

Subject 1:

Seeking anti-avoidance measures of general nature and scope - GAAR and other rules

Sebastian Bergmann / Martin Lehner

IFA-Landesgruppe Österreich

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Overview

- **Part One: General Anti-Avoidance Rule**
 - General overview
 - The tax avoidance scheme, arrangement or transaction
 - The tax benefit, gain or advantage
 - The taxpayer's purpose or intent
 - The consequences of the GAAR application to a given case
 - Conflicts between domestic GAAR and SAAR
- **Part Two: Case law**
 - Legislative influence of case law
 - Noteworthy cases on the operation of the Austrian GAAR
 - Overview
 - Treaty Shopping
 - Base Companies
 - Directive Shopping
- **Part Three: GAAR and taxpayer's safeguards**

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General overview

- **Austria's general anti-avoidance rule (GAAR) of sec. 22 BAO was implemented in 1962**
 - (1) The tax liability can neither be circumvented nor reduced through the abuse of forms and arrangements under civil law.*
 - (2) In the event of an abuse (para. 1) taxes must be levied as they would be in case of an appropriate legal arrangement based on the economic transactions, facts and circumstances.*
- **Sec. 22 BAO applies not only to domestic but also to cross-border situations as well as in the context of double tax conventions**
- **Besides the GAAR of sec. 22 BAO, tax avoidance is approached by various specific anti-avoidance rules (SAARs, also targeting abusive structures in cross-border contexts)**
- **In addition, the Austrian Federal Tax Code provides for (rarely used) rules on sham transactions (sec. 23 BAO) and fiduciary agreements (sec. 24 BAO)**

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The tax avoidance scheme, arrangement or transaction

- **Although sec. 22 BAO stipulates the legal consequences of tax avoidance, it does not define the concept of tax avoidance**
- **Austrian Supreme Administrative Court (e.g. VwGH 26.6.2014, 2011/15/0080)**

Tax avoidance within the meaning of sec. 22 BAO generally constitutes legal arrangements that are unusual and inappropriate with respect to their economic results and can only be explained by the intention of avoiding taxes

 - No clear definition or benchmark of the (objective) elements of unusualness and inappropriateness
 - Hence, the tax avoidance schemes, arrangements or transactions covered by sec. 22 BAO must be determined on a case-by-case basis
 - The application of sec. 22 BAO is not necessarily constituted by a single legal step but can also be realized by a chain of legal arrangements
- **Tax avoidance within the meaning of sec. 22 BAO has to be distinguished both from admissible tax planning and fraudulent tax evasion**

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The tax benefit, gain or advantage

- **Sec. 22 BAO is only applicable if a legal arrangement leads to a tax benefit, gain or advantage (VwGH 20.6.2000, 98/15/0008)**
- **Neither the law itself nor case law requires a particular amount or percentage of a tax benefit, gain or advantage to exceed in order to qualify a legal arrangement as abusive**
- **Sec. 22 BAO is only applicable if the tax benefit, gain or advantage results in a circumvention or reduction of an Austrian tax liability or in context of EU law a tax liability in an EU-Member-State. Thus, sec. 22 BAO is not applicable where a legal structure results in a reduction or the circumvention of foreign taxes (VwGH 15.11.1999, 97/15/0104)**

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The taxpayer's purpose or intent

- **The application of sec. 22 BAO requires that an unusual and inappropriate legal arrangement can only be explained by the intention of avoiding taxes (subjective element)**
- **Thus, it has to be examined, whether the legal arrangement with respect to its economic results would still be reasonable without a tax-saving effect (e.g. VwGH 28.1.2005, 2000/13/0214).**
- **Non-fiscal reasons for a structure**
 - E.g. liability limitations (VwGH 23.5.1990, 89/13/0272), liquidity requirements (VwGH 9.11.1994, 92/13/0305) or social security advantages (VwGH 15.1.1991, 90/14/0208)
 - Non-fiscal reasons have to be substantial in order to qualify as economic justification of a legal arrangement (VwGH 22.9.2005, 2001/14/0188)
- **Without the taxpayer's intent to avoid taxes the VwGH does not classify a legal arrangement as abusive**

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The consequences of the GAAR application to a given case

- In case of an application of sec. 22 BAO the respective legal arrangement is recharacterized (“...*taxes must be levied as they would be in case of an appropriate legal arrangement based on the economic transactions, facts and circumstances.*”)
- It seems reasonable to assume that the fiction only affects purposes of the avoided tax itself
 - However, case law occasionally indicates that a recharacterization can also have consequences for purposes of other taxes
 - E.g. a recharacterization for personal income tax purposes might have also effects with regard to gift-taxation (VwGH 1.3.2007, 2006/15/0070)
- In many cases it remains unclear, how the facts and circumstances should be recharacterized, as there could be several ways of recharacterization

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Conflicts between domestic GAAR and SAAR

- **In legal writing it is argued that SAARs, in principle, should have priority over the application of sec. 22 BAO**
 - I.e. within a SAAR's scope of application sec. 22 BAO should not be applied
 - Lex specialis derogat legi generali
- **However, the VwGH has authorized the application of sec. 22 BAO despite the existence of a SAAR**
 - E.g. regarding the switch-over-rule of the Austrian participation exemption stipulated in sec. 10 para. 4 CITA (VwGH 10.8.2005, 2001/13/0018)
 - Thus, both the Austrian GAAR and an Austrian SAAR may be applied independently
- **Some SAARs directly refer to sec. 22 BAO in order to clarify that the GAAR is also applicable within the scope of their application (e.g. sec. 44 UmgrStG)**

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Legislative influence of case law

- **VwGH: interpretation of sec. 22 BAO in line with EU law and CJEU case law**
- **No legislative changes since 1962**
- **Case law may had influence on the implementation of SAARs**
 - Austria has not implemented a general CFC-Rule
 - (until recently) preference not to include general treaty-based anti-avoidance provisions in DTCs

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Noteworthy cases on the operation of the Austrian GAAR

- **VwGH applies sec. 22 BAO to domestic and cross-border situations alike**
- **Cross-border situations**
 - inbound-investments by non-residents and
 - outbound-investments of Austrian residents

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Treaty Shopping

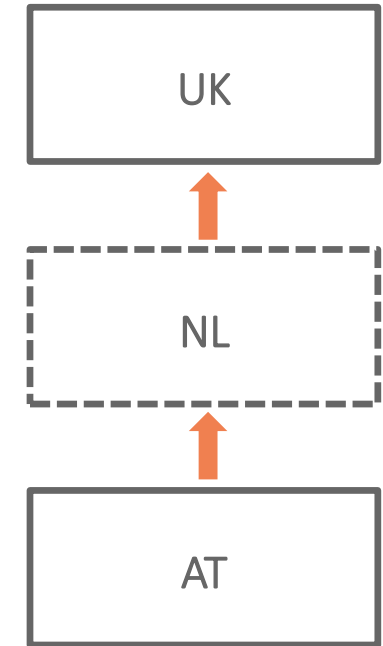
- **Positions of the VwGH in Treaty Shopping I:**

- Single legal actions as e.g. the transfer of shares or the formation of a company are normally not regarded as tax avoidance within the meaning of sec. 22 BAO.
- Attribution of income (i.e. dividends) must be denied,
 - if the foreign company is not engaged in an active business or
 - does not fulfill a reasonable function.

- **Positions of the VwGH in Treaty Shopping II:**

- The application of domestic anti-avoidance measures (sec. 22 BAO) is not excluded by a DTC.
- A statement of another country indicating that there is no tax avoidance has no binding effect.

VwGH 10.12.1997, 93/13/0185
(Treaty Shopping I)



Case: Refund of Austrian WHT
(DTC AT/NL)

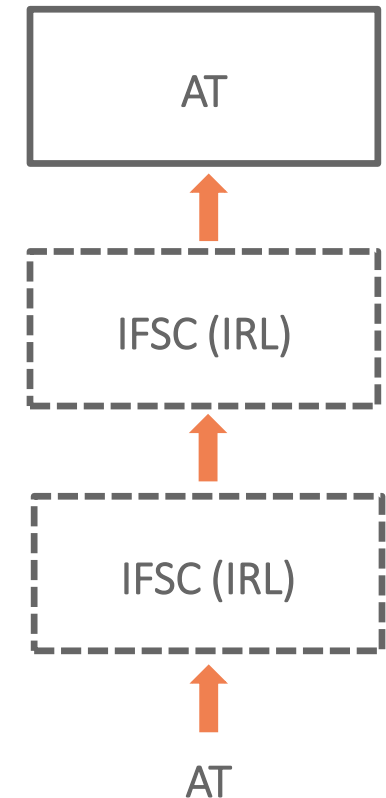
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Base Companies

- **Dublin Docks I + II:**
 - Structures were qualified as not appropriate (i.e. abusive)
 - Non fiscal reasons presented were not sufficient (e.g. limitation of liability, internationalization etc)
- **Positions of the VwGH in Dublin Docks I:**
 - Implementing a foreign company per se is not regarded as tax avoidance; however, evaluation of the structures in total is required
 - A legal arrangement is not inappropriate if taxpayers follow the way outlined by the law itself. However, simply avoiding the application of a SAAR – accidentally or not – is not enough to justify the structure and prevent the application of sec. 22 BAO
- **Positions of the VwGH in Dublin Docks II:**
 - Application of sec. 22 BAO in individual cases is in line with the fundamental freedoms provided by EU law
 - Application of sec. 22 BAO is not restricted by the fact that the foreign low-tax regime was authorized as state aid by the commission of the EU

VwGH 9.12.2004, 2002/14/0074
(Dublin Docks I)



Case: Austrian dividend participation exemption

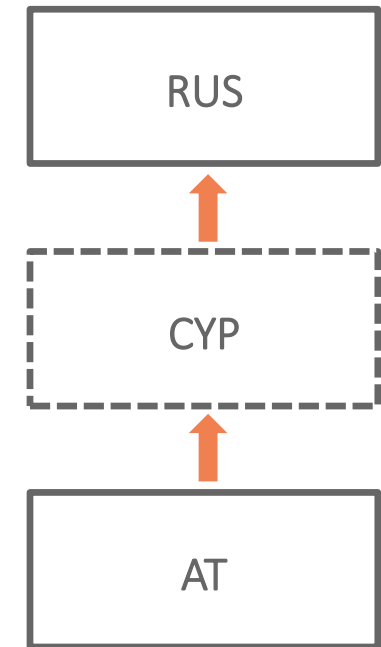
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Directive Shopping

- **Directive Shopping: further investigation of the lower court necessary, if the Cyprus Ltd is merely a conduit company**
- **Positions of the VwGH**
 - Application of sec. 22 BAO is possible to prevent “directive shopping”. Indication of tax avoidance:
 - There are no economic or other substantial reasons for the implementation of the company and
 - the interposed company is not engaged in an active business.
 - Consideration of the structure in total: implementation of the Cyprus Ltd and the tax effects for the ultimate shareholders.
 - A valid certificate of residence does not preclude the application of the Austrian GAAR and – in itself – does not qualify as evidence for any non-fiscal reason.
 - Sec. 22 para. 2 BAO:
 - income must be attributed to the ultimate shareholders (i.e. because a direct investment was assumed to be appropriate).
 - (partial) refund of Austrian source taxation possible

VwGH 26.6.2014, 2011/15/0080
(Directive Shopping)



Case: Refund of Austrian WHT
(EU Parent Subsidiary Directive)

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GAAR and taxpayer's safeguards

- **The tax administration is obliged to identify the facts and circumstances of a case. However, in case of cross-border situations the taxpayer has an increased obligation to cooperate (sec. 115 BAO).**
- **The facts of an inappropriate structure must be adjusted by the tax authorities. Taxes must be levied according to the adjusted facts and circumstances.**
- **Application of sec. 22 BAO (e.g. in tax audits): Austrian tax administration differs on a case-by-case basis.**
- **Taxpayers' rights are usually recognized and respected in a way that taxpayers are asked for a detailed explanation and justification of the legal arrangement in question.**
- **Statute of limitations range from 3 to 10 years depending on the type of tax.**
- **Tax rulings are limited in Austria and difficult to obtain in practice.**

Vielen Dank!

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