).

In a very brief statement, the VwGH rejected such an obligation, arguing that the interest from the securities is income of the Austrian taxpayer and that the tax treaty does not regulate the subjective attribution of income to a taxpayer.[54] It might be noted, first, that the Austrian tax administration has taken a more generous position in the past[55] and, second, that the VwGH's decision corresponds to the 2017 Update of Articles 23A and 23B of the OECD MC and Commentary

46 E.g., art 10(32.1) *OECD Model.*

47 *See*, e.g., EAS 3304 (23 Nov. 2012), EAS 3317 (8 April 2013) and EAS 3421 (25 Mar. 2020) (with a focus on "significant people functions" regarding a holding. For extensive analysis *see* Dziurdź, *supra* n. 7, at 521.

48 AT: BFG [Federal Tax Court], 15 Nov. 2018, RV/7105347/2017, and RV/7101779/2017 (6 July 2020).

49 *See* 2019/13/0007 (15 Oct. 2020), paras. 36-38.

50 Ibid.

51 Id., para. 26.

52 Id., para. 13.

53 Id., paras. 48-49; possibly *contra* RV/7101777/2015 (10 Oct. 2018).

54 *See* 2019/13/0007 (15 Oct. 2020), para. 49. *See* also Lang, *supra* n. 7, at 650-651, and Loukota, *supra* n. 7, at 187-188, arguing that such economic double taxation is not addressed by the tax treaty.

55 Indeed, the Austrian tax administration had accepted that Austria would be under an obligation to grant relief for residence-based taxes of the foreign hybrid partnership on its domestic and foreign income, and that the relief would take either the form of exemption or credit, depending on the specific tax treaty (*see* EAS 3304 (23 November 2012), concerning interest and royalties from sources within and outside the other Contracting State, referring to an extended reading of Example 17 and para. 131 in the OECD Partnership Report).

which now include clauses clarifying[56] that no relief has to be given for taxes that are levied by the other contracting state on a residence basis. Indeed, a treaty credit by the taxpayer's residence state need only be given for the other state's source-based taxation up to the maximum source tax under the treaty but not for any residence-based taxation on the hybrid entity if it is viewed as non-transparent by that other state.[57]

D. Taxation of a Subsequent Profit Distributions from the Slovak K.S. to the Taxpayer?

The VwGH did not have to deal with a potential subsequent issue: Since the Slovak K.S. is viewed as a resident taxpayer by the Slovak Republic, Article 10(2) would apply to any profit distribution it makes to the Austrian shareholder, i.e. the Slovak Republic as the source state of the "dividend" (Article 10(3)) could levy a maximum 10 % withholding tax.[58] Would Austria then be under an obligation to grant a treaty credit under Article 23(2)(b) for the Slovak dividend withholding tax? The answer is negative in two steps. First, from a treaty perspective, Austria would not be restricted in taxing that dividend (Article 10(1)) and would conversely be required to grant a tax credit (Article 23(2)(b)).[59] Second, however, from Austria's domestic tax perspective, the cashflow, i.e. the "dividend", is a mere tax-neutral withdrawal from a transparent partnership.[60] Additionally, as the withdrawal is tax neutral, there will be no credit for any Slovak withholding tax on the "dividend"[61] and, moreover, as the withdrawal is not "income", the Austrian tax administration does not consider it relevant for purposes of calculating the "per-country limitation" either (should the taxpayer have other Slovak-source income).[62]

56 At least the OECD views the new wording of art. 23 A and 23 B *OECD Model* (2017) after the 2017 update as merely clarifying ("result would logically follow from the wording of Articles 23 A and 23 B even in the absence of that phrase"; *see* art 23(11.1) *OECD Model* (2017). One might note, however, that the OECD guidance on that issue before the 2017 Update was not entirely clear (*see*, e.g., Example 18 in the *OECD Partnership Report*, *supra* n. 12 and art. 23(69.1) *OECD Model* (before 2017) "flow through" for purposes of the foreign tax credit). *See* for that tension also G. Kofler, *Some Reflections on the 'Saving Clause'*, 44 Intertax 2016, p. 585.

57 *See* art. 23(11.1) with Examples E and F and no. 69.1 *OECD Model* (2017). That means that no relief for the residence-based tax on foreign income or tax that exceeds the maximum source tax (e.g., in excess of 10% under art. 11(2) *OECD Model*) in the partnership State (art. 23 *OECD Model* (2017) and art 23(11.1) with Examples C and D *OECD Model* (2017).

58 *See* EAS 2683 (21 Dec. 2005); EAS 2375 (21 Nov. 2003); EAS 3018 (18 Nov. 2008); EAS 3040 (11 Feb. 2009); EAS 3303 (23 Nov. 2012); art. 23(69.1) *OECD Model*.

59 *See* also, *OECD Partnership Report*, *supra* n. 12, e.g. at para. 135.

60 *See*, e.g., EAS 2683 (21 Dec. 2005); EAS 3018 (18 Nov. 2008); EAS 3040 (11 Feb. 2009); EAS 3303 (23 Nov. 2012); *see* also *OECD Partnership Report*, *supra* n. 12, at para. 136 and art. 23(69.3) *OECD Model*.

61 *See* EAS 3040 (11 Feb. 2009) and EAS 3303 (23 Nov. 2012) (dividend is "excluded from the treaty credit system"); art 23(69.3) *OECD Model* (no credit "as there is simply no tax" in the residence State against which to credit).

62 *See* EAS 3303 (23 Nov. 2012).

Notes

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