

National Report Austria

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EXECUTIVE SUMMARY

PART I THE NOTION OF TAX

Neither the Austrian Federal Constitutional Law nor the Constitutional Finance Law provides a definition of the notion of “tax”. There is no definition of taxes (on income or taxes on capital) in Austrian tax law either. *Income* taxes cover taxes on the income of natural persons (Austrian individual income tax) and legal persons (Austrian corporate income tax). Generally, income tax is levied by way of assessment. The general tax rate is progressive for individuals and flat for corporations. Some categories of income are taxed “at source”. Taxes on *capital* are currently merely levied in the form of real estate taxes.

Based on section 48 FTC (which authorizes the Austrian Federal Ministry of Finance to partly or fully exempt certain items of income from tax liability or partly or fully credit the foreign tax on specific items against the domestic tax), a regulation specifies the conditions and the methods for eliminating double taxation in the field of income taxation. The regulation only covers the Austrian individual and corporate income tax. It is only applicable to taxpayers subject to unlimited tax liability in Austria and in the absence of a tax treaty with the foreign source state.

81 of the 88 tax treaties scrutinized contain a general clause more or less mirroring article 2.1 OECD MC. 14 Austrian tax treaties refer to the term “tax” in their definitions article. Where a treaty contains no, or no illuminating, definition of the term “tax” and the principle of autonomous treaty interpretation is given effect, the conceptual approach adopted by the 1969 Report of WP No. 30 may lead the way.

The somewhat tautological “definition” of “taxes on income and on capital” enshrined in article 2.2 OECD MC is taken over by 76 Austrian treaties. This rather imprecise definition is clarified in interaction with the distributive articles. While the name of a candidate tax will not be decisive, the tax base and the taxable subject or object will have to be considered.

Not all Austrian tax treaties follow the broad concept of article 2.1 OECD MC and include taxes which are “imposed on behalf of a Contracting State or of its political subdivisions or local authorities” in their scopes. Apart from the fact that 7 treaties refrain from including such general clause altogether, another 6 treaties contain a general clause but refrain from referring to “political subdivisions or local authorities”. The fact that none of the lists of taxes covered in Austria’s tax treaties contains subnational taxes does not, as such, exclude taxes imposed on behalf of Austria’s “political subdivisions or local authorities”.

Under Austrian law, taxes may be levied by assessment or by deduction at source. Both manners of levy, and regardless whether the tax base is a net or a gross amount, are within the scope of Austrian tax treaties.

Every single treaty examined contains a list of taxes covered (of either exemplary or exhaustive character). The Austrian individual and corporate income taxes are covered by all 88 tax treaties scrutinized. Almost 80 per cent of the treaties additionally cover the Austrian land tax, the levy on agricultural and forestry enterprises, and the tax on the value of vacant plots, or undeveloped real estate and, hence, what is left from capital or “substance” taxes under Austrian law. A selection of 6 Austrian tax treaties cover as much as 15 different taxes. Social security charges and inheritance and gift taxes are not, in Austrian tax treaty practice, considered to be within the scope of income and capital treaties.

All Austrian tax treaties contain an adjustment clause in order to include identical or (substantially) similar taxes into their substantive scopes.

PART II THE RELEVANCE OF THE NOTION OF TAX IN THE ELIMINATION OF DOUBLE TAXATION

A person is a resident of Austria and thus entitled to treaty benefits, if he/she is subject to unlimited (individual or corporate) income tax liability. The person must be liable to tax on his/her worldwide income. Limited liability to tax is not enough but “abstract” liability to tax is sufficient.

In the case of the exemption method, Austria, as the residence state, exempts the foreign income from those taxes that are covered by the treaty. Equally, foreign taxes creditable under a tax treaty are those that are covered by the treaty. Foreign income taxes covered by a tax treaty are not taken into account as a cost deduction.

58 of the 88 Austrian tax treaties scrutinized open up the substantive scope of their non-discrimination article to “taxes of every kind and description”. Non-income/capital examples are the Austrian Value Added Tax (*Umsatzsteuer*), excise taxes (*Verbrauchssteuern*) and customs duties (*Zölle*). The fact that discriminatory treatment involving a number of such “taxes” may also be prohibited by other instruments of international law does not automatically exclude them from the scope of a tax treaty’s non-discrimination article.

PART III THE RELEVANCE OF THE NOTION OF TAX IN THE ELIMINATION OF DOUBLE NON-TAXATION

During the last ten years, general subject-to-tax clauses were introduced in Austrian treaties. Specific subject-to-tax clauses have an exceptional character. Some (older) treaties contain remittance-base clauses and some treaties contain general or specific switch-over clauses.

Austrian corporate income tax law provides for several subject-to-tax clauses targeting cross-border situations. In all cases, the foreign tax taken into account has to be *comparable* to the Austrian corporate income tax.

All Austrian tax treaties under examination contain a provision on the exchange of information. 36 of them extend the scope of this provision to taxes of every kind and description imposed on behalf of the CSs, or of their political subdivisions or local authorities. 32 treaties, in contrast, explicitly restrict the scope of their exchange of information provisions to taxes covered by the respective treaty.

Only 10 per cent of the treaties examined contain a provision on the assistance in the collection of taxes. Only a single treaty thereof does not restrict assistance with reference to article 2.

7 October 2015

PART I THE NOTION OF TAX

Chapter 1 Domestic law meaning of tax

1.1 The notion of “tax” in domestic law

According to article 13.1 Federal Constitutional Law, the competences of the Federation and the provinces in the field of taxation are set out in the Constitutional Finance Law. Neither of these laws provides a definition of the notion of “tax” (*Abgabe*).¹ The Austrian Constitutional Court² defines taxes as

- (cash) payments
- levied by public authorities (*Gebietskörperschaften*; state, federal lands and municipalities; social security contributions – paid to insurance carriers – are thus not covered)
- by virtue of law
- in order to satisfy their financial requirements (“fiscal purpose” of a tax; fines, for example, are therefore not considered “taxes”).

Apart from taxes, public authorities in Austria levy fees (*Gebühren*) and contributions (*Beiträge*) which are not covered by the notion of tax. Fees are connected with specific public services or goods from the public entity to the individual (e.g. fee for sewer junction – *Kanalanschlussgebühr*). Contributions are payments for public services which are levied from potential users irrespective of the real use of the service (e.g. contributions for the first construction of streets – *Anliegerbeitrag*). Taxes, in contrast, are unrequited payments.

There is no definition of taxes on income or taxes on capital in Austrian tax law. This classification of taxes is one of many possible classifications which refers to the object of taxation (“income”, “capital”). There is, however, no clear-cut line between taxes on income and taxes on capital. In effect, the Austrian tax system classifies the individual income tax (*Einkommensteuer*) and the corporate income tax (*Körperschaftsteuer*) as taxes on income and the Austrian land tax (*Grundsteuer*), the levy on agricultural and forestry enterprises (*Abgabe von land- und forstwirtschaftlichen Betrieben*) and the tax on the value of vacant plots or undeveloped real estate (*Abgabe vom Bodenwert bei unbebauten Grundstücken*) as taxes on capital.

1.2 Taxes on income

Income taxes are taxes on the income of natural persons (Austrian individual income tax) and legal persons (Austrian corporate income tax). The basic underlying principle for the Austrian income taxation is the “ability-to-pay” principle. According to this principle, each taxpayer must contribute proportionally to his/her ability to pay taxes to satisfy the public financial needs. Income derived from market activities is considered to be an adequate indicator of an individual’s or a company’s economic performance and ability to pay taxes.

The Austrian Individual Income Tax Act (ITA) regulates the taxation of income of natural persons (individuals) and defines taxable income as the total amount of income aggregated from seven explicitly and exhaustively enumerated categories of income³ after the deduction

¹ See *Doralt/Ruppe*, *Steuerrecht II*⁷ (2014) m.no. 3.

² See inter alia Austrian Constitutional Court of 28 February 2002, B 1408/01; 7 October 2004, G 3/04.

³ Income from: agriculture and forestry; self-employment; commercial activities; employment; capital investments (including income from capital gains and derivative trade); renting, leasing and royalties; other specific income (income from recurrent earnings, income from the sale of private real estate and from speculative gains, income from occasional services, income from fulfilling certain official duties).

of losses, special personal expenses (section 18 ITA) and extraordinary expenses (section 34 ITA) and after the consideration of specific allowable deductions (sections 105 and 106a ITA).

Austria taxes the worldwide income (principle of universality), if the taxpayer has his/her residence or habitual abode in Austria (section 26 Federal Tax Code [FTC]).

Generally, income tax is levied by way of assessment. The general tax rate is progressive. Some categories of income, however, are taxed “at source”, in some cases at a flat rate. The Austrian income tax is levied in the form of a *wage withholding tax* on income from employment (progressive rate), in the form of a *capital withholding tax* on income from capital (such as dividends, interest, realized increases in value of assets generating investment income; flat rate of 25 per cent or 27.5 per cent as of 1 January 2016) and in the form of a *real estate gains tax* levied on income from the alienation of real estate (flat rate of 25 per cent or 30 per cent as of 1 January 2016). In the case of a flat rate withholding tax, the taxpayer can opt for regular taxation at the general progressive tax rate.

The Corporate Income Tax Act (CITA) regulates the taxation of legal persons (corporations). For the definition and the computation of taxable income, section 7.2 CITA principally refers to the provisions of the ITA. Austria taxes the worldwide income of a corporation if it has its seat or place of management (section 27 FTC) in Austria. The tax rate amounts to 25 per cent (flat rate). Certain corporations (e.g. limited liability companies) are subject to a minimum tax (5 per cent of the minimum nominal capital, as determined under company law, per year). This tax surfaces whenever the “conventional” corporate income tax leads to a tax burden below this minimum tax; it is creditable against “conventional” corporate income tax of later tax periods. According to section 22.3 CITA, a surplus of 25 per cent is levied on payments, where the corporation refrains from naming the recipient of the payment at the request of the tax authorities.

At present, no other taxes on income exist in Austria. Up to 1988, Austria levied a tax on directors’ fees (*Aufsichtsratsabgabe*) which was declared unconstitutional by the Austrian Constitutional Court and abolished as of 1 January 1989. Up to 1993, Austria levied a tax on commercial and industrial enterprises (*Gewerbesteuer*) which was abolished with effect from 1 January 1994. The former payroll tax (*Lohnsummensteuer*) which was part of the tax on commercial and industrial enterprises was replaced by the municipal tax (*Kommunalsteuer*) as of 1 January 1994. The municipal tax is levied on the total amount of salaries and wages paid by an enterprise to its employees. It is not a tax on “income” in its classical meaning, but a tax on the gross amount of salaries and wages. It is referred to as incidental wage costs. The inheritance and gift tax (*Erbschafts- und Schenkungssteuer*), which was levied on the unrequited transfer of property based on inheritance or donation, has been abolished as of 1 August 2008. Donations to private foundations are since then taxed under the Private Foundation Transfer Tax Act (*Stiftungseingangsteuergesetz*). Inheritance and gift tax and private foundation transfer tax were/are not considered to be taxes on income (but rather taxes on the unrequited transfer of property).

1.3 Taxes on capital

In general, the notion of capital comprises immovable property (real estate), movable property, capital assets (investments) and intangible assets. In Austria, taxes on capital are currently merely levied in the form of real estate taxes (*Grundbesitzabgaben*). Real estate taxes include the Austrian land tax, the levy on agricultural and forestry enterprises and the tax on the value of vacant plots or undeveloped real estate. The Austrian land tax is levied on property of agricultural and forestry enterprises, on real estate and on commercial property which is situated in Austria. The tax rate is expressed in per mil of the property’s value, whereby the rate varies for different types of property. The levy on agricultural and forestry enterprises is an additional land tax on property of agricultural and forestry enterprises. The tax on the value

of vacant plots or undeveloped real estate is an additional land tax on unimproved private and commercial plots. In all cases, the owner is generally obliged to pay the tax.

Currently, there is no comprehensive property tax in Austria. The former property tax (*Vermögensteuer*) has been abolished as of 1 January 1994.

1.4 Foreign taxes qualifying for the elimination of double taxation under section 48 FTC

Section 48 FTC authorizes the Austrian Federal Ministry of Finance to partly or fully exempt certain items of income from tax liability or partly or fully credit the foreign tax on specific items against the domestic tax if a taxpayer is subject to the tax sovereignty of multiple states, as far as this is necessary to balance the domestic and foreign taxation or to reach a treatment in accordance with the principles of reciprocity.⁴ These unilateral measures, however, are only applicable with respect to Austrian federal taxes which are collected by federal tax authorities. Austrian local or municipal taxes (regulated by land/municipal law or collected by local authorities) are not covered. As a consequence, the municipal tax, for example, is not covered because it is not collected by the federal tax authorities.⁵ According to its wording, section 48 FTC is applicable to taxpayers subject to unlimited or limited tax liability in Austria.⁶

Based on section 48 FTC, a regulation (Federal Law Gazette II 474/2002) specifies the conditions and the methods for eliminating double taxation in the field of income taxation. The regulation only covers the Austrian individual and corporate income tax. It is only applicable to taxpayers subject to unlimited tax liability in Austria and in the absence of a tax treaty with the foreign source state. The regulation provides for the application of the exemption method with progression for “active” income (listed in section 1.1 of the regulation). It is a prerequisite that the taxpayer’s income be subject to a foreign taxation (subject-to-tax clause) which is *comparable* to the Austrian individual or corporate income tax. The foreign average tax burden must amount to more than 15 per cent. The regulation, however, does not specify the notion of “comparable taxation”. A comparable foreign taxation requires, in our opinion, that the structure and the main taxation principles of the foreign tax resemble those of the Austrian individual or corporate income tax (e.g. regarding the definition of the subject and object of taxation as well as the principal definition of the tax base). Under the Austrian Constitutional Finance Law, comparability demands, at first, similarity of the *tax object*.⁷ As a consequence, in the context of the regulation, the foreign tax has to be a tax on “income” or on elements thereof. Therefore, taxes on capital, transfer taxes, value added taxes and the like are not “comparable” taxes to the Austrian individual or corporate income tax.⁸ Furthermore, the comparability of the *tax subject* has to be analysed. The comparability of the tax base and the structure of the tax rate are of minor relevance. The nominal tax rate, the manner in which a tax is levied, the denomination of the foreign tax and the purpose of the tax are of no relevance.⁹ For the calculation of the average foreign tax burden, the regulation refers to the regulation on international participations (Federal Law Gazette no. 57/1995¹⁰). In this regulation, comparability is assumed if the average foreign tax burden calculated as provided for in section 3 of the regulation amounts to more than 15 per cent.

If the exemption method is not applicable (e.g. for foreign “passive” income, i.e. income from dividends, interest, royalties; or in the case of a foreign tax burden equal to or lower than 15 per cent), the eligible foreign tax can be credited against the Austrian individual or corporate

⁴ Details in *Koffler*, Unilaterale Vermeidung der Doppelbesteuerung durch Einzelmaßnahmen nach § 48 BAO, in *Kirchmayr-Schliesselberger et al.* (eds), *Die Bedeutung der BAO im Rechtssystem* (2014) 377 et seqq.

⁵ See *Tanzer/Unger*, BAO³ (2010) 49; *Ritz*, BAO⁵ (2014) sec. 48 m.no. 6.

⁶ See *Kanduth-Kristen* in *Bendlinger et al.*, *Internationales Steuerrecht* (2015) VI/171.

⁷ *Haslinger*, Originär innerstaatliche Voraussetzung der Anwendung der Verordnung zu § 48 BAO, in *Bauer et al.*, *Unilaterale Maßnahmen zur Vermeidung der Doppelbesteuerung* (2004) 67 (84 et seq.).

⁸ See *Haslinger* in *Lang/Schuch/Staringer* (eds) *KStG* (2009) sec. 10 m.no. 166.

⁹ *Haslinger* in *Bauer et al.*, *Unilaterale Maßnahmen*, 86 et seqq.

¹⁰ Now: regulation published in Federal Law Gazette II 295/2004.

income tax. If a tax treaty exists which provides for the credit method and does not cover foreign *local* income taxes, the foreign local income taxes can be credited against the Austrian individual or corporate income tax according to section 1.3 of the regulation.

Chapter 2 Taxes covered by the distributive articles of Austria's tax treaties

2.0 Preliminary remarks

The Austrian network of income and capital tax treaties covers 90 bilateral tax treaties, 86 of which have already entered into force. 4 treaties (Chile, Libya, Syria, and Turkmenistan)¹¹ were already signed in 2012, 2010, 2009, and 2015 respectively, but have not yet entered into force.

The following analysis is based on the 86 treaties already in force plus the treaties concluded with Chile and Turkmenistan; the official texts of the treaties with Libya and Syria are not yet available.

2.1 "Taxes on income and on capital"

By and large modelled along the lines of the OECD Model Convention, Austrian income and capital tax treaties frequently feature an equivalent to article 2.1 OECD MC and hence apply to "taxes on income and on capital". 81 of the 88 tax treaties scrutinized contain a general clause more or less mirroring article 2.1 OECD MC. 75 per cent of them actually adopt the text of the Model Convention without deviation.

A two-step approach seems appropriate in order to determine what "taxes on income and on capital" are meant to be within a treaty context. First, the notion of "tax" and second, the reference to "income and capital" will have to be considered. In doing so, the domestic law meaning of these terms may only be consulted where the context does not otherwise require:

14 Austrian tax treaties (concluded between 1962 and 2010, so with no specific historical focus) refer to the term "**tax**" in their definitions article. 13 of these treaties simply state that the term "tax" means the tax of one or the other contracting state (henceforth: CS), as the context requires. Obeying the principle of autonomous treaty interpretation, the mere impact of such a definition is restricted to introducing the territorial element in a declaratory manner.

1 of the 14 treaties mentioned – concluded with Turkey (2008) – states that "the term 'tax' means any tax covered by Article 2 of this Agreement" (article 3.1.c). This kind of circular definition seems to be of no appreciable value.

The treaty with Pakistan (2005), besides referring to "Austrian tax or Pakistan tax, as the context requires", features a unique provision by excluding, from the term "tax", "any amount which is payable in respect of any default or omission in relation to the taxes to which the Convention applies or which represents a penalty imposed relating those taxes" (article 3.1.d). The same is provided by article 22.3 of the treaty with Nepal (2000), but only for the purpose of article 22 (elimination of double taxation). The protocol to the treaty with New Zealand (2006) excludes penalties or interest (paragraph 1).

Where a treaty contains no, or no illuminating, definition of the term "tax" and the principle of autonomous treaty interpretation is given effect, the conceptual approach adopted by the 1969 Report of WP No. 30 – the Austrian-Swiss working party set up to examine, inter alia, article 2 of the draft 1963 OECD MC – may lead the way: "In theory, payments made upon a legal obligation are normally qualified as 'taxes' if they are made without any specific return"¹².

The somewhat tautological "definition" of "**taxes on income and on capital**" – proceeding to the second step of interpretation – enshrined in article 2.2 OECD MC is taken over by 76

¹¹ Until the entry into force of the 2015 treaty, the relationship with Turkmenistan will still be protected by the tax treaty concluded in 1981 with the former USSR.

¹² Report of Working Party No. 30 of the Fiscal Committee (Austria – Switzerland), FC/WP 30(69)1, m.no. 27.

Austrian treaties. This rather imprecise definition is clarified in interaction with the distributive articles.¹³ As indicated by the respective chapter headings of the Model Convention, the equivalents to articles 6 to 21 OECD MC (chapter heading: “Taxation of Income”) and article 22 OECD MC (chapter heading: “Taxation of Capital”) will have to be considered in order to determine the precise scope of “taxes on income” and “taxes on capital”, respectively. While the name of a candidate tax will not be decisive, the tax base and the taxable subject or object will have to be considered.

Also taxes on income not yet realized (“fictitious” income) may fall within the scope of a tax treaty. Under Austrian income tax law, this issue may arise in respect of what is broadly referred to as “**exit taxation**” (*Wegzugsbesteuerung*). As the Austrian income tax is referred to in all lists of taxes covered of the Austrian treaty network,¹⁴ a case is made that this kind of “exit tax” is in any case covered by those treaties that were concluded after the event of exit at stake was declared a taxable event under Austrian income tax law. For prior treaties, however, and indeed more general, the interpretation of article 2.2 OECD MC-equivalents will also lead to the result that exit taxes are covered by the treaty. Just like in the OECD Model Convention, taxes on capital appreciation are explicitly included in 73 out of 75 Austrian treaties that refer, in their equivalents to article 2.2 OECD MC, to a number of particular types of taxes. Taxes on capital appreciation do not presuppose the realization of income so that they also cover exit taxes.

Austrian corporate income tax law (section 24.4 CITA) requires certain corporations subject to unlimited taxation in Austria to pay a “**minimum tax**” (see part I, section 1.2) that is expressed as a percentage of their minimum nominal capital. It is not entirely clear whether this tax is a tax on income, a tax on capital (both covered by a treaty following the concept of the OECD MC, but subject to different distributive rules), or a tax sui generis (not covered).¹⁵

The Austrian Supreme Administrative Court¹⁶ supports the last-mentioned view in the case that, in later tax periods, there is not enough income so that the minimum tax can, de facto, not be credited against “conventional” corporate income tax. The tax burden created by the minimum tax is final in this case. Categorization as a tax on capital, in turn, could be based on the argument that the tax base is constituted by the taxpayer’s minimum nominal capital and without reference to any income-generating activity whatsoever. This argument may fail as the relevant (minimum nominal) capital is in no way related to the corporations’ actual capital. *Philipp*¹⁷ (supported by *Lang*¹⁸) proposes altering perception and reframing the minimum tax into a minimum corporate income tax base and hence pave the way for classifying it an income tax.

Finally, as a rule, **claims accessory** to taxes on income and on capital are regarded as falling within the substantive scope of Austrian tax treaties (exception: Pakistan 2005). This concerns, for instance, increases (*Abgabenerhöhungen*) such as the corporate income tax surcharge levied where the taxpayer refrains, upon request, from disclosing the recipient of an expense (section 22.3 CITA) and accessory levies such as interest for deferred payment (*Stundungszinsen*, section 212.2 FTC), interest for payment suspension (*Aussetzungszinsen*, section 212a.9 FTC), assessment interest (*Anspruchszinsen*, section 205.2 FTC), appeal interest (*Beschwerdezinsen*, section 205a FTC), late payment surcharges (*Säumniszuschlag*, section 217 FTC) as well as fees and reimbursements of enforcement.

¹³ So, for example, *Ismer* in *Vogel/Lehner* (eds) DBA⁶ (2015) Art. 2 m.nos. 32 to 34.

¹⁴ See section 2.4.

¹⁵ Also refer to *Lang*, Der sachliche Anwendungsbereich der Doppelbesteuerungsabkommen auf dem Gebiet der Steuern vom Einkommen und Vermögen, in *Lang/Jirousek* (eds) *Praxis des internationalen Steuerrechts – liber amicorum Loukota* (2005) 265 (282 et seq.).

¹⁶ Supreme Administrative Court of 15 November 1995, 95/13/0101.

¹⁷ *Philipp*, Befreiungssystem mit Progressionsvorbehalt und Anrechnungsverfahren (1971) 167.

¹⁸ *Lang*, Progressionsvorbehalt und Körperschaftsteuerrecht, in *Gassner/Lang/Lechner* (eds) *Die Methoden zur Vermeidung der Doppelbesteuerung* (1995) 187 (204).

2.2 Austria and “its political subdivisions or local authorities”

Following the idea of article 2.1 OECD MC, taxes which are “imposed on behalf of a Contracting State or of its political subdivisions or local authorities” are to be included in the scope of a tax treaty. Not all Austrian tax treaties follow this broad concept. Apart from the fact that 7 treaties (Australia 1986, Brazil 1975, Egypt 1962, Ireland 1966, Japan 1961, Philippines 1981, United Kingdom 1969) refrain from including such general clause altogether, another 6 treaties (Canada 1976, Malaysia 1989, Mexico 2004, Slovakia 1978, USSR/Turkmenistan 1981, USA 1996) contain a general clause but refrain from referring to “political subdivisions or local authorities”.¹⁹

A scant 70 per cent of the Austrian tax treaties contain a “definition” of the term “Contracting State”²⁰; a good 90 per cent of them simply state, though, that, as the context requires, Austria or the other CS (mentioned by name) is therewith referred to. In a chain of definitions, however, almost all of them further define what “Austria” and the other CS are understood to be. In the case of Austria, this leads to the “Republic of Austria” or, sometimes, to the “territory of the Republic of Austria”.²¹ Limiting this understanding to the federal level of the Republic or to taxes imposed on the federal level seems inadequate.²² More appropriate, the term “Contracting State” will constitute an umbrella term covering all levels of the state alike and hence all “Gebietskörperschaften”.

A contrary conclusion, however, will have to be drawn in respect of treaties concluded with states that have reserved their positions in that respect where the actual treaty indeed does not contain such reference. Among Austria’s relationships with OECD member countries, this concerns Canada and the United States. Even though also Chili has made a respective reservation, the treaty with Austria follows the wording of the Model Convention and hence includes a reference to the CSs’ political subdivisions or local authorities. As far as non-OECD economies are concerned, only Brazil has made a respective reservation. The treaty with Brazil, however, does not contain an equivalent to Article 2.1 OECD MC anyway.

Finally, the fact that none of the lists of taxes covered in Austria’s tax treaties contains subnational taxes does not, as such, exclude taxes imposed on behalf of Austria’s “political subdivisions or local authorities”. As *Wassermeyer* correctly points out, for reasons of clarity, taxes imposed on below-federal level will not normally be included in the list of taxes covered even though they are meant to be covered by the scope of the treaty.²³ This view is generally supported.

2.3 “The manner in which [the taxes covered] are levied”

Under Austrian law, taxes may be levied by assessment or by deduction at source. Both manners of levy, and regardless whether the tax base is a net or a gross amount,²⁴ are within the scope of Austrian tax treaties. Out of the 81 treaties that contain a general clause on taxes covered equal or similar to article 2.1 OECD MC, 79 insofar take over the wording of the Model

¹⁹ In the treaty with Kyrgyzstan (2001), political subdivisions are included via a protocol provision to art. 2 para. 1 of the treaty.

²⁰ This includes the treaty with Hong Kong (2010) which, against the background of public international law, refers to “Contracting Parties” instead of “Contracting States” and the treaty with The Netherlands (1970) which merely refers to “States”.

²¹ Deviating therefrom, the treaties with China (1991) and Russia (2000) contain both specifications and the treaties with Iran (2002) and Turkey (2009) refer to “the territory under the sovereignty [and/or jurisdiction] of the Republic of Austria”.

²² Also refer to *Staringer/Seiler*, Die persönliche und sachliche Abkommensberechtigung in den österreichischen DBA, in *Lang/Schuch/Staringer* (eds) Die österreichische DBA-Politik (2013) 79 (108).

²³ *Wassermeyer*, in *Wassermeyer/Kaesler/Lang/Schuch* (eds) Doppelbesteuerung³ (2015) Art. 2 MA m.no. 56.

²⁴ See also *Wassermeyer*, in *Wassermeyer et al.*, Doppelbesteuerung, Art. 2 MA m.no. 17.

Convention and clarify²⁵ that the respective taxes are covered “irrespective of the manner in which they are levied”. The 2 treaties (Hungary 1975, Turkmenistan 1981) that lack this clause will nevertheless apply to both manners of levy. The relevant paragraphs’ wording does not restrict the coverage of the treaty to any particular manner of levy whatsoever. Moreover, the taxes listed in article 2.3 OECD MC-equivalents always include the Austrian individual income tax without qualification as to the manner in which it is levied.²⁶ The same must be true for all other taxes covered.

2.4 The list of taxes in Austrian tax treaty practice

Every single treaty examined contains a list of taxes covered. 69 of the treaties examined follow the (introductory) wording of article 2.3 of the OECD MC without any deviation and hence contain a list of taxes covered of an exemplary²⁷ (in principle, presumably, complete²⁸) character. Only 18 (and in addition possibly the treaty with Turkmenistan) of Austria’s treaties can be considered candidates for treaties featuring an exhaustive list of taxes covered:

- In 6 treaties concluded in the 1960s and 1970s (Egypt 1962, Hungary 1975, Ireland 1966, Japan 1961, Malta 1978, United Kingdom 1969) the list of taxes covered is indeed exhaustive. They simply list the taxes to which the respective treaty applies without any linguistic caveat.
- Another 12 treaties seem to exhaustively list the taxes covered but require further attention because they either, in their German version, state that “the following taxes ‘belong’ to the taxes covered” (and this does not necessarily mean that others may not be covered as well) and/or precede the list of taxes covered with the phrase “in particular” in their English versions. None of the 4 treaties that use the phrase “in particular” in their English version uses the direct German equivalent “insbesondere”.

Out of these 18 treaties, 12 mention that the taxes listed are “existing” taxes of the respective CS. Nevertheless, all of them contain an adjustment clause in their equivalents to article 2.4 OECD MC in order to include identical or similar taxes subsequently imposed. The exhaustive character of the lists of these treaties does not preclude the coverage of such subsequent taxes.²⁹ More generally, where a treaty contains an equivalent to article 2.4 OECD MC (and all 88 Austrian treaties examined do so!), any list of taxes covered will, from a temporal perspective, always be of an exemplary character.³⁰

With a view to the relationship of a general clause modelled along the lines of paragraphs 1 and 2 of article 2 OECD MC and the list of taxes contained in the treaties’ equivalents to article 2.3 OECD MC, it is interesting to note that not all of the 18 treaties mentioned above lack equivalents to paragraphs 1 and 2 of article 2 OECD MC. Even in the first category above, 2 treaties (Hungary 1975, Malta 1978) can be identified that nevertheless contain a general clause to include taxes “on income and on capital.” Considering the strong normative character of an exhaustive list of taxes covered and drawing upon the *lex specialis* principle, these general clauses do not seem to have the capacity of broadening, or narrowing, the list of taxes covered.³¹ As mentioned below, all of these treaties containing an exhaustive list of taxes covered feature an adjustment clause against the scope of which, and despite the fact that the list of taxes covered is exhaustive, a general clause may well yield a field of application.³²

²⁵ *Wassermeyer*, in *Wassermeyer et al.*, *Doppelbesteuerung*, Art. 2 MA m.no. 16.

²⁶ Also refer to *Wassermeyer*, in *Wassermeyer et al.*, *Doppelbesteuerung*, Art. 2 MA m.no. 16.

²⁷ See, for instance, *Lang*, *Introduction to the Law of Double Taxation Conventions*, 2nd ed. (2013) m.no. 226.

²⁸ So the Commentary on Art. 2 OECD MC, m.no. 6.

²⁹ See section 2.5.

³⁰ Also refer to *Lang*, *Kommunalsteuer und DBA*, SWI 2005, 16 (20).

³¹ Contrast *Brandstetter*, “Taxes Covered” – A study of Article 2 of the OECD Model Tax Conventions (2011) 55.

³² Details in section 2.5.

The question of the relationship between paragraphs 1 and 2 of article 2, on the one hand, and paragraph 3 of article 2, on the other hand, also arises if the treaty contains a list of taxes covered of, at least at first sight, an exemplary character. The position of the OECD³³ is well-known albeit not entirely enlightening; *Lang* presents a reasonable appreciation of this issue: If a tax in force at the time of conclusion of a tax treaty is mentioned in the list of taxes covered, there are good arguments that this tax is indeed covered by the scope of the treaty and hence be considered a “tax on income and on capital”. If, in contrast, a tax in force at the time of conclusion of a tax treaty is not mentioned in the list of taxes covered, there is a lot to commend it to be outside the scope of the treaty.³⁴ The latter nuance in this view is disputed, though, and a number of authors highlight the provision’s exemplary character.³⁵

Finally, 7 Austrian treaties follow the approach described in m.no. 6.1 of the OECD Commentary on article 2, according to which countries that do not include equivalents to article 2.1 and 2.2 OECD MC in a tax treaty will list exhaustively the taxes in each country to which the treaty will apply. 3 of these treaties (Australia 1986, Brazil 1975, Philippines 1981), however, fall within the second category of (only presumably) exhaustive lists that use the vague word “gehören” in their German version (but lack the phrase “in particular” in their English versions), so that a mere 4 definite representatives remain.

As regards the actual content of the lists, whether exemplary or exhaustive and as expected, The former Austrian property tax as well as the former Austrian tax on capital which is not subject to the succession duty (*Abgabe von Vermögen, die der Erbschaftssteuer entzogen sind*) – which were both abolished in 1993 – are still mentioned in 22 and 21 treaties, respectively, all of which were concluded before 1994.

The directors’ tax – which was declared unconstitutional by the Austrian Constitutional Court in 1988 due to similarity to the individual income tax and hence abolished – is still covered by 24 treaties. Three of these treaties (Malaysia 1989, Cyprus 1990, China 1991) were concluded after the judgment of the Court was delivered.

The tax on commercial and industrial enterprises, also referred to as business tax in Austrian tax treaties, is listed in 25 treaties, all concluded pre-1994. The tax was abolished in 1993. 92 per cent of these treaties also explicitly cover the (former) Austrian payroll tax, also referred to as the tax levied on the sum of wages, which was an integral part of the tax on commercial and industrial enterprises. Interestingly, in 3 treaties, the tax on commercial and industrial enterprises also appears in or in relation to the distributive rule on shipping and air transport in the form of an explicit exemption from this tax. 2 of these treaties (France (1993) and Ireland (1966)) also mention this tax in their list of taxes covered (Ireland via reference to the distributive rule at stake), while the treaty with Japan (1961) refrains from doing so.

Under the current state of the law, (only) the payroll tax continues to exist, but in a modified manner and under a new name (*Kommunalsteuer*). The question as to whether this successor of the former payroll tax is covered by treaties that mentioned the former payroll tax is discussed below, in section 2.5.

A selection of 6 Austrian tax treaties, all of them concluded between 1969 and 1975, cover as much as 15 different taxes.

³³ Commentary on Art. 2 OECD MC, m.no. 6.

³⁴ *Lang*, „Taxes Covered“ – What is a „Tax“ according to Article 2 of the OECD Model?, Bulletin 2005, 216 (220 et seq.); *Lang*, in *Lang/Jirousek*, liber amicorum Loukota, 277 et seq. Also refer to *Wassermeyer*, in *Wassermeyer et al.*, Doppelbesteuerung, Art. 2 MA m.no. 56.

³⁵ So, for instance, *Martín Jiménez*, Defining the Objective Scope of Income Tax Treaties: The Impact of Other Treaties and EC Law on the Concept of Tax in the OECD Model, Bulletin 2005, 432 (437); *Ismer* in *Vogel/Lehner*, DBA, Art. 2 m.no. 51; *Heidenbauer*, Internationale Aspekte der EU-Quellensteuer, SWI 2005, 459 (463); *Brandstetter*, Taxes Covered, 47 et seqq. and 53 et seq., and, with a view to the tax treaty with Slovenia, *Lang/Daurer*, Doppelbesteuerungsabkommen Österreich/Slowenien (2014) Art. 2 m.no. 8.

A peculiar provision in the tax treaty with Korea (1985) exempts enterprises of Austria and Korea from the value added tax (!) in Korea and any tax similar to the value added tax in Korea which may hereafter be imposed in Austria, respectively (article 8.3).

2.5 “Identical or substantially similar taxes”

All Austrian tax treaties contain an adjustment clause in order to include identical or (substantially) similar taxes into their substantive scopes. Two thirds of the treaties follow the language of article 2.4 OECD MC in this respect. More than three fourths stick to the wording of the Model Convention and include taxes “identical or *substantially* similar” to those already imposed at the date of signature of the treaty. Only about 20 per cent merely refer to “identical or similar taxes”. Identity and similarity will have to be determined with reference to the taxable subject or object and the tax base; the label of a candidate tax will not be decisive. The protocol to the treaty with Mexico (2004) contains a clause according to which any net wealth tax imposed after the date of signature of the treaty will be covered by the treaty. It is submitted that this provision is of declaratory character only. The treaty contains both the general clauses of article 2.1 and 2.2 OECD MC and the adjustment clause of article 2.4 OECD MC, so that respective coverage is secured. The fact that the list of taxes covered of this treaty comprises income taxes only does not frustrate this conclusion.

Taxes not mentioned in the list of taxes covered may nevertheless fall within the scope of the respective tax treaty: A **municipal tax** was introduced in the course of the 1993 tax reform.³⁶ Strictly speaking, this tax is not a tax on “income”.³⁷ The former Austrian payroll tax constituted an integral part of the former tax on commercial and industrial enterprises which was abolished in 1993. As mentioned in section 2.4, this tax is listed in 25 Austrian treaties (23 of which also explicitly refer to the former Austrian payroll tax). All of these treaties contain an adjustment clause and the prevailing opinion, including the opinion of the Austrian Supreme Administrative Court and the Federal Ministry of Finance, considers that the municipal tax is covered.³⁸ The Supreme Administrative Court even took this position in a case involving the tax treaty with Japan where the adjustment clause (contained in article I.2 and explicitly referring only to the exhaustive list of taxes contained in article I.1) did not immediately refer to the tax on commercial and industrial enterprises (only referred to in article VIII in respect of the operation of ships or aircraft which was, in principle, applicable to the case at hand).³⁹

Treaties that do not explicitly list the former tax call for a differentiated approach (which no longer concerns the scope of the adjustment clause): The respective treaties concluded *before* 1994 can, in our opinion, not be deemed to cover the municipal tax where they did not even include the then-in-force tax on commercial and industrial enterprises. Treaties concluded *after* the former tax was abolished which do not explicitly mention the tax on commercial and industrial enterprises may, in contrast, and even though not a single Austrian tax treaty explicitly lists the municipal tax in its list of taxes, very well cover the new municipal tax. In our view, it will be decisive whether the treaty features a provision equivalent to article 2.2 OECD MC and hence includes “taxes on the total amounts of wages or salaries paid by enterprises” within its substantive scope. In respect of this last group of treaties, the Austrian Ministry of Finance holds a different view and interprets any article 2.2 OECD MC-equivalents to the effect that the phrase mentioned only serves the purpose of including income taxes assessed upon

³⁶ Federal Law Gazette 1993/819 of 30 November 1993.

³⁷ Details in part I, section 1.2.

³⁸ So, for instance, *Züger*, Kommunalsteuer, sonstige Lohnabgaben und Doppelbesteuerungsabkommen, SWI 2000 164 (164); *Burgstaller*, Kommunalsteuer und DBA, SWI 2004, 18; *Staringer/Seiler*, in *Lang/Schuch/Staringer*, DBA-Politik, 110. Also refer to the Austrian Supreme Administrative Court of 15 December 1999, 98/12/0021; 3 August 2000, 99/15/0265; and the Information of the Federal Ministry of Finance of 28 December 2011 on the Municipal Tax Act 1993, BMF-010222/0260-VI/7/2011, m.no. 183. Contrast *Wurz*, Kommunalsteuer und Doppelbesteuerungsabkommen, SWI 1998, 231 (231 et seq.).

³⁹ Supreme Administrative Court of 28 March 2001, 2000/13/0134.

the total amount of wages; it concludes that the municipal tax is outside the scope of such treaties.⁴⁰ The treaty with Bulgaria (2010) is explicit in this respect and provides that such taxes are covered only if they replace taxation of the individual employments income paid by such enterprise and not if they are levied in addition to such taxation (paragraph 1 of the protocol).

2.6 Austrian levies outside the scope of “taxes covered”

In line with the view adopted by the OECD, **social security charges** are not, in Austrian tax treaty practice, considered to be within the scope of income and capital treaties.⁴¹ In any case, they are not mentioned in any list of taxes covered nor are they regarded as falling within the scope of the general clause. Even though social security charges may constitute what is understood to be a “tax” in international tax law, considering the *lex specialis* principle as well as, as the case may be, the primacy of EU law, they should at least be seen outside the scope of an income and capital tax treaty if and insofar a social security agreement or EU legislation governs the relevant relationship.⁴²

Again in line with the view adopted by the OECD, **inheritance and gift taxes** are also not regarded as falling within the scope of income and capital tax treaties in Austrian practice.⁴³ In Austria, inheritance and gift taxes are covered by a separate network of (in fact only 9) tax treaties. The “newer” treaties with France (1993), The Netherlands (2001), the Czech Republic (1996), and the USA (1982) cover both inheritance and gift taxes, while the older treaties with Liechtenstein (1955), Poland (1926), Sweden (1962), Switzerland (1976), and Hungary (1975) cover inheritance taxes only. This finding reflects the fact that the substantive scope of the OECD EIG MC, originally published in 1966, was extended in 1982 to also include gift taxes. After having been held unconstitutional in respect of the tax base by the Austrian Supreme Constitutional Court,⁴⁴ the Austrian inheritance and gift tax was abolished in 2008.

⁴⁰ Information of the Federal Ministry of Finance, BMF-010222/0260-VI/7/2011, m.nos. 183 and 196.

⁴¹ See *Loukota*, Österreichs Außensteuerrecht (2002) m.no. 232, and, in general, Commentary on Art. 2 OECD MC, m.nos. 3 and 6.1.

⁴² So *Martín Jiménez*, Bulletin 2005, 436; *Brandstetter*, Taxes Covered, 125 et seq.

⁴³ Also refer to the Commentary on Art. 22 OECD MC, m.no. 1. Further *Wassermeyer*, in *Wassermeyer et al.*, Doppelbesteuerung, Art. 2 MA m.no. 51.

⁴⁴ Supreme Constitutional Court of 7 March 2007, G 54/06 and others.

PART II THE RELEVANCE OF THE NOTION OF TAX IN THE ELIMINATION OF DOUBLE TAXATION

Chapter 1 Tax treaty resident concept

A person is a resident of Austria and thus entitled to treaty benefits, if he/she is subject to unlimited (individual or corporate) income tax liability according to section 1.2 ITA or section 1 CITA.⁴⁵ The person must be liable to tax on his/her worldwide income. Limited liability to tax is not enough⁴⁶ but “abstract” liability to tax is sufficient. Consequently, persons with exempt or no income qualify as residents for treaty purposes⁴⁷ if they have their domicile or habitual abode (individuals; section 26 FTC) or seat or place of management (corporations; section 27 FTC) in Austria. Thus, “liable to tax” does not amount to a subject-to-tax clause.⁴⁸ Some treaties, however, explicitly restrict their personal scope: According to article 26 of the treaty with Liechtenstein (1969), for example, the treaty does not apply to companies and trusts that are exempt from tax and whose shareholders are neither individuals resident in Liechtenstein nor entities established under the public law of Liechtenstein.⁴⁹ Article 16 of the treaty with the United States (1996) also provides for a comprehensive limitation-on-benefits clause (article 16.1.g).

Unlimited tax liability for income tax purposes, though, does not automatically imply “residence” for treaty purposes. If a taxpayer who is subject to limited tax liability because of his/her domicile and habitual abode abroad opts for unlimited tax liability under section 1.4 ITA, he/she is not regarded a resident for treaty purposes.

If income is not attributed to a “resident” person because of a lack of business activity (especially in the case of letter-box companies), the Austrian Ministry of Finance will not issue a certificate of residence.⁵⁰ In the case of dual residence, a person – although in principle subject to unlimited tax liability in Austria – is not entitled to treaty benefits under Austrian tax treaties with third states if the tie-breaker rule attributes the residence to the other CS.⁵¹

Partnerships and investment funds, both of which are treated as transparent under Austrian income tax law and are not, as such, subject to unlimited (individual or corporate) income tax, are not recognized for treaty purposes. In some treaties (e.g. USA (1996) article 4.1.b; Mexico (2004) paragraph 5 of the protocol; San Marino (2004) article 4.1) the term “resident of a Contracting State” also applies to partnerships(, estates) and trusts, but only to the extent that the income derived by a partnership(, estate) or trust is subject (San Marino: liable) to tax in that state as the income of a resident, either in its own hands or in the hands of its partners(, beneficiaries) or grantor.

Chapter 2 The methods for the elimination of international double taxation

2.1 The exemption system

In the case of the exemption method, Austria, as the residence state, exempts the foreign income from those taxes that are covered by the treaty (see part I, chapter 2). For unilateral measures see part I, chapter 1.4.

⁴⁵ See *Loukota/Jirousek*, Internationales Steuerrecht I/1 Z 4 m.no. 4 (1 March 2015, rdb.at).

⁴⁶ See *Loukota/Jirousek*, Internationales Steuerrecht I/1 Z 4 m.no. 5. This is in line with the second sentence in art. 4.1 OECD MC.

⁴⁷ See *Wassermeyer/Kaesler*, in *Wassermeyer et al.*, Doppelbesteuerung, Art. 4 MA m.no. 25.

⁴⁸ See *Loukota/Jirousek*, Internationales Steuerrecht I/1 Z 4 m.no. 7.

⁴⁹ See EAS 19 of 31 July 1991 and EAS 30 of 27 September 1991.

⁵⁰ See Austrian Ministry of Finance, Salzburger Steueralog 2010, decree of 18 October 2010, BMF-010221/2575-IV/4/2010, 3.

⁵¹ See Austrian Ministry of Finance, BMF-010221/2575-IV/4/2010, 3.

2.2 The credit system

Foreign taxes creditable under a tax treaty are those taxes that are covered by the treaty (see part I, chapter 2). Practical experience is scarce and includes the following:

- If covered by the treaty, also foreign local taxes may be credited against Austrian individual or corporate income tax.⁵²
- The Italian “imposta regionale sulle attività produttive (IRAP)” was introduced after the conclusion of the tax treaty with Italy (1985). Despite its impersonal character,⁵³ this tax is characterized as a tax on income and can be credited against Austrian income tax.⁵⁴
- According to article 23.3.d of the treaty with Kuwait (2002), the Kuwaiti tax Zakat mentioned in paragraph 3 of article 2 is considered an income tax for the purposes of the tax credit for royalties.
- According to article 22.3 of the treaty with Mexico (2004), the Mexican assets tax mentioned in paragraph 3 of article 2 is considered an income tax for the purposes of the convention.

A credit for foreign taxes requires the payment of those taxes abroad. The credit in Austria, however, is granted in the assessment period in which the foreign income is subject to Austrian (corporate or individual) income tax, so that timing differences may occur.⁵⁵ A credit is only granted for definitive foreign taxes; mere advance payments which are refundable are not taken into account.⁵⁶

A credit of foreign taxes against the Austrian minimum corporate income tax in the case of a negative worldwide income is not possible.⁵⁷ A credit is only granted in the case of an overall profit and to the extent that corresponds to the amount of “conventional” corporate income tax on this profit, even if this amount is lower than the minimum corporate income tax.⁵⁸

2.3 Deduction system

In Austria, foreign income taxes covered by a tax treaty are not taken into account as a cost deduction. According to section 20.1.6 ITA and section 12.1.6 CITA, taxes on income and other personal taxes are non-deductible expenses.⁵⁹

Chapter 3 Non-discrimination

58 of the 88 Austrian tax treaties⁶⁰ scrutinized open up the substantive scope of their non-discrimination article to “taxes of every kind and description” and do so by either adopting the wording of the 1963 Draft or later Model Conventions.⁶¹ One additional treaty (USA 1996)

⁵² See EAS 3068 of 22 May 2009 concerning local US taxes.

⁵³ The IRAP is a regional tax calculated as a percentage of the net value of the production derived in each Italian region.

⁵⁴ See EAS 2968 of 26 May 2008.

⁵⁵ See EAS 1120 of 8 August 1997. Timing differences can also arise in the case of a business year deviating from the calendar year (see EAS 42 of 18 November 1991).

⁵⁶ See EAS 2117 of 16 September 2002.

⁵⁷ See Federal Tax Court of 29 June 2004, RV/0158-L/04 and of 25 January 2005, RV/0256-G/04.

⁵⁸ Example: A limited liability company which exists more than ten years is subject to a minimum corporate income tax of EUR 1,750 per year. In the case of a profit of EUR 5,000, the “conventional” corporate income tax of 25 per cent would be EUR 1,250. The tax burden, however, is EUR 1,750 (= minimum corporate income tax). In this case, foreign taxes would (only) be creditable up to an amount of EUR 1,250.

⁵⁹ See Federal Tax Court of 25 June 2008, RV/1663-W/04 and of 7 October 2009, RV/1022-L/09.

⁶⁰ 3 treaties do not contain a non-discrimination article.

⁶¹ This is particularly interesting for the treaties with Brazil (1975), Bulgaria (2010), Greece (2007), Romania (2005), Thailand (1985), Tunisia (1977), and Ukraine (1997), as, in their reservations or position on the OECD

adopts the wording of the US Model Convention and specifies these taxes to cover, in contrast to its article 2, “taxes of every kind and description *imposed by a Contracting State or a political subdivision or local authority thereof*” (emphasis added). The Commentary to article 24.6 OECD MC (ever since the 1963 Draft Convention) actually features the same phrase. The scope of these 58, plus 1, treaties’ non-discrimination article hence stretches to “taxes” – as defined in section 2.1 above and without any reference to “income” and “capital” whatsoever – imposed by the respective CSs or their political subdivisions or local authorities. Non-income/capital examples are the Austrian Value Added Tax (*Umsatzsteuer*), excise taxes (*Verbrauchssteuern*) and customs duties (*Zölle*).⁶²

The fact that discriminatory treatment involving a number of such “taxes” may also be prohibited by other instruments of international law does not automatically exclude them from the scope of a tax treaty’s non-discrimination article. Applicability will have to be solved according to precedence rules of international law, most importantly the *lex specialis* principle. Failing this, there is no reason why the person seeking non-discrimination may not rely on dual or multi-protection and hence rely on the more favourable regime.

14 Austrian treaties explicitly narrow the scope of their non-discrimination articles to taxes which are the subject of the respective treaty. This restriction is, in our opinion, of a declaratory character as article 2 OECD MC-equivalents do not restrict their scope to the distributive rules of the treaty. Another 12 treaties do not contain a qualification in one or the other direction so that it is submitted that the substantive scope of their non-discrimination articles will be predetermined by their article 2 OECD MC-equivalents.⁶³

Model Convention, these states explicitly reserve the right to restrict the application of the non-discrimination article to taxes covered by the respective treaties.

⁶² Also refer to *Wassermeyer/Schwenke*, in *Wassermeyer et al.*, *Doppelbesteuerung*, Art. 24 MA m.no. 104.

⁶³ So also *Rust* in *Vogel/Lehner*, DBA, Art. 24 m.no. 185, in respect of equivalent German tax treaties.

PART III THE RELEVANCE OF THE NOTION OF TAX IN THE ELIMINATION OF DOUBLE NON-TAXATION

Chapter 1 Tax treaty subject-to-tax clauses

In the past, only some Austrian tax treaties included subject-to-tax clauses. In most cases, those clauses were not of a general nature but referred to specific items of income (“specific subject-to-tax-clauses”). During the last ten years, general subject-to-tax clauses (partly modelled along the provision of article 23B.4 of the OECD MC which was included in the MC as of April 2000) were introduced in Austrian treaties. Specific subject-to-tax clauses have an exceptional character.⁶⁴ The following examples may illustrate this.⁶⁵

Treaty with	Article/ modelled along	Content
Albania (2007; article 23.2.d), Bosnia and Herzegovina (2010; article 23.1.c), Bulgaria (2010; article 23.4), Czech Republic (2006; article 22.1.c), Macedonia (2007; article 22.1.e), Moldavia (2004; article 22.1.d), New Zealand (2006; article 22.1.d), Romania (2005; article 24.2.e), Taiwan (2014; article 21.1.d); Tajikistan (2011; article 23.1.e).	Elimination of Double Taxation; modelled along article 23B.4 of the OECD MC ⁶⁶	Example (Albania, article 23.2.d): “d) The provisions of subparagraph a) shall not apply to income derived or capital owned by a resident of Austria where Albania applies the provisions of this Convention to exempt such income or capital from tax or applies the provisions of paragraph 2 of Articles 10, 11 or 12 to such income.”
Belarus (2001; article 23.1.e), Croatia (2000; article 23.1.d), Denmark (2007; article 24.2.d), Estonia (2001; article 23.1.d), Kazakhstan (2004; article 23.2.e), Latvia (2005; article 24.1.d), Lithuania (2005, article 24.1.d), Mexico (2004; article 22.4), Russia (article 23.1.e), Slovenia (1997; article 24.1.d), Spain (1966 as amended in 1995; article 24.3), Ukraine (1997; article 23.1.d), Uzbekistan (2000; article 23.5).	Elimination of Double Taxation; modelled along article 23.1.e of the former “Austrian MC” of 1998 ⁶⁷	Example (Spain, article 24.3): “Income derived by a resident of a Contracting State which is considered by that State to be taxable under this Convention in the other State may nevertheless be taxed in the first-mentioned State if, after the conduct of a mutual agreement procedure, the other Contracting State exempts that income from tax by virtue of this Convention.”

⁶⁴ See *Jirousek*, Die österreichische Position beim Abschluss von DBA, in *Lang/Schuch/Staringer*, DBA-Politik, 23.

⁶⁵ The first two examples of general subject-to-tax-clauses are sometimes not regarded as subject-to-tax-clauses (see *Pamperl*, Die Methoden zur Vermeidung der Doppelbesteuerung in den österreichischen DBA (Art. 23 OECD-MA), in *Lang/Schuch/Staringer*, DBA-Politik, 322), because in both cases the non-taxation in the source state results from the application of the treaty and not domestic law.

⁶⁶ This provision corresponds to art. 23A.4 of the OECD MC.

⁶⁷ See *Schilcher*, Subject-to-tax-Klauseln in der österreichischen Abkommenspraxis (2004) 93 et seq. In the treaties with Belarus, Croatia, Denmark, Estonia, Kazakhstan, Latvia, Lithuania, Russia, Slovenia and Ukraine, the subject-to-tax clause only provides (unilaterally) for a taxation right of Austria in the case of non-taxation in the other state (the CSs apply the credit method). In the other treaties (like those with Mexico, Spain, Uzbekistan), the wording of the clause is neutral and becomes effective for both CSs. The clause eliminates double non-taxation which results from a qualification conflict (see *Schilcher*, Subject-to-tax-Klauseln, 98).

<p>Bahrain (2009)</p> <p>similar provisions can be found in the treaties with Montenegro (2014; article 22.1.b) and San Marino (2004; article 23.1.b)⁶⁸</p>	<p>Article 22.2.b) (Elimination of Double Taxation) – “active-business-test”</p>	<p>“b) Where a resident of Austria who is engaged in substantive active business operations in Bahrain, derives income which, in accordance with the provisions of Article 7, may be taxed in Bahrain and is liable to tax in Bahrain according to the provisions of the domestic law of Bahrain, Austria shall, notwithstanding sub-paragraph a), exempt such income from tax.”</p>
<p>Hong Kong (2010)</p>	<p>Article 22.2.a (Methods for Elimination of Double Taxation)</p>	<p>“(a) where a resident of Austria derives income or owns capital which, in accordance with the provisions of this Agreement, may be taxed in the Hong Kong Special Administrative Region and are subject to tax therein, Austria shall, subject to the provisions of subparagraphs (b) to (e), exempt such income or capital from tax; [...] (e) the provisions of subparagraph (a) shall not apply to income derived or capital owned by a resident of Austria where the Hong Kong Special Administrative Region applies the provisions of this Agreement to exempt such income or capital from tax or applies the provisions of paragraph 2 of Article 10 or 12 to such income.”</p>
<p>Poland (2004)</p>	<p>Article 24.1.a⁶⁹ (Methods for Elimination of Double Taxation)</p>	<p>“(a) Where a resident of Poland derives income or owns capital which, in accordance with the provisions of the Agreement is taxed in Austria, Poland shall, subject to the provisions of subparagraph (b) of this paragraph, exempt such income or capital from tax;”</p>

⁶⁸ In these treaties, Austria generally applies the credit method to eliminate double taxation.

⁶⁹ As revised in 2008.

Australia (1986)	Article 15.2.d ⁷¹ (Dependent Personal Services)	“(2) [...] remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned state if [...] (d) the remuneration is, or upon the application of this Article will be, subject to tax in the first-mentioned State.”
Cuba (2003)	Article 12.3 (Royalties)	“(3) Notwithstanding the provisions of paragraph 2, the copyright royalties paid in respect of the author’s right and other similar remuneration for the production of literary, dramatic, musical or artistic work, arising in a Contracting State and paid to a resident or the other Contracting State who is liable to tax on them, once the recipient of said royalties is the beneficial owner, shall be exempt from tax in the first-mentioned state.”
Germany (2000)	Article 15.4 (Dependent personal services)	„(4) Für Zwecke dieses Artikels gilt die Arbeit im anderen Vertragsstaat nur dann als ausgeübt, wenn die Vergütungen in Übereinstimmung mit diesem Abkommen im anderen Vertragsstaat besteuert worden sind.“ For the purposes of this Article, employment is deemed to be exercised in the other Contracting State only where the remuneration therefrom was subject to tax in that State in accordance with this Convention. ⁷²

⁷⁰ Further examples: Art. 13.5 of the treaty with Norway (1995) contains a subject-to-tax-clause for the alienation of movable property. Art. 13.4 of the treaty with Switzerland (1974) contains a subject-to-tax-clause concerning the alienation of specific participations. According to art. 10.3.c of the treaty with France (1993), the “avoir fiscal” is only granted to Austrian residents if the dividends stemming from France are subject to Austrian taxation.

⁷¹ “Inverse” subject-to-tax clause (see *Rosenberger*, Subject-to-tax-Klauseln, SWI 2008, S 59): The exemption in the source state depends on the actual taxation in the residence state.

⁷² Unofficial translation prepared by the IBFD.

Malaysia (1989)	Article 20.1 (Teachers and Researchers)	“An individual who is a resident of a Contracting State immediately before making a visit to the other Contracting State, and who, at the invitation of any university, college, school or other similar educational institution, visits that other State for a period not exceeding two years solely for the purpose of teaching or research or both at such educational institution shall be exempt from tax in that other State on any remuneration for such teaching or research which is subject to tax in the first-mentioned State.”
Norway (1995)	Article 8.1 (Shipping, inland waterways transport, air transport and containers)	“(1) Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated. If this State cannot tax the total profits of the enterprise the part of the profits thus not subject to tax may be taxed in the State of which the recipient is a resident.”
Poland (2004)	Article 20 (Professors and Researchers)	“A professor, teacher or researcher who makes a temporary visit to a Contracting State solely for the purpose of teaching or carrying out research at a university, college or other recognised educational institution in that Contracting State and who is or was immediately before that visit a resident of the other contracting state, shall be exempt from tax in the first-mentioned Contracting State for a period not exceeding two years from the date of his first visit for that purpose in respect of remuneration for such teaching or research, provided that he is taxed on such remuneration in the other Contracting State.”

San Marino (2004)	Article 17.2 (Pensions)	“(2) The provisions of paragraph 1 shall not apply if the recipient is not subjected to taxation in respect of such income in the State of which he is a resident and according to the laws of that State. In such case such income shall be taxable in the State in which it arises.”
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According to the prevailing opinion in Austria, subject-to-tax clauses do not require the actual payment of the tax.⁷³ The wording of the specific subject-to-tax clauses, however, differs (e.g. “is/are subject to tax” [Australia; Hong Kong; Malaysia]; “is taxed” [Poland]; “besteuert worden sind”/“was subject to tax”⁷⁴ [Germany]; see the listing above).

Some (older) treaties feature remittance-base clauses (a kind of general subject-to-tax clause not confined to specific income) to avoid double non-taxation. According to article 3.2 of the treaty with the United Kingdom (1969), for example, in the case of a remittance-base taxation in the United Kingdom, an exemption in Austria is only granted with respect to the amount of income which is remitted to or received in the United Kingdom. Such a clause can also be found in the treaties with Ireland (1966; article 2.2), Israel (1970; article 3.2), and Malta (1978; article 2.5).

Apart from these subject-to-tax and remittance-base clauses, some treaties contain general or specific switch-over clauses (from the exemption to the credit method) in order to avoid double non-taxation (e.g. article 28 of the treaty with Germany).

The treaty with Vietnam (2008) contains a clause safeguarding special tax treatments in Vietnam (article 23.3).

Chapter 2 Domestic law anti-avoidance provisions

Austrian corporate income tax law provides for several subject-to-tax clauses targeting cross-border situations. In all cases, the foreign tax taken into account has to be *comparable* to the Austrian corporate income tax (for details see part I, chapter 1.4).

Under the international participation exemption (section 10.1.7, 10.2 et seqq. CITA CITA) any capital gains from a participation in a foreign company of 10 per cent or more are exempt from corporate income tax under certain conditions. However, section 10.4 CITA provides for a switch-over from the exemption to the credit method if foreign-source income is subject to taxation which is not comparable to the Austrian corporate income tax (the foreign tax does not exceed 15 per cent) and the main aim of the business of the foreign company is to directly or indirectly derive tainted passive income. In such cases, a credit is granted for the underlying foreign corporate income tax, if any.

Capital gains from participations of less than 10 per cent are exempt if they stem from companies situated in EU Member States, EEA Member States or third states with whom Austria has concluded an agreement on comprehensive administrative assistance. According to section 10.5 CITA, also in this case a switch-over from the exemption to the credit method takes place if the foreign company is not (directly or indirectly) subject to a tax comparable to the Austrian corporate income tax or taxed at a rate of less than 15 per cent or the foreign

⁷³ See *Schilcher*, Subject-to-tax-Klauseln, 45, with further references in fn. 156.

⁷⁴ Refer to fn. 72.

company benefits from a comprehensive tax exemption (except exemptions for domestic capital gains). In such a case, the underlying foreign corporate income tax, if any, is credited.

In all cases, capital gains are not exempt in Austria if they are deductible in the source state (section 10.7 CITA).

As of 1 March 2014, interest and royalty payments to domestic and foreign affiliated corporations are no longer tax deductible in Austria under section 12.1.10 CITA if the income of the recipient corporation (beneficial owner)

- is not subject to taxation due a tax exemption of the person or the income; or
- is subject to a nominal tax rate or a specific tax rate applicable to interest or royalty income of less than 10 per cent; or
- is subject to a tax rate of less than 10 per cent due to specific tax regimes (effective tax rate); or
- is subject to a tax rate of less than 10 per cent due to a tax refund (tax refunds on shareholder level are also taken into account).

The limitations to tax deductibility do not apply if the tax rate of the recipient of the interest or royalty income is below 10 per cent due to own losses or losses allocated under a tax group/consolidation regime.

Furthermore, the Austrian Supreme Court⁷⁵ holds the view that the general anti-avoidance rule set out in section 22 FTC and the substance-over-form approach of section 21 FTC are applicable in treaty situations, even if the treaty does not contain any similar rules.

Chapter 3 Administrative Assistance

All Austrian tax treaties under examination contain a provision on the **exchange of information**. 36 of them extend the scope of this provision to taxes of every kind and description imposed on behalf of the CSs, or of their political subdivisions or local authorities,⁷⁶ and hence follow the broad approach assumed by the OECD since 2000. Non-income/capital examples are the Austrian Value Added Tax, excise taxes, and customs duties. As submitted in respect of a tax treaty's non-discrimination article,⁷⁷ in the case of collision with an exchange of information provided by other international instruments, practical applicability will have to be solved according to precedence rules of international law.

32 treaties, in contrast, explicitly restrict the scope of their exchange of information provisions to taxes covered by the respective treaty. It is submitted that this restriction is of declaratory character.⁷⁸ The remaining 20 treaties contain no express reference to all kinds of taxes or to taxes covered so that it is again submitted that the substantive scope of their exchange of information articles will be predetermined by their article 2 OECD MC-equivalents.⁷⁹ It is interesting to note that there is no parallel between the date of conclusion of the Austrian treaties (pre- or post-2000) and the question as to how the scope of the exchange of information article is defined.

Not much practical experience is available in Austria with regard to article 27 OECD MC on the **assistance in the collection of "taxes"** (as in the heading) or "revenue claims" (as in the text of the article). Only 10 per cent of the treaties examined contain a provision on the

⁷⁵ See inter alia Austrian Supreme Court of 13 September 2006, 2002/13/0190; 26 July 2000, 97/14/0070.

⁷⁶ An exception applies in respect of the United States where the reference is to "taxes of every kind imposed by a Contracting State" only (refer to Art. 25.6 of the tax treaty with the United States).

⁷⁷ Refer to part II, section 3.

⁷⁸ See the argument put forward in part II, chapter 3.

⁷⁹ Again, also refer to part II, chapter 3.

assistance in the collection of taxes. Only a single treaty thereof (Liechtenstein 1969, as amended through 2013) does not restrict assistance with reference to article 2. 3 treaties (Algeria 2003, France 1993/2011, Norway 1995/2009) explicitly (but nevertheless in a declaratory manner only) restrict the scope of the assistance in the collection of taxes to taxes covered by the treaty and include, in line with art. 27.2 OECD MC, related revenues such as legal surtaxes, tax increases, surcharges for late payment, interest or costs related to such taxes. Another 5 treaties feature no express reference so that they also relate to taxes covered by the treaty.⁸⁰ The reasoning as to the taxes eventually covered by these categories of treaties applied in respect of the non-discrimination and exchange of information articles can also be extended to the assistance in the collection of taxes articles. Apart from that, there may be an interdependence between the scope of an exchange of information and an assistance in the collection of taxes provision as the former may be kind of a prerequisite for the latter.⁸¹

⁸⁰ A protocol attached to the treaty with the United States (1996) extends mutual assistance in the recovery of taxes to interest but explicitly excludes the collection of fines or other penalties. In the treaty with Switzerland (1974/2012), assistance in the collection of taxes is restricted to the collection of tax claims with regard to remuneration derived by a person in respect of an employment in the requested CS.

⁸¹ Also refer to the Commentary on Art. 27 OECD MC, m.nos. 5 and 13. Further *Martín Jiménez*, Bulletin 2005, 443.