Austria

Johannes Heinrich/Mona Philomena Ladler

1. (Tax) residence in the domestic context

1.1. Civil law, corporate law and other non-tax areas

1.1.1. Statutory seat as decisive factor

In order to determine whether a person falls under the personal and territorial scope of legislation a territorial assignment of the person is necessary. This assignment is achieved by defining criteria that indicate a certain nexus of a particular person to a particular territory and the legislation in force there. In the case of natural persons, nationality, domicile or permanent place of residence plays an essential role. In the case of legal persons, the place of the headquarters, the head office or the management or also the place of a branch office can be decisive for the territorial assignment. A classification which is completely uniform for all legal areas cannot be considered because it is necessary to differentiate according to the respective purposes of the norms in question. There may be areas in which a company is permitted to determine the connecting factor – without regard to the actual circumstances – more or less autonomously by means of a mere statutory determination; in other cases, however, for the effective enforcement of the law and the avoidance of circumventions of the law, it is necessary to take into account actual circumstances.\(^1\)

In Austria, the specific statutes for all different kinds of companies with legal personality provide that the seat of the company must be determined within the contract of association.\(^2\) The place where the seat is to be located is regulated differently in the laws.\(^3\) In any case the seat of a company must be located within Austria. This is due to the fact that all companies start to exist with the entry in the commercial register. The commercial register is administered by the courts of first instance; the competent court is determined by the “main office” of the company (sec. 120 Law on Court Jurisdiction - "JN"). Without a domestic seat, no Austrian court is competent and a registration in the Austrian commercial register hence not be possible. As a consequence, the company cannot be established under Austrian law.\(^5\)

Whether the seat of a company is subject to free design or has to be located in a specific place is regulated differently in the various company law acts:

- For partnerships, i.e. the general partnership ("Offene Gesellschaft") and limited partnership ("Kommanditgesellschaft"), Sec. 106 Commercial Code provides that the

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\(^1\) Cf. Heidinger/Schneider in Jabornegg/Strasser (ed.), AktG \(^1\) § 5 Rz. 1.
\(^2\) Sec. 17 no. 1 Aktiengesetz (AktG; Austrian Stock Corporation Act); Sec. 4 para. 1 no. 1 Gesetz über Gesellschaften mit beschränkter Haftung (GmbHG ; Austrian Act on Companies with Limited Liability); Sec. 5 no. 1 Gesetz über Erwerbs- und Wirtschaftsgenossenschaft (GenG ; Austrian Act on Cooperatives) ; Sec. 9 para. 1 no. 4 Privatstiftungsgesetz (PSG, Austrian Act on Private Foundations).
\(^3\) See below.
\(^4\) For purposes of Sec. 120 JN the criterion “main office” is only material for the determination of the seat of a sole-entrepreneur.
\(^5\) Zib in Zib/Dellinger (ed.), UGB I Vor § 12 Rz. 8; Ratka in Straube/Ratka/Rauter (ed.) § 5 GmbHG Rz. 78.
A partnership has to be registered at the place, where it is seated. This is understood as the place where the head office is located. Therefore, the seat of a partnership is determined by its head office. Since partnerships for tax purposes are treated transparently, they will not be discussed in more detail.

- Companies with limited liability (LLC; "Gesellschaft mit beschränkter Haftung") and joint stock companies ("Aktiengesellschaft") have to designate the place of their seat within the company agreement. The statutory seat can be a place of a business, the place of the head office or the place of the central administration. Which of these places is designated as the seat of the company is subject to a free choice as long as the place is within Austria.

- For cooperatives it is only provided for that their seat must be determined within the cooperative agreement. The GenG does not contain further provisions governing the place of the seat of the cooperative.

- For private foundations it is provided for, that the seat of the foundation has to be determined within the foundation declaration and that the seat must be in Austria.

All forms of companies (foundation) mentioned above have in common, that, among others, the seat of the company (foundation) has to be determined within the company agreement (foundation declaration) and has to be filed with the commercial register. Therefore, the notion “Sitz” could either be translated into English as “statutory seat” or as “registered office”. On the other hand, foreign companies have to be registered with the commercial register if they have a branch in Austria. The term “registered office” is more suitable to describe that domestic branch of a foreign company. Thus, for domestic companies the term “statutory seat” is further used in this report to translate the German term “Sitz”. In any case, the place of the statutory seat, which to a certain degree is subject to free choice, must be distinguished from the place where the real seat (place of central administration) is located. According to the doctrine, a company may only have one statutory seat.

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7 According to Sec. 161 para. 2 Commercial Code; U. Torggler in Straube/Ratka/Rauter (ed.), UGB I § 106 Rz. 6, 7.
8 See above footnote 2.
9 Sec. 5 AktG and Sec. 5 para. 2 GmbHG; Heidinger/Schneider in Jabornegg/Strasser (ed.), AktG I § 5 Rz. 7; Ratka in Straube/Ratka/Rauter (ed.) § 5 GmbHG Rz. 74 et seq.
10 Until 31.12.2006 for an LLC any place within Austria could be determined to be the place of its seat. With statute, BGBl I 2005/120, the provisions governing the seat of an LLC were adapted to the provisions governing the seat of a stock company. The rule in force does not anymore explicitly require that the seat has to be within Austria. Such a rule was not supposed to be necessary since otherwise the LLC could not be registered with the commercial register and without registration would not start to exist (see above; see also Heidinger/Schneider in Jabornegg/Strasser (ed.), AktG I § 5 Rz. 9; Ratka in Straube/Ratka/Rauter (ed.) § 5 GmbHG Rz. 73).
11 Sec. 5 no. 1 GenG.
12 Sec. 9 para. 1 no. 4 PSG.
13 Sec. 1 para. 1 PSG.
14 Sec. 12 para. 1 UGB.
15 E.g. Heidinger/Schneider in Jabornegg/Strasser (ed.), AktG I § 5 Rz. 13 with many references.
1.1.2. The real seat as connecting factor in international cases

According to Sec. 10 of the Private International Law Act ("IPRG") the lex societatis is determined by the real seat of the head office. Austria follows the "real seat theory". There is both an internal and an external dimension of the real seat. From an internal point of view, this is the place where the leading management decisions are implemented on a daily basis. The external dimension requires visibility of management activity; i.e. a certain degree of organization (e.g. office, secretary, computers) on a continuous basis. Both requirements are met by the place of the general direction, whereas the place of the accounting department, the shareholders meeting or the registered office – if different from the real seat – do not suffice.

From Sec. 10 IPRG follows that a company formed under foreign law which has its real seat within Austria is not regarded as legal entity under Austrian Law. But, foreign companies can transform into a domestic company by transferring their statutory seat to Austria. The company keeps its corporate identity but has to comply with the domestic requirements concerning minimum capital, statutes, internal organization of company etc. Alternatively, foreign companies can establish a subsidiary or a branch in Austria. To enhance transparency, domestic branches of foreign companies have to be registered in the Austrian commercial register. This means, that the foreign company has to comply with the provisions of the Austrian Commercial Registry Act ("FBG"). In terms of the Commercial Registry Act, a branch of a foreign company is treated like a head office of an Austrian company.

If, on the contrary, a company is formed under Austrian law and has its statutory seat within Austria, it is in practice always treated as legal person in Austria, regardless whether from the very beginning it is managed from a foreign country or the company’s real seat was subsequently transferred to a foreign country.

Art 10 IPRG is not applicable to cases within the EU. According to Art 49 Treaty on the Functioning of the European Union ("TFEU") restrictions on the freedom of establishment of nationals of a member state are prohibited. Companies or firms formed in accordance with the law of a member state and having their registered office, central administration or principal place of business within the EU are to be treated in the same way as natural persons (Art 54 TFEU). The European Court of Justice ("ECJ") ruled that the freedom of establishment requires recognition of foreign companies incorporated in another member state. The governing law of the member state, where the company has been incorporated, determines the lex societatis ("incorporation theory") even if the real seat has

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17 Verschraegen in Rummel/Lukas (ed.) § 10 IPRG Rz. 3; cf. Koziol/Bydlinski/Bollenberger, Kommentar zum ABGB, IPRG § 10 Rz. 1; Adensamer, Kollisionsrecht 37.
18 OLG Wien 19.9.2006, 28 R 53/06d = NZ 2007, V 28; OGH 27.4.2006, 6 Ob 45/06w.
19 Sec. 12 UGB; Sec. 107 GmbHG; Sec. 254 AktG.
20 Zib in Zib/Dellinger (ed.), UGB I § 12 Rz. 2.
21 See Heidinger/Schneider in Jabornegg/Strasser (ed.), AktG I § 5 Rz. 10 with references.
been transferred to another member state.\textsuperscript{23} Member states must not impose additional obligations on foreign companies ("import restrictions"). However, member states may otherwise restrict their own companies from moving to another member state ("export restrictions"). As the Court confirmed in \textit{Cartesio}\textsuperscript{24}, member states might deprive companies their legal personality when moving the real seat to another jurisdiction.\textsuperscript{25} In Austria, only in case of transferral of the statutory seat to another country a company will lose its legal personality (see already above in relation to non-EU-countries).

\subsection{1.1.3. Challenging the seat of a company}

For stock companies and LLC the choice of the place of the statutory seat is limited to places in Austria, to which there is a material connection (business, head office, place of administration). In the course of registering with the commercial register, the competent court has to check whether these prerequisites are met. Otherwise it shall refuse registration. If the court in the course of first registering a company realizes that the real place of management is not in Austria but in a non-EU-country, it also shall refuse registration. If the company was registered in the commercial register despite the unlawful designation of the statutory seat, this does not result in the nullity of the company.\textsuperscript{26} A transfer of seat has to be filed with the competent court.\textsuperscript{27} To enforce compliance with this obligation, the competent court can impose penalties. Nevertheless, enforcement might be ineffective as judicial action requires knowledge of the violation.

According to Sec. 75 JN, the place where a company can be sued is based on the statutory seat of the company. In doubt, i.e. only in absence of a registered seat,\textsuperscript{28} the place of the central administration is deemed to be the seat of the company. The competence of the court is only determined by formal criteria, i.e. the registered office; the court does not examine whether the registered seat has been determined in accordance with substantive law. That means, the seat cannot be challenged on grounds of unlawful determination and registration of the seat.\textsuperscript{29}

\subsection{1.1.4. The notion of residence of companies in other areas of law}

In addition to the statutory seat, the place of establishment ("Ort der Niederlassung") is a common connecting factor in Austrian law. The term establishment ("Niederlassung") and derivative terms like "Zweigniederlassung" (branch) or "Hauptniederlassung" (main


\textsuperscript{24} ECJ C-210/06, \textit{Cartesio}, para. 112.

\textsuperscript{25} In detail \textit{Eckert, Gesellschaftsrecht} 563 et seq.

\textsuperscript{26} \textit{Heidinger/Schneider} in \textit{Jabornegg/Strasser} (ed.), \textit{AktG I} § 5 Rz. 24; \textit{Zib} in \textit{Zib/Dellinger} (ed.), \textit{UGB I} § 10 FBG Rz. 55 and 59; \textit{Ratka} in \textit{Straube/Ratka/Rauter} (ed.), \textit{GmbHG} § 5 Rz. 77.

\textsuperscript{27} § 26 \textit{GmbHG}, § 10 para. 1 FBG.

\textsuperscript{28} OGH 4.7.1991, 6 Ob 586/91; \textit{Geroldinger} in \textit{Burgstaller/Neumayr/Geroldinger/Schmaranzer} (ed.), \textit{Internationales Zivilverfahrensrecht} Art. 22 EuGVO, Rz. 78.

\textsuperscript{29} OGH 2.6.1981, 4 Ob 52/81 = GesRZ 1982, 53.
establishment) are not legally defined. The meaning of the terms must be determined from the purpose of the respective laws. In the following, a few examples are given without referring to the more specific meaning of the legal terms.

As already mentioned, according to Sec. 12 para. 1 UGB companies having their seat in a foreign country have to register a domestic branch with the commercial register.

According to Sec. 905 ABGB\(^{30}\) commercial liabilities, if not concluded otherwise, are to be settled at the domicile or the place of establishment of the debtor. Pecuniary liabilities are to be settled at the domicile or place of establishment of the creditor (sec. 907a ABGB). The place of establishment in the meaning of the Civil Code could be the place of the seat of a company as well as the place of a branch of the company or any other place of business operations.\(^{31}\)

A manufacturer of batteries in the meaning of the “Abfallwirtschaftsgesetz” (Austrian Waste Management Act) is any person with a seat or establishment within the local area of application of that federal law (sec. 13a Abfallwirtschaftsgesetz), which for the first time sells batteries or accumulators commercially in Austria, irrespective of the sales method.

Legal persons and other foreign legal entities, which neither have their statutory seat nor a branch office in Austria, cannot run a commercial business, except international treaties provide otherwise (Sec. 14 para. 4 Gewerbeordnung [Austrian Trade Regulations]).

1.2. Tax Law

1.2.1. Residence of companies according to Austrian law

Companies are resident in Austria if they either have their place of management or their seat in Austria.\(^{32}\) Both criteria origin from the German KStG 1934 which was set into force in Austria in 1938 due to the annexation of Austria by the German Third Reich. After World War II the German tax law remained in force in Austria. Since then, the criteria for the residence of companies are the same.

According to Sec. 27 para. 2 BAO\(^{33}\), the place where the centre of the business management is located is deemed to be the place of management.

A company, on the other hand, has its seat for purposes of tax law at the place which due to the law, the company contract, the statute, the letter of incorporation and the same is deemed to be as the company’s seat. If there is no such provision, the place of management is deemed to be the company’s seat (Sec. 27 para. 1 BAO).

While the place of management is defined solely by tax law, the company’s seat is determined by the law, the company contract and comparable legal sources. There is no hierarchy between both criteria. For being subject to unlimited tax liability it does not matter whether a company has its seat or its place of management or both within Austria. On the other hand, companies which have neither their seat nor their place of management within Austria are not

\(^{30}\) Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code).

\(^{31}\) Zib in Zib/Dellinger (ed.), UGB I Vor § 12 Rz. 28.

\(^{32}\) Sec. 1 para. 2 KStG („Körperschaftsteuergesetz 1988“, Corporate Income Tax Act)

\(^{33}\) „Bundesabgabenordnung“ (BAO; Fiscal Code).
subject to unlimited taxation but are taxed only with income from domestic sources (Sec. 1 para. 3 no. 1 KStG combined with Sec. 21 para. 1 KStG; limited tax liability).

1.2.2. The meaning of the term “seat” in tax law

The term “seat of a company” in tax law has the same meaning as the term “(statutory) seat” in company law. The seat is determined by the legal basis of the corporation. The place of the seat of a company can therefore locally be determined by a contractual agreement, unless the law provides otherwise. For joint stock companies and LLC the law\(^{34}\) states that the seat shall be the place where the company runs a business or the place where the management or the administration is located. From these requirements may be derogated for important reasons. In detail see above chapter 1.1.1.

1.2.3. The meaning of the term “place of management” in tax law

The place where the centre of business management is located is deemed to be the place of management (Sec. 27 para. 2 BAO). There are only a few judgments of Austrian courts on the concept of "centre of business management". In the literature, therefore, reference is made to judgements of the German Bundesfinanzhof. This seems appropriate since the legal provisions in Austria and Germany are the same.

The place of management of a company is based on actual facts\(^{35}\) and – unlike the seat of a company – cannot be subject to an agreement or arrangement\(^{36}\).

The centre of business management is where the will, which is decisive for the management, is formed. It is the place where the necessary and important measures for the management of the company are taken.\(^{37}\) The centre of business management is determined by the organization of the company, the corresponding administrative facilities, the corresponding premises (offices) and the staff provided for this purpose.\(^{38}\) The overall picture of the actual situation in organizational terms is decisive.\(^{39}\)

According to the Austrian Administrative Court, it is not decisive where – from a legal point of view – the power of management is located, but where the important management instructions are given.\(^{40}\) In the case concerned, the centre of business management of a company running a hotel in City A was not (as claimed) the office of a lawyer in City B (at the same time, the only director of the company was residing and working in a foreign country), but the place where the hotel manager made all necessary decisions for the operation of the hotel.

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\(^{34}\) Sec. 5 AktG and Sec. 5 para. 2 GmbHG.
\(^{35}\) VwGH 24.5.2012, 2008/15/0211.
\(^{36}\) BFG 21.5.2014, RV/4100330/2012.
\(^{38}\) VwGH 24.5.2012, 2008/15/0211.
\(^{40}\) VwGH 24.5.2012, 2008/15/0211.
For answering the question, which instructions in particular are most important, one has to take the the nature of the business of the company into consideration.\textsuperscript{41}

The centre of the business management is determined by the ongoing management of the company. This comprises the actual and legal acts entailing the company’s ordinary operations and such organizational measures which are part of the ordinary management of the company (day-to-day business).\textsuperscript{42} The centre of the business management is not the place where the principles of corporate policy are laid down or where shareholders participate in the making of decisions of particular economic importance.\textsuperscript{43}

According to the ruling doctrine, a company can only have one centre of business management.\textsuperscript{44} The case law has followed this view.\textsuperscript{45}

In the case of decentralized management, the place of management is the place where, according to an overall picture of the situation, the most important parts of the business management in organizational and economic terms is situated.\textsuperscript{46} If the commercial and the technical management are at different places, the place of the commercial management is the centre of the business management.\textsuperscript{47}

In a group of companies (“Organschaft”), the place of management of a group member (“Organgesellschaft”) is only in that case at the place of management of the parent company (“Organträger”) if the leading company intervenes in the day-to-day business of the group member.\textsuperscript{48}

To put it in a nutshell, the centre of business management is determined by

- the necessity and importance of the management decisions with regard to day-to-day business
- the person(s) who factually and not only on grounds of organizational company law make(s) the decisions
- and in case of a decentralized management structure, the place where the most important decisions are made, whereby economic decisions proceed technical decisions.\textsuperscript{49}

1.2.4. Tax implications from being considered a resident company for direct taxation

There are only a few tax law provisions which directly link legal consequences to the existence of a domestic statutory seat or place of management.

First of all, Sec. 1 para. 2 KStG is to mention. According to this provision companies which have their seat or place of management in Austria are subject to unlimited tax liability. That

\textsuperscript{41} VwGH 24.5.2012, 2008/15/0211.

\textsuperscript{42} VwGH 24.5.2012, 2008/15/0211.

\textsuperscript{43} BFH 7.12.1994, BStBl 1995 II 175.

\textsuperscript{44} Ritz, BAO 2014, § 27 Rn 5.

\textsuperscript{45} BFG 21.5.2014, RV/4100330/2012.

\textsuperscript{46} BFH 21.9.1989, UR 1889, 193.

\textsuperscript{47} BFH 23.1.1993, BStBl 1991 II 554.

\textsuperscript{48} BFH 7.12.1994, BStBl 1995 II 175

\textsuperscript{49} See also Macho/Stieber, Tätig sein, tätig werden – aber wo ? taxlex 201, 195.
means, that they are taxed on their worldwide income. Many other tax law provisions do not directly attach legal consequences to the residence of the company, but to the company’s unlimited tax liability. This, however requires the residence of the company.

Important provisions which use the unlimited tax liability as decisive element are for example:

- **Sec. 7 para. 3 KStG**: For Austrian companies and comparable foreign companies which are subject to unlimited tax liability, all kind of income is deemed to be income from trade or business.
- **Sec. 24 para. 4 KStG**: Austrian and foreign companies which are subject to unlimited tax liability have, regardless of the amount of profit, to pay an annual minimum corporate income tax. The minimum CIT amounts for stock corporations to € 3,500,- and for LLC to € 1,750,-. The minimum CIT can be carried forward and deducted from regular CIT in later years. Companies which are subject to unlimited tax liability in Austria have to pay the minimum CIT even in that case, that after application of a DTC they are deemed to be a resident of the other state.

In addition, some provisions use the terms domestic (“inländisch”) and foreign (“ausländisch”) in order to make a difference between companies. Sec. 10 KStG contains exemptions for dividend income derived from participations in domestic or foreign companies. A domestic company in the meaning of this provision is a company which has its statutory seat within Austria. Companies which have their statutory seat in a foreign country are a foreign company even if they are subject to unlimited tax liability due to a place of management in Austria. Dividends derived from a foreign company are unlike dividends from a domestic company only tax exempt if the profit of the distributing company was subject to CIT at a level of at least 15% and the dividends were not deductible as business expenses.

Important other provisions which connect legal consequences to a domestic seat and/or a domestic place of management:

- Investments into new shares are deductible as special expenses to a certain amount if the issuing company has its seat and its place of management within Austria (Sec. 18 para. 1 no. 4 in connection with para. 3 no. 4 lit. a EStG).
- Dividends are subject to a withholding tax if the distributing company has either its seat or its place of management in Austria (Sec. 93 para. 2 no 1 EStG). The domestic company has the duty to withhold the tax and to pass it on to the competent fiscal administration (Sec. 95 para. 2 no. 1 lit a EStG).
- Profits from the alienation of participations in domestic companies (seat or place of management in Austria) of at least 1 % are falling within the scope of limited tax liability (Sec. 98 para. 1 no. 5 EStG).

50 The minimum CIT is reduced for LLC during the first ten years.
51 Vock in Quantenschigg et al (ed.), KStG § 10 Tz. 57; Kirchmayr in Achatz/Kirchmayr (ed.), KStG § 10 Tz. 40.
52 See Sec. 10 para. 4 and 5 KStG.
53 Sec. 10 para. 7 KStG.
• The local responsibility of the fiscal authorities in all matters, except taxes in connection with unmovable property and businesses, is determined by the place of the seat of the company (Sec. 70 para. 3 BAO).

1.2.5. Challenging the residence of a company

There are many different reasons, why the courts had to deal with the seat and the place of management of companies.

One of the younger leading cases (VwGH 24.5.2012, 2008/15/0211) on the place of management of a company resulted from the question which fiscal office is locally competent for the company in matters of VAT. It was the taxpayer who challenged the local competence of the tax office.

In case BFG 21.5.2014, RV/4100330/2012, a British private limited company by shares (Ltd), which was the only fully liable partner of an Austrian limited partnership, didn’t want to pay minimum CIT\(^54\) in Austria. The fiscal administration argued that the Ltd has its place of management at the business address of the limited partnership in Austria. Other cases concerning minimum CIT of foreign companies which have their place of management in Austria are UFS 23.8.2011, RV/0820-L/11; UFS 18.3.2013, RV/3084-W/12.

In case UFS 19.11.2010, RV/1258-L/09 the tax administration found that the place of management of a Maltese Ltd. was in Austria. The Maltese company, therefore, was subject to unlimited tax liability in Austria and dividends paid by the company subject to Austrian withholding tax. The tax claim of the Republic of Austria, which at that time had not been notified, should be secured my means of pledge rights. In the course of the appeal proceedings against the securing of the tax claim, the UFS (“Unabhängiger Finanzsenat”) had to decide on the unlimited tax liability of the Maltese company due to a place of management in Austria. Another case concerning foreign companies which are supposed to be subject to unlimited tax liability due to a place of management in Austria is UFS 18.3.2013, RV/3084-W/12.

1.2.6. Anti-avoidance rules

The Austrian tax law does not know something like Controlled Foreign Company rules. In relation to base companies, the tax administration as well as the courts often refer to the rules on the personal attribution of income. According to the prevailing doctrine and case law, income is attributable to the person who earns the income on his own account and at his own risk, this is the person who can use the opportunities given by the market by providing services or by refusing to provide services.\(^55\) Against the background of this doctrine, income is not attributed to (foreign) base companies which function as mailboxes (no office, no staff), but the income is attributed to the shareholders of the base company.\(^56\)

\(^{54}\) Sec. 24 para. 4 KStG.

\(^{55}\) On the ruling doctrine see inter alia Heinrich in Quantschnigg et al. (ed.), KStG § 7 Tz. 13.

1.2.7. The role of the residence of a person for the application of other taxes (e.g. VAT)

In VAT law, the seat of a legal person plays a subordinate role. As long as a transaction takes place within the territory of Austria, it is not material for the taxation whether the taxpayer is an Austrian national, whether he/it has a domicile, a seat or a permanent establishment in Austria and whether the invoice is issued and the remuneration is collected in Austria (Sec. 1 para. 2 UStG\(^{57}\)). For determining the place of supply of services, the place where the supplier has established his business or has a fixed establishment from which the service is supplied is material (Sec. 3a para. 6 UStG). This place is not necessarily the place where a legal person has its seat or the place of management.

For some services rendered to consumers\(^{58}\), the place of supply is the place where the customer has his domicile, seat or his habitual abode. For some other services, this rule only applies if the consumer has his domicile, seat or habitual abode in a third country.\(^{59}\) The provisions serve to implement Art. 56 VAT-Directive and are of no special relevance for companies which are usually not consumers.

In connection with the supply of goods to private customers (consumers) in a third country (Sec. 7 UStG), the term foreign costumer (“ausländischer Abnehmer”) is used. A foreign costumer is a person which neither has his domicile, seat nor habitual abode within Austria.

The deduction of input VAT may be restricted for taxpayers which have neither a seat nor a permanent establishment (fixed place of business) within the EU by means of an administrative regulation under certain circumstances (Sec. 12 para. 1 no. 3 UStG). For non-resident taxpayers, these are taxpayers without seat or permanent establishment within Austria, the refund of input VAT can be regulated deviating from the normal procedure by means of an administrative regulation (Sec. 21 para. 9 UStG). Non-resident taxpayers (see above) can appoint a fiscal representative, taxpayers without domicile, seat or permanent establishment within the EU have to appoint a fiscal representative (Sec. 27 para. 8 UStG).

The seat of a taxpayer is further material in connection with intra-community acquisitions of goods (Art. 1 UStG\(^{60}\)), intra-community supplies of goods (Art. 3 UStG) and triangular cases (Art. 25 UStG).

Finally, in some other tax acts (e.g. tax on insurance services, tolls) the seat of a company is used for the territorial delimitation of tax claims.

\(^{58}\) Hiring out of means of transport (Sec. 3a para. 12 no. 2 UStG), electronically supplied services (Sec. 3a para. 13 UStG).
\(^{59}\) Sec. 3a para. 14 UStG.
\(^{60}\) Appendix to the UStG “Binnenmarktregelung” provisions of the UStG respective the internal market).
2. (Tax) residence in an international (cross-border) context

2.1. Austria’s treaty policy with regard to the residence of companies

Austria’s tax treaty policy with regard to the residence of companies in the past did not deviate from the OECD’s strategy. This can be inferred from the fact that Austria made no reservations on Art. 4 OECD-MC and also no observations on the Commentary to the OECD-MC.61

Deviations from the OECD-MC current at the time of conclusion of a specific convention sometimes simply result from the fact that during the treaty negotiations the OECD-MC was partly revised. This happened e.g. in 1995 when states and any political subdivisions or local authorities thereof were explicitly mentioned within the MC as resident persons. There are some bilateral conventions concluded after 1995 that do not have the provision on the status of states as resident person simply because negotiations had started (long) before 1995.62

According to the Austrian treaty policy, states and their political subdivision are resident persons in the meaning of a DTC regardless whether they are explicitly mentioned within Art. 4 para. 1 or in Art. 3 of the respective treaty.63

2.2. Connecting factors

A resident of a contracting state is a person which is liable to tax by reason of his domicile, residence, place of management or any other criterion of a similar nature. For legal persons a criterion of a similar nature could be the statutory seat or the place of registration. The place of registration or the place of incorporation is explicitly mentioned as connecting factor within the following DTC concluded by Austria: Albany, Azerbaijan, Bahrein, Belarus, Belgium, Bulgaria, Chile, China (place of head office), Croatia, Hong Kong, India, Kazakhstan, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Moldova, Qatar, Romania, Russia, Saudi Arabia, Soviet Union (not applicable to Russia but to all other former SU republics in absence of a new treaty), Taipei, Turkey, United Arabic Emirates, USA, Vietnam.

2.2. Liable to tax (Art. 4 para. 1 OECD-MC) – tax exempt legal entities

The term resident of a contracting state means any person who, under the laws of that state, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature (Art. 4 para. 1 OECD-MC).

The decisive question in this context is whether, in addition to the fulfilling of one of the elements of personal connection like residence, place of management etc., a taxation to the

62 E.g. DTC with Finland, Greece, Norway, Pakistan, Slovenia, Ukraine, Uzbekistan, Belarus; see Staringer/Seiler in Lang et al. (ed.), DBA-Politik, 89.
63 Staringer/Seiler in Lang et al. (ed.), DBA-Politik, 87 seq.
greatest possible extent under the national law of the state (taxation of world-wide income) is necessary?

The Austrian Corporate Income Tax Act distinguishes between unlimited tax liability and two different kinds of limited tax liability. A company which either has its seat or place of management in Austria is subject to unlimited tax liability. A company which neither has a seat nor a place of management in Austria is only liable for tax on certain kind of domestic income. This kind of tax liability is called limited tax liability of the first type.

Additionally, legal persons formed under Austrian public law like communities, recognized churches and other institutions and charitable organizations are also exempt from unlimited tax liability. Those persons are liable for tax on capital income, income from the alienation of immovable property and in case of charitable organizations on profits from undertakings which are in competition with taxable persons. This kind of tax liability is called limited tax liability of the second type.

A legal person which, under Austrian CIT law, is subject to unlimited tax liability is a resident person in the meaning of Art. 4 para. 1 OECD-MC. A legal person which due to the absence of a seat or a place of management in Austria is subject to limited tax liability of the first type is not a resident person in the meaning of Art. 4 para. 1 OECD-MC. But what about legal persons which are subject to limited tax liability of the second type?

- **Legal bodies formed under public law other than states and its political subdivisions**
  With regard to the Federal State of Austria and its subdivisions which, under Austrian tax law, are subject to limited tax liability of the second type, it has already been mentioned that from the Austrian point of view they are regarded as resident persons. The same applies to other legal persons formed under public law which are not a political subdivision or local authority of the state. In the DTC with Germany this is even explicitly stated.

- **Other tax exempt legal entities like charities, pension funds**
  Other legal entities subject to limited tax liability of the second type (e.g. charities) are, from the Austrian point of view, also resident persons as long as one of the criteria for a personal connection is met. Some DTC (e.g. USA, Kazakhstan, Saudi Arabia) have special

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64 Sec. 1 para. 2 KStG.
65 Sec. 1 para. 3 no. 1 KStG combined with Sec. 21 para. 1 KStG.
66 Sec. 1 para. 3 no. 2 and 3 KStG combined with Sec. 21 para. 2 and 3 KStG.
67 Staringer/Seiler in Lang et al. (ed.), DBA-Politik, 89.
68 Art 4 para. 1 DTC Austria – Germany.
69 See Schuch, Die Ansässigkeit von Pensionsfonds und gemeinnützigen Körperschaften, in Lang et al. (ed.), DBA-Politik, 109 et seq., 118 with references to the opinion of the Austrian tax administration.
70 According to Art. 16 para. 1 lit. g DTC Austria – USA, dealing with limitation of benefits, a person which is a resident of a contracting state and derives income from the other contracting state shall be entitled, in that other contracting state, to benefits of this convention only if such person is: an entity which is a not-for-profit organization (including pension funds and private foundations), and which, by virtue of that status, is generally exempt from income taxation in the contracting state of which it is a resident, provided that more than half of the beneficiaries, members or participants, if any, in such organization are persons that are entitled, under this Article, to the benefits of the Convention.
provisions concerning tax exempt legal bodies. From the existence of such provisions can be deduced that tax exempt companies are resident persons in the meaning of the DTC.

On the other hand, there are DTC which explicitly exclude tax exempt legal bodies from the application of the DTC. According to Art 26 DTC Austria – Liechtenstein companies and trusts which, under the laws of Liechtenstein, are exempt from taxes on income and capital are excluded from the application of the convention, unless individuals or companies, foundations and institutions formed under public law of Liechtenstein are participating directly in such companies or trusts or are beneficiaries.

The qualification of tax exempt legal persons as resident persons is problematic under the DTC Austria – Switzerland. Within that convention the term “unbeschränkte Steuerpflicht” (unlimited tax liability) is explicitly used in the definition of the term resident person. For the purpose of this convention, the term “a resident person of a contracting state” means any person who, under the laws of that state, is subject to unlimited tax liability (Art. 4 para. 1 DTC A – CH).

2.3. Dual resident companies

Due to the possibilities of digital communication, dual resident companies are a phenomenon which more and more frequently occur. Therefore, almost all DTC concluded by Austria have a provision dealing with dual resident companies, but the mechanism to solve the problem of dual residence are different.

Many DTC follow the OECD-MC using the effective place of management as decisive criterion. According to the Commentary on Art. 4 OECD-MC, para. 24, the effective place of management is the place where key management and commercial decisions that are necessary for the conduct of the entity’s business as a whole are made in substance. The definition “place of effective management” is congruent to the definition of “Mittelpunkt der geschäftlichen Oberleitung” (centre of business management) as used in national tax law (Sec. 27 para. 2 BAO) in order to determine the place of management of a company (see above chapter 1.2.3.).

71 According to Art 4 para. 1, 2nd sentence DTC Austria – Kazakhstan the term “resident of a contracting state” shall include also any pension fund and similar institutions and any charitable organization, established under the law of a contracting state the income of which is generally exempt from tax in that contracting state.

72 According to Art. 4 para. 1, lit c DTC Austria – Saudi Arabia a resident person is also: A legal person organized under the laws of a contracting state and that is generally exempt from tax in that State and is established and maintained in that State either: i. exclusively for a religious, charitable, educational, scientific, or other similar purpose; or ii. To provide pensions or other similar benefits to employees pursuant to plan.


75 Art. 4 para. 1 DTC Austria – Switzerland: For the purpose of this convention, the term “a resident person of a contracting state” means any person who, under the laws of that State, is subject to unlimited tax liability.

Some, especially older, DTC use the place of effective management as tie-breaker, but have added some special provisions:

- The DTC with Spain which was concluded in 1967 in general uses the place of effective management as tie-breaker but in addition provides for the statutory seat as decisive element in case that the place of effective management cannot be determined.\textsuperscript{77} Similar regulations could be found in the DTC Austria – Germany from 1954 and DTC Austria – France from 1961 which both are not in force any more.
- Some DTC, in case the place of management cannot be determined, explicitly provide for a mutual agreement between the contracting states (e.g. India, Korea). These provisions are only of demonstrative nature since a mutual agreement procedure could be started in any case.\textsuperscript{78}
- Within the DTC Austria – Switzerland there is a closer explanation of what is not a centre of effective management: The mere fact that a person is a shareholder of a company or that it, as member of a group, makes group-wide management decisions does not constitute a centre of effective management for the subordinated company at the place where those decisions are made or the person is resident (Art. 4 para. 5 DTC A – CH).

Since its 2008 update, the Commentary on the OECD-Model alternatively suggests the determination of the state of residence of dual resident countries by means of a case-by-case approach. The competent authorities of the contracting states shall endeavour to determine by mutual agreement the contracting state of which such person shall be deemed to be a resident for purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted an any other relevant factor. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the contracting state.\textsuperscript{79}

Indeed, there is a group of DTC concluded by Austria which do not provide for the place of effective management as tie-breaker rule but for a \textbf{mutual agreement} as only mean for the determination of the state of residence. Just a few of them are (as can be seen from the date of signature which are indicated in parentheses) concluded after 2008, the year when the Commentary was revised: Bulgaria (2010), Canada (1976), Belarus (2001), Chile (2012), Estonia (2001), Latvia (2005), Lithuania (2005), Mexico (2004), Philippines (1981), Thailand (1985), Turkey (1970), United States (1996; Art 4 para. 4 DTC Austria – USA is applicable on persons other than an individual or a company).

Within this group there is a sub-group of DTC which, in case that the contracting states cannot agree on the state of residence, as a kind of sanction provide for the non-application of

\textsuperscript{77} Art 4 para. 3 last sentence DTC Austria – Spain.
\textsuperscript{78} See Staringer/Seller in Lang et al., DBA-Politik, 102.
\textsuperscript{79} Commentary on Art 4 OECD-MA para. 24.1.; see also Boccardo, Dual resident corporations and the changes in the Commentary on the OECD MC 2008 - impact on existing treaties, in Hofstätter/Plansky (ed.), Dual Residence in Tax Treaty Law an EC Law (2009), 115; Plakhin, The Place of Management as a Tie-Breaker Criterion, in Hofstätter/Plansky (ed.), Dual Residence, 81.
the treaty (Canada, Estonia, Latvia, Lithuania, Mexico, Turkey). In the case of Mexico, the DTC is not applicable except the Article on the exchange of information.

The following DTC uses the (statutory) seat of a company, the place of registration, the law under which the company was created or a mixture of criteria as tie-breaker:

- The DTC with Hungary which was concluded in 1975 uses in case of a double resident company the tax liability by reason of a (statutory) seat as criterion for the determination of the state of residence.\(^{80}\)
- According to Art 4 para. 3 DTC Austria – USA, a company which is a resident of both contracting states, if created under the laws of a contracting state or a political subdivision thereof, shall deemed to be a resident of that state.
- According to Art 4 para. 3 DTC Azerbaijan a dual resident company is deemed to be a resident only of the state where it is registered and in which its place of effective management is situated. If the place of registration and the place of effective management are not located in the same contracting state, the competent authorities of the contracting states shall endeavour to settle the question by mutual agreement.
- The DTC with Vietnam (Art. 4 para. 3) distinguishes two cases: In general, dual resident companies are resident in the state, where the place of registration is. However, where such person has its place of registration in one of the states and its place of effective management in the other state, then the residence state of the company shall be determined by mutual agreement.

The DTC with China provides for a tie-breaker rule which won’t break the tie in the case that the head office and the place of management are situated in different countries: According to Art 4 para. 3 DTC Austria – China the place of the head office or the place of management is decisive for determining the state of residence.

Finally, there are some DTC that a priori exclude dual resident companies from the application of the treaty by means of defining them as non-resident persons. Thus, there is no need for a tie-breaker rule:

- According to Art. 4 para. 1 lit b DTC Austria – Liechtenstein, the term “resident of a contracting state” means … a juridical person, which has its seat and its effective management in that state. Due to this provision which were included for anti-abuse reasons, double resident companies are no residents in the meaning of the convention and, thus, the convention is not applicable to them. In such a case, there is no need for a tie-breaker rule.
- According to Art. III lit. a DTC Austria – Japan “the term ´Japanese corporation´ means any corporation or other association having juridical personality or any association without juridical personality which has its head or principal office in Japan and which does not have its headquarters (Sitz) in Austria, or the business of which is not wholly managed and controlled in Austria\(^{81}\); and, the term ´Austrian corporation´ means any body corporate or any entity treated as a body corporate for tax purposes

\(^{80}\) Art. 4 para. 3 DTC Austria – Hungary.
\(^{81}\) Due to this part of the definition, a company formed under Japanese law can never be a dual resident company.
which has its headquarters (Sitz) in Austria, or the business of which is wholly managed and controlled in Austria and which does not have its head or principal office in Japan."\(^{82}\)

2.4. BEPS Action 6

The possible switchover from the place of effective management as tie-breaker to a case-by-case approach based on a mutual agreement between the contracting states is discussed and criticized in academia to a brought extent.\(^{83}\) The points of criticism are: \(^{84}\)

- It is doubted that dual resident companies are mainly built up for reasons of tax avoidance.
- It is questioned, what are the relevant factors to be obeyed in course of an mutual agreement aiming to decide on the state of residence? If it is mainly the place of effective management and the place of incorporation almost nothing would have changed compared to the actual situation.
- There would be a loss of predictability.
- It could be a problem with respect to the constitution of a country to leave the decision on the state of residence to the administration without providing for a specific legal framework which sets limits to the decision.
- The current mutual agreement procedures have deficiencies.
- In case of a failed agreement, the companies are always the losers.

The Final Report on BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances) from October 2015 respects many of the critical remarks made during the review phase. The proposed hint in paragraph 24.5 of the commentary on the OECD-MC, that states which consider the “place of effective management”-rule as preferable and which agree on how the concept “place of effective management” should be interpreted are free to include in their bilateral treaty such rule, will calm down the discussion in Austria.

3. Tax implications of the cross-border change of residence

3.1. Immigration of companies

In the opinion of the prevailing doctrine\(^{85}\) and the tax administration\(^{86}\), companies which were incorporated under foreign law and transfer their place of management to Austria, irrespective

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\(^{82}\) An Austrian corporation (statutory seat or place of management in Austria) could be managed from a place in Japan and remains to be an Austrian corporation.


\(^{84}\) See inter alia Bräumann/Tumpel in Lang et al. (ed.), BEPS, 309 et seq.

\(^{85}\) See inter alia Hohenwarter-Mayr in Lang/Rust/Schuch/Staringer (ed.), KStG\(^2\) § 1 Tz. 56; Achatz/Bieber, in Achatz/Kirchmayr (ed.), KStG § 1 Tz. 306 with many references.
of the possibility that according to civil law such companies could lose their legal personality, retain to be a person subject to CIT. What changes is the extent of tax liability. Companies subject to limited tax liability are now subject to unlimited tax liability.

The main arguments for this tax treatment are the following: Foreign non-resident companies are subject to Austrian CIT only in case that they resemble an Austrian type of company. It would not be obvious why such a company should lose its status as CIT taxpayer just by reason of transferring its place of management to Austria. In addition, foreign corporations subject to unlimited tax liability are subject to the minimum CIT by statutory order.87

By transferring the seat or place of management to Austria, the company becomes subject to unlimited tax liability in Austria. Austria will tax the company on its worldwide income. In order to delimit the right of taxation between the departure state and Austria, the Austrian law provides for a step-up in the value of the company’s assets. The assets that first time enter Austrian fiscal sovereignty are to be valued at market prices.88

Non-resident shareholders of a resident company are subject to limited tax liability on capital gains. If the tax liability arises as a result of the transfer of the seat or the place of management to Austria, the shares are to be valued at fair market value.89

In case of re-immigration after emigration of the company, the former acquisition costs are material, except the market value is lower. On the proof of the taxpayer, value increases in the EU/EEA area can be deducted from the realized capital gains.90

3.2. Emigration of companies

A company formed under Austrian law remains to be subject to unlimited tax liability if the place of management is transferred to a foreign country. But, because of a potential DTC which determines the state in which the place of effective management is situated to be the state of residence, Austria’s taxing rights are restricted to income derived through permanent establishments situated in Austria.

In case that Austria’s right to tax business assets is restricted, it is provided for that assets are to be valued at market value91 and hidden reserves within such assets are subject to tax. If the company emigrates to another EU-state or to an EEA-state providing comprehensive administrative assistance and enforcement, on application of the company, the tax which results from the appreciation of the assets may be paid evenly distributed over seven years (two years in case of short-term assets). Pending instalments are due immediately if the assets are sold or transferred to a third-country.92

As a result of the emigration of the company, the Austrian right to tax the hidden reserves in the shares can be restricted. In order to avoid losses in tax revenue, the restriction on the right

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86 E.g. EAS 2516 from 17.8.2004.
87 Sec. 24 para. 4 KStG.
88 Sec. 6 no. 6 lit. g KStG.
89 Sec. 27 para. 6 no. 1 lit. e EStG.
90 Sec. 27 para. 6 no. 1 lit e EStG.
91 Sec. 6 no. 6 lit b EStG.
92 Sec. 6 no. 6 lit d EStG.
to taxation is deemed to be a disposal of the shares. The shares are to be valued at market value. Under the circumstances described above, instalment payments are possible.

4. Policy issues

At the beginning of this century, British LLC were broadly promoted in Austria as a mean to circumvent the minimum capital requirements of Austrian companies with limited liability (GmbH). The Austrian tax administration quickly clarified that such LLC if they are managed by a person resident in Austria are subject to unlimited tax liability because of their place of management in Austria. Still, mainly for company law reasons, foreign companies are discussed as alternatives to the Austrian GmbH. The frequent use of foreign legal forms in Austria and the fact that such companies are subject to unlimited tax liability in Austria due to their place of management is likely to be one of the reasons why Austria is tending to maintain the current tie-breaker rule based on the place of effective management.

In 2005 Austria introduced a group taxation regime which provides for the possibility to deduct foreign company losses from domestic taxable profits. At the same time, the CIT-rate was reduced from 34 % to 25 %. Both tax measures, together with other arguments (like education level, standard of living), are used for promoting Austria as an outstanding place for headquarters. International companies should be convinced to found a company in Austria, which, in particular, can be used to develop the Eastern European market. Companies resident in the EU/EEA area not necessarily have to immigrate to Austria to make use of the group taxation regime. They only have to register a branch in Austria which can take over the role as parent company. As probably in all countries of the world, immigrating companies are welcomed in Austria and any kind of emigration is viewed critically.

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93 Sec. 27 para. 6 no. 1 EStG.
94 Sec. 27 para. 6 no. 1 lit d combined with Sec. 6 no. 6 lit. c EStG.
95 The minimum capital of an Austrian GmbH amounts to € 35,000,-, at least € 17,500,- have to be paid in. Since dx it is possible to set up a GmbH with only € 10,000,- (€ 5,000,- have to be paid in), however, after 10 years the capital has to be raised up to € 35,000,-.
98 See e.g. Austrian Business Agency, investinaustria.at (18.12.2016). The ABA is a state-owned company.
99 Sec. 9 para. 3 KStG.