



Newsletter



Austrian Bank Secrecy Reduced in Certain Cross-Border Situations

A. Summary

Since September 9, 2009 a new law is in force in Austria that allows for a wider exchange of information than before if a double tax treaty, an EC-Directive or international agreements provide for it. Since September 18, 2009 Austria is no longer on the OECD's Grey List of countries that are considered to not fully implement OECD tax standards.

B. Background

Being pointed out together with a group of countries like the Bermudas, the British Virgin Islands or Grenada is great when it comes to tourism; it's not so great being pointed at together with such countries when it comes to taxation. That was what happened to Austria in April 2009 when the OECD added Austria to its Grey List of countries that have not yet implemented certain tax standards, but agreed to do so.

In order to fulfill those standards the First and the Second Chamber of the Austrian Parliament (also: National Council and Federal Council, Nationalrat and Bundesrat) adopted the Act on the Execution of Administrative Assistance (Amtshilfe-Durchführungsgesetz, ADG - the Administrative Assistance Act), a law implementing the OECD-principles regarding the bilateral exchange of information that entered into force on September 9, 2009.

Together with amending double tax treaties in order to provide for an exchange of information as set forth in Article 26 OECD-Model Tax Convention and entering into new double tax treaties this was the major step for Austria to be dropped from the Grey List on September 18, 2009.





C. The New Act

The Administrative Assistance Act is based on three pillars:

- a declaration as to its purpose, a quasi-preamble,
- a description of how administrative Assistance is achieved and to what extent, and
- the manner in which the Austrian bank secrecy is softened by the new Act.

1. Setting a New Standard

The purpose of the new Act is simple and boils down to "the implementation of the OECD-principles regarding the bilateral exchange of information;" its consequence should be to adopt a new threshold upon which information, including bank account details, is provided to foreign authorities: whatever is "**foreseeably relevant**" for purposes of the administration and enforcement of tax laws has to be exchanged. While not explicitly incorporated into the Act, the Finance Committee of the First Chamber of the Parliament (Finanzausschuss des Nationalrates) confirmed the implementation of that minimum threshold by the new law and pointed out that **fishing expeditions** allowing random scanning of information are **not within its scope**. The threshold for the exchange of information with respect to bank accounts was much higher before: criminal fiscal proceedings concerning intentional tax evasion had to be initiated in a qualified manner prior to the release of bank information. With respect to Germany such qualified initiation was generally not accepted, since the initiation of criminal fiscal proceedings in our neighboring state cannot be appealed against, which was required under Austrian law according to the Supreme Administrative Court.

2. Extent of Information-Exchange

The second pillar of the Act on the Execution of Administrative Assistance provides for the manner and the extent of the information exchange. The determination of the extent as to which information has to be exchanged is up to the respective double tax treaty, EC legislation or international agreement (e.g., a Tax Information Exchange Agreement) and is, therefore, not read out of the Act itself; further, the extent is subject to substantial changes and differences depending on the bilateral relationships. Due to the reference to international agreements for purposes of determining the extent of information to be exchanged, international principles limit such extent, since reciprocity, professional privileges, or *ordre public* have to be taken into account (see, e.g., Article 26 OECD-Model Convention).

3. Manner of Bank Detail-Exchange

The third pillar of the new Act is the rules as to how the exchange of information is implemented with respect to bank details. Such details, generally protected by the Austrian bank secrecy, may only be obtained, if Community law, the applicable double tax treaty or another international agreement includes an exchange of information-provision according to which the exchange may not be rejected for the sole reason that the respective information is obtained from a bank. Whether or not information

that is protected by Austrian bank secrecy rules has to be provided to foreign authorities is, therefore, not a question of Austrian law anymore, but depends on the relevant international law.

Credit institutions have to provide all information requested by the Austrian authorities to fulfill their information exchange obligations vis-à-vis the respective foreign authorities. The person whose banking details have to be obtained must be informed immediately after the Austrian authorities have determined that, generally, an information exchange procedure is legitimate. If the affected person has good reason, he or she may within two weeks request the authorities to issue a ruling stating the reasons why bank details might be obtained and passed on to the foreign authority. This ruling can subsequently be appealed against at the Administrative Court or the Constitutional Court. Until the respective court decides the information exchange procedure is halted.

Since obtaining information despite the bank secrecy is only possible in the international context, the Finance Committee of the National Council takes the position that the bank secrecy is only affected in the context of persons not subject to tax in Austria.

D. Political Support of the New Act and Outlook

On September 8, 2009, the day the new Act was published in the Federal Law Gazette, the Finance Minister, Josef Pröll, stated that "today three double tax treaties in line with the OECD-standards were signed with Great Britain, Denmark and Norway" and mentioned that 12 further double tax treaties were recently initialed. He added that the goal of the government was to be off the Grey List prior to the G20-Meeting held in Pittsburg this fall. This goal was achieved when Austria was dropped from the List on September 18, 2009.

Instead of adopting the Administrative Assistance Act Austria could have chosen to amend each single double tax treaty in order to provide for an adequate exchange of information standard, especially regarding bank information. Adopting an Act stating that goal explicitly and providing the decisive procedural tools was apparently important to set a clear sign to the international community that Austria is on its way to complying with the OECD-standards and, as a consequence, being no longer pointed at.

More on this Topic

For more details on this topic please contact us or read *Wirtschaftsblatt*, September 23, 2009, Beilage: *Anwälte für die Wirtschaft*, p. 19 and *Tax Notes International (Austria Moves Forward on Information Exchange)*, September 21, 2009, pp. 989

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