Issue 20/2024 | 3 October 2024

Tax Short Cuts

Current tax information for Austria from EY

Organizational Decree on the COFAG Reorganization and Resolution Act, amendment of the Upper Limits Directive

Contents

The Organizational Decree on the COFAG Reorganization and Resolution Act (COFAG-Neuordnungs- und Abwicklungsgesetz, COFAG-NoAG) from 1 August 2024 (2024-0.565.597) regulates the implementation of the change of responsibility stipulated in the law. Since 1 August 2024, the tasks performed by COFAG regarding subsidy applications in context with COVID-19 have been transferred to the MoF.

The tasks include:

- Determination of reimbursement claims and interest,
- Recording of repayments in the subsidy manager,
- Notifications to the Transparency Database and European Transparency Database (TAM reports),
- Granting of financial measures regarding open subsidy applications from COFAG and their recording in the subsidy manager.

In particular, the decree deals with the reimbursement of subsidies received.

Reimbursement claims arise if a contracting party has received unjustified financial benefits from a subsidy agreement. The examination of the existence of such a claim under public law is the responsibility of the tax office, which is or would also be responsible for the collection of VAT. This also applies to retroactive audits initiated but not completed before 1 August 2024.

Building a better working world

The reimbursement claims may result from overpayments that exceed the amount stipulated in the subsidy agreement or the amount permitted under state aid law, or from non-compliance with the tax good behavior requirements. However, a reimbursement claim does not arise if the amount has already been asserted before an ordinary court before 1 August 2024, if an execution title has been issued for the amount or if a civil law agreement on the reimbursement of a financial benefit has been concluded with the contractual partner and the claims arising from this have been transferred to the federal government.

The amount of the reimbursement claim corresponds to the difference between the amount received and the amount that would have been due if the amount received had exceeded it. Interest at a rate of two percentage points above the base rate per annum will be charged on the reimbursement amounts for the period from payment until assessment. However, this interest does not apply if interest has already accrued due to a deferral or suspension. The interest is determined by the responsible tax office by tax assessment.

The decree also clarifies once again that decisions on outstanding applications for subsidies will continue to be made in accordance with civil law principles. However, since 1 August 2024, the MoF has also been responsible for granting outstanding subsidy applications, with the Tax Office for Large Enterprises being appointed as the processing office. The audit is divided into an examination of the formal requirements and an examination of the substantive requirements.

It should be noted that due to the responsibility of the MoF, offsetting can now take place in accordance with Sec 1438 et seq. Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch), in particular if the subsidy applicant has outstanding tax arrears that can be offset.

The changes by the COFAG-NoAG have already been integrated into the Upper Limits Directive (Obergrenzenrichtlinien) through an amendment (Federal Law Gazette II No. 242/2024 on 4 September 2024), which regulate the review and reclassification of COFAG subsidies exceeding the upper limits as compensation for losses, for damages or de minimis aid.

The Austrian Chamber of Tax Advisors and Auditors has submitted questions on the Upper Limits Directive to the MoF, which have been answered and published. The answers can be accessed via the following link (German version only): https://www.bmf.gv.at/themen/cofag-abwicklung/obergrenzenrichtlinien.html

The recently published answers part 3 on 20 September 2024 relate in particular to questions on the prohibition of profit distributions and clarifications on the calculation of loss compensation.

Austrian Supreme Administrative Court: No application of Sec 10/3 KStG upon liquidation of a foreign group member

Corporate Income Tax Act

In its decision of 16 April 2024 (Ro 2023/13/0003), the Austrian Supreme Administrative Court (Verwaltungsgerichtshof, VwGH) dealt with the question whether Sec 10/3 Corporate Income Tax Act (Körperschaftsteuergesetz, KStG) – assertion of final asset losses – can also be applied for the liquidation of a foreign group member within the meaning of Sec 9 KStG.

In the relevant case, an Austrian corporate group held a third-country participation via an Austrian group member, which was integrated into the corporate group as a foreign group member. As part of the group assessment, ongoing losses of the foreign group member were considered as tax deduction, and in excess of this amount as tax neutral partial write-downs.

The law stipulates that if a foreign group member leaves the group, the losses claimed on an ongoing basis must be taxed subsequently. If the foreign group member leaves the group due to liquidation or insolvency (i.e. final loss of assets), the losses to be taxed subsequently are reduced by the tax neutral partial write-downs made during the group membership (up to the amount of EUR 0.00) in accordance with Sec 9/6/7 KStG.

As the tax neutral partial write-downs exceeded the losses to be subsequently taxed, the complainant applied to additionally claim these excess partial write-downs as tax deductible pursuant to Sec 10/3 KStG.

If there is no tax group, Sec 10/3 KStG stipulates that in the event of an actual and final capital loss due to liquidation or insolvency, the losses incurred, reduced by tax neutral profit shares (especially dividends) from the last 5 years, can be claimed as a tax deduction. This applies even if the taxpayer has decided for the tax neutrality of changes in value.

It should be noted that the above mentioned procedure in accordance with Sec 10/3 KStG does not include losses that are considered on an ongoing basis, but rather tax neutral losses that are only considered as tax deductible when the final capital loss is incurred (in comparison to group taxation, where losses of foreign group members are considered on an ongoing basis).

The VwGH has ruled that the parallel application of Sec 9/6/7 KStG and Sec 10/3 KStG is not possible. This is because Sec 9/6/7 KStG is a lex specialis to the general provision of Sec 10/3 KStG and supersedes this within group taxation. The VwGH also explains that it was not the legislator's intention to combine the advantages of both systems.

The VwGH ruling refers to foreign group members domiciled in a third country. If the liquidated group member is resident in the EU, it would have to be examined separately whether the application of Sec 10/3 KStG is required under European Union law.

Contact

Feedback

If you have any questions or suggestions or if you would like to be contacted please send an e-mail to: Feedback

Website

Get more information about our services, activities and events on our website: ey.com/at

Archive

Find our previous issues of this newsletter on our website or send us an inquiry to newsletter@at.ey.com.

Unsubscribe

If you want to unsubscribe from this newsletter please send an e-mail that contains your name and your e-mail address to ey.crm@ey.com.

Business Tax

Markus Stefaner
Phone +43 1 211 70 1283
markus.stefaner@at.ey.com

International Tax

Roland Rief
Phone +43 1 211 70 1257
roland.rief@at.ey.com

Transfer Pricing

Manuel Taferner
Phone +43 1 211 70 1104
manuel.taferner@at.ey.com

Indirect Tax

Ingrid Rattinger
Phone +43 1 211 70 1251
ingrid.rattinger@at.ey.com

People Advisory Services

Regina Karner
Phone +43 1 211 70 1296
regina.karner@at.ey.com

Global Compliance & Reporting

Maria Linzner-Strasser
Phone +43 1 211 70 1247
Maria.Linzner-Strasser@at.ey.com

Transaction Tax

Andreas Sauer
Phone +43 1 211 70 1625
andreas.sauer@at.ey.com

Editor and owner of the medium

Ernst & Young
Steuerberatungsgesellschaft
m.b.H. ("EY")
Wagramer Straße 19, IZD Tower
1220 Vienna

Responsible Partner

Klaus Pfleger
Phone +43 1 211 70 1179
Klaus.Pfleger@at.ey.com

EY | Building a better working world

EY exists to build a better working world, helping to create long-term value for clients, people and society and build trust in the capital markets.

Enabled by data and technology, diverse EY teams in over 150 countries provide trust through assurance and help clients grow, transform and operate.

Working across assurance, consulting, strategy, tax and transactions, EY teams ask better questions to find new answers for the complex issues facing our world today.

The integrated service portfolio of EY is complemented by comprehensive legal advisory services provided by the international network of EY Law, in Austria represented by Pelzmann Gall Größ Rechtsanwälte GmbH.

In this publication, "EY" and "we" refer to all Austrian member firms of Ernst & Young Global Limited. Each EYG member firm is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Information about how EY collects and uses personal data and a description of the rights individuals have under data protection legislation are available via ey.com/privacy. For more information about our organization, please visit ey.com.

Information according to § 25 Austrian Media Act (MedG) can be accessed here.

In Austria, EY has 4 locations.

Ernst & Young
Steuerberatungsgesellschaft m.b.H.
1220 Vienna, Wagramer Straße 19
4020 Linz, Blumauerstraße 46
5020 Salzburg, Sterneckstraße 33
9020 Klagenfurt, Eiskellerstraße 5

ey.com/at