

# Tax Short Cuts

Current tax information  
for Austria from EY

## Austrian Supreme Administrative Court on change in the organizational structure of a corporate shell

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In the decision of 24 April 2024 (Ro 2022/15/0040), the Austrian Supreme Administrative Court (VwGH) had to decide on the existence of a corporate shell (Mantelkauf). In particular, it was to be assessed whether there had been a change in the organizational structure despite the retention of the board member.

Pursuant to Sec 8/4/2/c Austrian Corporate Income Tax Act (KStG), the requirements of a corporate shell are met if there is a significant change in the shareholder structure, the economic structure and the organizational structure against consideration. If all three prerequisites are fulfilled, tax loss carry forwards are forfeited.

In the case at hand, the sole managing director who had been director for many years was not replaced following the sale of shares of the company. Following a tax audit, the tax office assumed a change in the organizational structure and thus the realization of the corporate shell requirement, as the appointed managing director did not carry out any visible operational activities. The Federal Fiscal Court, in turn, upheld the appeal and denied the realization of the corporate shell requirement because there had been no replacement or addition of new managing directors.

According to the VwGH, a significant change in the organizational structure generally exists if all or the vast majority of the members of the management change successively in one go or if there is an internal connection. In conjunction with a significant change in the economic structure and the shareholder structure, this change must result in the company's economic identity becoming different.

## Austrian Supreme Administrative Court on change in the organizational structure of a corporate shell

With regard to substance over form, the organizational structure is based on the actual circumstances, i.e. those managing directors who actually manage the business. If a position on a corporate body is only formally retained while the de facto management changes, this results in a significant change to the organizational structure. In this way, merely formally retaining the position of board member cannot prevent the effects of the corporate shell.

If the previous executive bodies are not replaced or no new managing director is appointed, in cases in which the previous management is formally retained and the business is actually managed by executive bodies of an affiliated company, the de facto managing director, who is also included in the managing director liability in the same way by the legislator through Sec 9a of Austrian Federal Fiscal Code (BAO), may also be relevant in the context of the overall consideration of the individual case.

The decision can be accessed via the following link (German version only):  
[https://www.ris.bka.gv.at/Dokumente/Vwgh/JWT\\_2022150040\\_20240424J00/JWT\\_2022150040\\_20240424J00.pdf](https://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2022150040_20240424J00/JWT_2022150040_20240424J00.pdf)

## MoF: Interest on refunds under the COFAG Reorganization and Resolution Act

### *COFAG-NoAG*

With the COFAG Reorganization and Resolution Act (COFAG-NoAG), the tasks of the former COFAG for COVID-19 subsidies were transferred to the MoF (see our Tax Short Cuts 16/2024 of 6 August 2024 for the organizational decree).

In accordance with the basic rule of Sec 16/1 first sentence COFAG-NoAG, interest of 2% above the base interest rate (or 1% above the base interest rate in accordance with the special regulation of Sec 16/1 second sentence COFAG-NoAG) is to be paid on the reimbursement of unduly received financial benefits.

The MoF regularly publishes adjustments to interest rates in accordance with the Federal Fiscal Code by decree. The interest rates for interest on refund claims were included in the decree dated 9 August 2024 (2024-0.584.522); these are 5.88% and 4.88% p.a. respectively.

The decree can be accessed via the following link (German version only):  
<https://findok.bmf.gv.at/findok/resources/pdf/e9a13d62-aad5-4112-b49d-68481b2bb87c/83030.1.1.pdf>

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