

## Summary and conclusions

Austrian tax law does not contain specific rules that link taxable income with a taxable person. It only provides surrogation and timing rules for certain cases of a transfer of future passive income. However, for income tax as well as for corporate tax, there is broad agreement that the taxpayer who exercises control over a “source of income” (by having the power to take advantage of market opportunities, vary or refuse services, disinvest, terminate a tenancy, etc.) and in whose sphere success or failure of dispositions materializes can be identified as the subject of attribution, so that economic ownership of property gains indicational importance for the attribution of passive income that is closely tied to the income-producing assets. The application of these principles to interposed non-resident subsidiaries earning passive income has dominated discussion in Austria over the past years, and several recent decisions of the Supreme Administrative Court have held that the principles of income attribution are effectively supplemented by Austria’s general anti-abuse rule which may result in a reattribution of income based on an adequate hypothetical structuring of a transaction. It is, however, clear that according to the economic concept of income attribution agents, fiduciaries or nominees are generally disregarded and that a valid shift in income attribution will only occur in cases of a horizontal division of disposition capacities, such as might result from a usufruct.

Viewing the “beneficial owner” concept as merely clarifying, treaty benefits are in principle only available to the taxpayer who is the subject of attribution in respect of the income in question under Austrian law, including reattribution under the general anti-abuse rule, irrespective of the in- or outbound character of a transaction and irrespective of whether the taxpayer is resident or non-resident. Despite a possible tension with the principles applied to conflicts of entity classification, the decisiveness of Austrian income attribution principles may result in double taxation or double non-taxation if the other taxing jurisdiction identifies a different subject of attribution. If Austrian attribution resulted in a treaty-based waiver of taxing rights, ruling practice would tend to apply domestic attribution principles with the reservation that the treaty partner’s domestic attribution rules identified the same taxpayer as the subject of attribution and referring to a treaty’s mutual agreement procedure if this was not the case. Conversely, attribution to an Austrian resident will not be questioned because of

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a deviating attribution under the treaty partner's domestic rules, and conflict leading to (economic) double taxation will generally only be resolved by a mutual agreement procedure initiated in the partner state.

## 1. General principles

### 1.1. Domestic law

Although taxation of income necessarily requires a specific link between taxable income and a taxable person, Austrian tax law does not provide explicit rules on such attribution of income.<sup>1</sup> For taxation of individuals, §2 EStG<sup>2</sup> merely states that income that has been “obtained” (*bezogen*) by a taxpayer is subject to income taxation. However, income taxation is based on “sources of income” (*Einkunftsquelle*), such as a business, partnership interest, self-employed activity, employment, shares, securities, etc. The common denominator for sources of income is the realization of assets or services on the market for a valuable consideration.<sup>3</sup>

Based thereon, the taxpayer who exercises control over a “source of income” (by having the power to take advantage of market opportunities, vary or refuse services, disinvest, terminate a tenancy, etc.) and in whose sphere success or failure of dispositions materializes can be identified as the subject of attribution.<sup>4</sup> However, none of the several attempts to operationalize this widely accepted principle for specific types of income has proved to be completely satisfactory.<sup>5</sup>

Broadly speaking, attribution of active income is governed by market participation and thus the taxpayer's exposure to success or failure,<sup>6</sup> irrespective of whether such activity is carried out personally or through a deputy or agent.<sup>7</sup> Consequently, if a business is under lease, the power of market participation lies

<sup>1</sup> Specific rules under §§21(1)(2), 22(3), 23(2) EStG provide for an attribution of a partnership's income to its partners, which are, however, not the subject of this report.

<sup>2</sup> Income Tax Act (*Einkommensteuergesetz* 1988 — EStG 1988)

<sup>3</sup> Fundamentally Hans Georg Ruppe, “Möglichkeiten und Grenzen der Übertragung von Einkunftsquellen als Problem der Zurechnung”, in Klaus Tipke (ed.), *Übertragung von Einkunftsquellen im Steuerrecht*, pp. 7 *et seq.* (Cologne: Schmidt, 2nd edn 1979); Hans Georg Ruppe, “Die persönliche steuerliche Zurechnung von Einkünften und Abzugsposten innerhalb des Angehörigenverbandes”, in Hans Georg Ruppe (ed.), *Handbuch der Familienverträge*, pp. 127 *et seq.* (Vienna: Orac, 2nd edn 1995).

<sup>4</sup> See for the case law of the Supreme Administrative Court (VwGH), e.g. VwGH 21 July 1998, 93/14/0149, ÖStZB 1999, 15; VwGH 19 November 1998, 97/15/0001, ÖStZB 1999, 364. See further e.g. paras. 104 *et seq.* of the Income Tax Guidelines (EStR 2000).

<sup>5</sup> For a recent attempt see Michael Tanzer, “Einkünftezurechnung im Einkommen- und Körperschaftsteuerrecht”, 15 ÖJT III/1 (2003), and the criticism by Peter Fischer, “Einkünftezurechnung im Einkommen- und Körperschaftsteuerrecht”, 15 ÖJT III/2 7 *et seq.* (2004).

<sup>6</sup> Para. 104 EStR 2000.

<sup>7</sup> See e.g. VwGH 22 February 1995, 95/15/0016, ÖStZB 1995, 539, and VwGH 27 May 1998, 93/13/0052, ÖStZB 1998, 893 (concerning attribution to taxpayers who lost dominion over their businesses to the liquidator in bankruptcy); VwGH 3 August 2004, 2001/13/0128, ÖStZB 2005/137 (concerning carrying on of activities of an imprisoned taxpayer by his spouse).

with the risk-bearing lessee, to whom income from the business activities will be attributed, while the lessor will be the subject of attribution of the income from the lease.<sup>8</sup> The same principles also apply for broadly understood passive income. Attribution of income from rent is therefore equally based on market participation and exposure, hence on the power to take advantage of market opportunities and to refuse services by terminating a tenancy.<sup>9</sup> As “source of income” may, for example, also lie in the right to let or sublet rented property,<sup>10</sup> it becomes evident that attribution of income is not necessarily tied to the legal or – largely coinciding – economic ownership of property under §24(1)(d) BAO.<sup>11</sup> However, economic ownership under §24(1)(d) BAO is judicially defined as a position entitling the economic owner to the main positive ownership rights (such as use, change of use, consumption, encumbrance, or sale) and negative ownership rights (such as exclusion of third persons) and chances and risks concerning the specific asset,<sup>12</sup> and may, therefore, gain indicational importance for the attribution of passive income that is closely tied to the income-producing assets.<sup>13</sup> Quite correctly, therefore, economic ownership is viewed as one or even the decisive factor for determining attribution of dividend, interest, and royalty income.<sup>14</sup> Finally, economic ownership is decisive for the attribution of income from a sale or exchange.<sup>15</sup>

The corporate tax area equally lacks direct guidance. §7 KStG<sup>16</sup> plainly refers to the EStG for the definition of income and §3 KStG provides that an entity will only be subject to corporate taxation if income is not taxable to other taxpayers. Although the latter provision’s obvious aim is to exclude transparent entities from corporate taxation, it also implies that either an entity or its owners can be the subject of attribution of the income in question. Based on this “either-or-principle” and legislative history, there is broad agreement to apply the same principles of income attribution in the income and the corporate tax area,<sup>17</sup> whereas a

<sup>8</sup> See e.g. para. 107 EStR 2000.

<sup>9</sup> VwGH 29 November 1994, 93/14/0150, ÖStZB 1995, 442; VwGH 26 September 2000, 98/13/0070, ÖStZB 2001/140.

<sup>10</sup> Para. 104 EStR 2000.

<sup>11</sup> See VwGH 19 November 1998, 97/15/0001, ÖStZB 1999, 364; VwGH 26 September 2000, 98/13/0070, ÖStZB 2001/140.

<sup>12</sup> See e.g. VwGH 9 May 1989, 89/14/0033, ÖStZB 1990, 57; VwGH 28 May 2002, 99/14/0109, ÖStZB 2002/710.

<sup>13</sup> See Eduard Lechner, “Die Bedeutung des wirtschaftlichen Eigentums für die Zurechnung von Einkünften”, in Michael Tanzer (ed.), *Die BAO im 21. Jahrhundert*, pp. 51 *et seq.* (Vienna: LexisNexis, 2005). An even stronger emphasis on §24 BAO is put by Wolfgang Gassner, “Grundsatzfragen der Einkünftezurechnung”, 15 ÖJT III/2 67 *et seq.* (2004), who operates with deemed assets (such as the right to sublet, accrued interest, or a declared dividend) and applies the rules on beneficial ownership to them, based on which income will be attributed.

<sup>14</sup> Helmut Loukota, “Einkünftezurechnung im Internationalen Steuerrecht”, 15 ÖJT III/2 101, 106 (2004); for usufructs see, however, below section 1.3 and for further references see below sections 2.2.1, 2.2.2 and 2.2.3.

<sup>15</sup> See also, in an international context, EAS 1599 = SWI 2000, 147.

<sup>16</sup> Corporate Tax Act (*Körperschaftsteuergesetz* 1988 — KStG 1988)

<sup>17</sup> See e.g. VwGH 10 October 1996, 95/15/0208, 95/15/0209, ÖStZB 1997, 648; cf. Georg Kofler, *Der steuerliche Durchgriff bei der Privatstiftung*, pp. 21 *et seq.* (Vienna: Linde, 2001), and the contributions by Wolfgang Gassner, Nikolaus Zorn and Helmut Loukota in 15 ÖJT III/2 (2004).

corporation's formal relations to the market are not *per se* decisive.<sup>18</sup> Based on the strict legal separation between a corporation and its shareholders, income of a wholly owned subsidiary will therefore generally not be attributed to its sole shareholder<sup>19</sup> and – as the existence of an explicit group taxation regime implies<sup>20</sup> – control over a corporation does not deprive this corporation of its dominion over the “source of income”.<sup>21</sup> For income attribution it is, however, necessary that a corporation “participates in gainful activities” and fulfils “sensible functions” within the corporate structure in which it is interposed.<sup>22</sup> Indicia for such determination may be inferred from the existence of premises, staff, and equipment necessary to carry out the purported function leading to the income in question. Hence, ruling practice is generally hesitant to accept “letter-box companies”<sup>23</sup> or formally interposed “invoice processing companies”<sup>24</sup> as subjects of income attribution. Needless to say, however, especially in cases of low-tax, passive income, the borderline is not easy to draw. But as long as economic ownership of passive income-producing assets is vested with the foreign company,<sup>25</sup> attribution to the company is not to be questioned solely because it earns passive income<sup>26</sup> or is a non-resident.<sup>27</sup> This position becomes evident from §10(4) KStG, which foresees a switchover from the exemption of inbound inter-company dividends to the indirect credit system if the foreign distributing company derives mainly passive income and is subject to low taxation. As §10(4) KStG can, of course, only apply if the foreign company is the subject of attribution of the income in question,<sup>28</sup> this quite correctly implies that passive income and low taxation will not necessarily jeopardize attribution.

Therefore, unsurprisingly, extensive discussion surrounds the application of Austria's general anti-abuse provision of §22 BAO<sup>29</sup> to the attribution of income

<sup>18</sup> For the opposite view see Michael Tanzer, “Die Zurechnung von Einkünften bei der juristischen Person im Körperschaftsteuerrecht”, 28 GesRZ 213 *et seq.* (1999) and 29 GesRZ 12 *et seq.* (2000), and Michael Tanzer, “Einkünftezurechnung im Einkommen- und Körperschaftsteuerrecht”, 15 ÖJT III/1 43 *et seq.* (2003) (arguing for an object-like character of corporate taxation which, in combination with the legal recognition of corporate entities, results in the attribution of income derived from a corporation's formal relations to the market).

<sup>19</sup> VwGH 10 December 1991, 91/14/0154, ÖStZB 1993, 105.

<sup>20</sup> See below section 2.1.

<sup>21</sup> VwGH 14 May 1991, 90/14/0280, ÖStZB 1992, 176.

<sup>22</sup> VwGH 10 December 1997, 93/13/0185, ÖStZB 1998, 568 (*Treaty Shopping I*).

<sup>23</sup> See e.g. EAS 1040 = SWI 1997, 277; EAS 1075 = SWI 1997, 333; EAS 1113 = SWI 1997, 428; EAS 1599 = SWI 2000, 147; EAS 1980 = SWI 2002, 110; EAS 2346 = SWI 2003, 445; EAS 2415 = SWI 2004, 165; EAS 2467 = SWI 2004, 430.

<sup>24</sup> EAS 2020 = SWI 2002, 211; EAS 2395 = SWI 2004, 206; cf. VwGH 23 February 1994, 92/15/0159, ÖStZB 1994, 590 (concerning a Liechtenstein company interposed for US real estate transactions).

<sup>25</sup> For the decisive importance of economic ownership see also the extensive analysis by Michael Tanzer, “Einkünftezurechnung an ausländischer Basis- und Finanzierungsgesellschaften”, 34 GesRZ 59 *et seq.* and 115 *et seq.* (2005).

<sup>26</sup> VwGH 11 August 1993, 91/13/0005, ÖStZB 1994, 175.

<sup>27</sup> For application of the same principles of attribution irrespective of the residence of the subject of attribution see VwGH 10 December 1997, 93/13/0185, ÖStZB 1998, 568 (*Treaty Shopping I*).

<sup>28</sup> See EAS 1410 = SWI 1999, 149; EAS 1485 = SWI 1999, 407.

<sup>29</sup> *Bundesabgabenordnung* – Austrian Federal Tax Code.

to foreign subsidiaries.<sup>30</sup> Despite the freedom of taxpayers to arrange their matters in a tax efficient manner,<sup>31</sup> §22(1) BAO provides that abuse of legal forms and arrangements under civil law cannot reduce or circumvent tax liability. If such abuse exists, under §22(2) BAO taxes must be levied in accordance with a legal structure appropriate to the economic transactions, facts, and circumstances. Decade-long disputes surrounding the interpretation of §22 BAO have resulted in two main schools of thinking.<sup>32</sup> The prevailing opinion in legal scholarship rightly argues that §22 BAO is merely an expression of an economic approach of taxation, leading to a specific focus on systematic and teleological interpretation (so-called *Innentheorie*).<sup>33</sup> Under this view, §22 BAO really adds nothing to the principles of income attribution, which are already based on an economic concept that applies independently from the formal structuring of a transaction.<sup>34</sup> The opposite position is taken by the Austrian tax administration and Austrian courts, interpreting §22 BAO as a provision that explicitly allows taxation of a hypothetical transaction and has to be applied to supplement attribution principles (so-called *Aussentheorie*).<sup>35</sup> Thus, even if on a first level income were attributed to one taxpayer under general principles, §22 BAO might allow for reattribution of income to another taxpayer on a second level if a tax planning structure or series of transactions was unusual, inadequate, and solely aimed at tax avoidance, i.e. where no non-tax reasons for a specific structure or transaction existed so that it could only be explained by the purpose of avoiding Austrian taxes. Based on these considerations, in the recent *Dublin Docks I* and *II*, *Hong Kong* and *Jersey* cases<sup>36</sup> the Administrative Court has taken the position that shifting passive income to a foreign subsidiary for tax saving and without a valid non-tax reason is abusive under §22 BAO and income will be reattributed to the Austrian shareholders on a second level, irrespective of whether an applicable tax treaty contains an explicit anti-abuse provision,<sup>37</sup> or whether a company

<sup>30</sup> For a recent focus on §23 BAO, which deals with sham transactions, see Michael Tanzer, “Einkünftezurechnung an ausländischer Basis- und Finanzierungsgesellschaften”, 34 GesRZ 59 *et seq.* and 115 *et seq.* (2005).

<sup>31</sup> For this generally accepted principle see recently VwGH 22 September 2005, 2001/14/0188, RdW 2005/806 (*Jersey*).

<sup>32</sup> See e.g. Wolfgang Gassner, Austria, in IFA (ed.), *Form and substance in tax law*, vol. 87a, *Cahiers de Droit Fiscal International*, pp. 119 *et seq.* (2002).

<sup>33</sup> Fundamentally Wolfgang Gassner, *Interpretation und Anwendung der Steuergesetze* (Vienna: Orac, 1972); for further references and an extensive discussion see Georg Kofler, *Die steuerliche Abschirmwirkung ausländischer Finanzierungsgesellschaften*, pp. 210 *et seq.* (Vienna: Linde, 2002).

<sup>34</sup> Wolfgang Gassner, “Grundsatzfragen der Einkünftezurechnung”, 56 ÖStZ 438, 443 (2003).

<sup>35</sup> See e.g. EAS 1410 = SWI 1999, 149; VwGH 27 September 1995, 93/13/0095, ÖStZB 1996, 146, and the references therein.

<sup>36</sup> VwGH 9 December 2004, 2002/14/0074, ÖStZB 2005/460 (*Dublin Docks I*); VwGH 10 August 2005, 2001/13/0018, ÖStZ 2005/945 (*Dublin Docks II*); VwGH 19 January 2005, 2000/13/0176, ÖStZB 2005/308 (*Hong Kong*); VwGH 22 September 2005, 2001/14/0188, RdW 2005/806 (*Jersey*).

<sup>37</sup> See extensively EAS 2184 = SWI 2003, 54. For a recent discussion of objections to this position see Michael Lang, “VwGH zur Anwendung des § 22 BAO auf irische IFSC-Gesellschaften”, 15 SWI 67, 76 *et seq.* (2005); Christine Obermair and Patrick J. Weninger, “Treaty Shopping and Domestic GAARs in the Light of a Recent Austrian Decision on Irish IFS Companies”, 33 *Intertax* 466 *et seq.* (2005). Explicit reference to the application of domestic

resident in another EU Member States is concerned.<sup>38</sup> This was, for example, the case when Austrian investors transferred monies to preferentially taxed Irish Dublin Docks companies and such funds were invested in risk-free Austrian government bonds,<sup>39</sup> or when a Jersey-resident “letter-box company” was interposed for granting a loan to a German subsidiary to transform into tax-exempt dividends what would have been taxable interest income in the case of a direct loan.<sup>40</sup> However, as under the *Aussentheorie* §22 BAO is only to be applied after attribution of income has been decided under the general principles, the Court’s application of §22 BAO suggests that the foreign companies in question indeed were the subjects of attribution under general principles and that a single valid non-tax reason would have validated the intended structure.

## 1.2. Treaties

The application of tax treaties is part of a three-step procedure in evaluating cross-border tax cases. First, the question of whether and to what extent a specific transaction may be taxed is to be evaluated purely under domestic law; second, it has to be determined whether and to what extent such a national taxing right is restricted by a tax treaty; and third, the remaining taxing right is to be enforced according to domestic law.<sup>41</sup> Based on these principles it is generally assumed that attribution of income is an issue to be resolved under domestic law, while tax treaties generally remain silent on attribution issues.<sup>42</sup> Hence, treaty benefits are in principle only available to the taxpayer who is the subject of attribution in respect of the income in question under Austrian law,<sup>43</sup> irrespective of the in- or outbound char-

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anti-abuse provisions is, however, made in art. 28(2) of the 2000 Austria–Germany DTC and in art. 28(7) of the 1974 Austria–Switzerland DTC. Further, some Austrian tax treaties contain additional anti-avoidance or anti-abuse clauses like, e.g. the tax treaties concluded between Austria and Luxembourg (excluding holding companies), Liechtenstein (excluding dual resident companies and foreign-dominated base companies), Switzerland (excluding conduit companies) and the treaty with the USA (containing an LoB clause).

<sup>38</sup> For a critical analysis in the context of the EC freedoms, especially when foreign low taxation results from permissible state aid, see Georg Kofler, “Dublin Docks Gesellschaften zwischen Missbrauch und Gemeinschaftsrecht”, 23 RdW 786 *et seq.* (2005).

<sup>39</sup> VwGH 9 December 2004, 2002/14/0074, ÖStZB 2005/460 (*Dublin Docks I*); VwGH 10 August 2005, 2001/13/0018, ÖStZ 2005/945 (*Dublin Docks II*).

<sup>40</sup> VwGH 22 September 2005, 2001/14/0188, RdW 2005/806 (*Jersey*).

<sup>41</sup> See Rz 32 EStR 2000.

<sup>42</sup> See VwGH 26 July 2000, 97/14/0070, ÖStZB 2001/57 (*Treaty Shopping II*); EAS 381; EAS 759; EAS 788 = SWI 1996, 87; EAS 984 = SWI 1997, 90; EAS 1040 = SWI 1997, 277; EAS 1479 = SWI 1999, 418; EAS 1980 = SWI 2002, 110; EAS 2020 = SWI 2002, 211; EAS 2294 = SWI 2003, 421; EAS 2346 = SWI 2003, 445; EAS 2361 = SWI 2003, 487; EAS 2395 = SWI 2004, 206; EAS 2470 = SWI 2004, 431; see generally Heinz Jirousek, Austria, in IFA (ed.) *Double Non-taxation*, vol. 89a, *Cahiers de Droit Fiscal International*, pp. 169, 172 *et seq.* (2004).

<sup>43</sup> VwGH 10 December 1997, 93/13/0185, ÖStZB 1998, 568 (*Treaty Shopping I*); EAS 2294 = SWI 2003, 421; EAS 2467 = SWI 2004, 430; EAS 2470 = SWI 2004, 431 (ruling that in a case where the Canadian parent corporation and not its European subsidiary is the subject of attribution of Austrian source dividends, such parent corporation may claim a withholding tax reduction under the Austria–Canada treaty); see also Michael Lang, “VwGH zur Verweigerung der Abkommensberechtigung”, 10 SWI 423, 427 (2000).

acter of a transaction<sup>44</sup> and irrespective of whether the taxpayer is a resident or non-resident.<sup>45</sup> As in a purely domestic context, the actual cash flow is of course not decisive for income attribution,<sup>46</sup> but is viewed as decisive for the temporal delimitation of treaty application for dividend, interest, and royalty flows.<sup>47</sup>

Although many Austrian treaties contain the concept of “beneficial owner” (*Nutzungsberechtigter*)<sup>48</sup> as laid down in articles 10, 11 and 12 OECD MC, there is little guidance as to its interpretation.<sup>49</sup> The Austrian tax administration considers this concept as merely clarifying, since income attribution under domestic law already follows economic principles;<sup>50</sup> the beneficial ownership concept is, however, also deemed to comprise the concepts of abuse under §22 BAO, sham transactions under §23 BAO, and economic ownership under §24 BAO.<sup>51</sup> Although much weight is given to economic ownership of the assets under §24(1)(d) BAO in the area of dividends, interest, and royalties,<sup>52</sup> this is not necessarily so to say that the term “beneficial owner” is always to be viewed as integrating the idea of economic ownership of the (intangible) assets and thus generally preventing a split between company shares, liability, and license right on the one hand, and dividends, interest, and royalties on the other hand. However, attribution of dividend and interest income largely, although not always,<sup>53</sup> coincides with the economic ownership of the income-producing assets,<sup>54</sup> which is not necessarily true for royalty income, although ruling practice puts decisive weight on economic ownership of the intangibles in cases of potential abuse, fiduciary agreements, or merely formal sub-licensing agreements in back-to-back structures.<sup>55</sup>

<sup>44</sup> See EAS 038; EAS 569 = SWI 1995, 114 (citing also the administrative agreement with Germany on letter-box companies, published in SWI 1991, 197); EAS 1001 = SWI 1997, 92; EAS 1871 = SWI 2001, 368.

<sup>45</sup> VwGH 10 December 1997, 93/13/0185, ÖStZB 1998, 568 (*Treaty Shopping I*); Helmut Loukota, “Einkünftezurechnung im Internationalen Steuerrecht”, 15 ÖJT III/2 101, 113 *et seq.* (2004).

<sup>46</sup> See EAS 406; EAS 759; EAS 1048 = SWI 1997, 234; EAS 1946 = SWI 2002, 153.

<sup>47</sup> See below sections 2.2.1, 2.2.2 and 2.2.3; for different positions see e.g. Michael Lang, “Zeitliche Zurechnung bei der DBA-Anwendung”, 9 SWI 282 *et seq.* (1999).

<sup>48</sup> The joint German translation of the OECD model for Austria, Germany and Switzerland refers to the “beneficial owner” as *Nutzungsberechtigter*, deliberately avoiding translating the term as *wirtschaftlicher Eigentümer* (“economic owner”), as the latter concept was already used by Austrian and German domestic law; see Jürgen Killius, “The Concept of ‘Beneficial Ownership’ of Items of Income under German Tax Treaties”, 17 *Intertax* 1989, 340, 341 (1989).

<sup>49</sup> For the different positions on “beneficial ownership” see generally Michael Lang, General Report, in IFA (ed.), *Double Non-taxation*, vol. 89a, *Cahiers de Droit Fiscal International*, 73, 94 (2004); Joanna Wheeler, “The Attribution of Income to a Person for Tax Treaty Purposes”, 59 *BIFD* 477, 478 *et seq.* (2005). See also note 48.

<sup>50</sup> Heinz Jirousek, Austria, in IFA (ed.), *Double Non-taxation*, vol. 89a, *Cahiers de Droit Fiscal International*, pp. 169, 182 *et seq.* (2004); see also EAS 406 = SWI 1994, 138.

<sup>51</sup> EAS 1040 = SWI 1997, 277 (concerning the Austria-UK treaty, which contains the concept of beneficial ownership in arts. 10, 11 and 12); Helmut Loukota, “Die aktuelle österreichische DBA Politik”, 48 ÖStZ 249 *et seq.* (1995). For a critical analysis see Tatjana Polivanova-Rosenauer, “Das Konzept des Nutzungsberechtigten aus abkommensrechtlicher Sicht”, 11 SWI 257 *et seq.* (2001).

<sup>52</sup> See below sections 2.2.1, 2.2.2 and 2.2.3.

<sup>53</sup> For usufructs see below section 2.1.

<sup>54</sup> See below sections 2.2.1 (dividends) and 2.2.2 (interest).

<sup>55</sup> See below section 2.2.3.

Some focus has been on tax planning schemes to avoid Austrian source taxation. Although recent case law of the Administrative Court implies that – in extreme cases – the general anti-abuse rule of §22 BAO has importance in countering treaty shopping,<sup>56</sup> past decisions have put clear emphasis on the principles of income attribution. The *Treaty Shopping I* case<sup>57</sup> concerned the transfer of a participation in an Austrian corporation by a UK parent to a Dutch subsidiary when, due to a change in Austrian domestic law, a loophole in the Austria–Netherlands treaty was – temporarily – opened which allowed Dutch taxpayers to receive Austrian source dividends free of withholding tax, thereby avoiding the 5 per cent withholding tax that could have been imposed under the Austria–UK treaty. Quite reluctant to accept the tax administration’s abuse assessment and deciding the case on procedural grounds, the Administrative Court nevertheless emphasized that income would only be attributed to the UK parent if the Dutch subsidiary did not serve the purposes that it was alleged to serve, for example if it did not “participate in gainful activities” or fulfill “sensible functions” within the corporate structure in which it was interposed. If such was the case, however, dividend income would have to be attributed to the UK parent and article 10 of the Austria–Netherlands treaty would not apply.<sup>58</sup> The *Treaty Shopping II* case<sup>59</sup> dealt with a Swiss holding company that was purportedly interposed by residents of a non-treaty partner state to receive withholding tax benefits under the Austria–Switzerland treaty. Although this case basically dealt with the taxpayer’s obligation to cooperate in fact-finding, the Administrative Court’s decision nevertheless implies that the domestic principles of income attribution and also reattribution under §22 BAO are not adversely affected by the existence of a treaty, unless the treaty provides for specific attribution rules. As in the reverse situation of avoiding residence state taxation, the *Treaty Shopping II* case is viewed as suggesting that the mere existence of a treaty will not restrict application of domestic anti-abuse principles by the source country.<sup>60</sup>

### 1.3. Alienation of income

As income attribution follows economic, rather than formal criteria, that a taxpayer receives income-generating payments is not *per se* decisive.<sup>61</sup> If, therefore, earnings are voluntarily or involuntarily, directly or indirectly, transferred to another person, the original subject of attribution remains taxable on the income

<sup>56</sup> VwGH 26 July 2000, 97/14/0070, ÖStZB 2001/57 (*Treaty Shopping II*).

<sup>57</sup> VwGH 10 December 1997, 93/13/0185, ÖStZB 1998, 568 (*Treaty Shopping I*).

<sup>58</sup> See also Helmut Loukota, “Das erste Treaty Shopping Urteil des VwGH”, 8 SWI 105 *et seq.* (1998).

<sup>59</sup> VwGH 26 July 2000, 97/14/0070, ÖStZB 2001/57 (*Treaty Shopping II*).

<sup>60</sup> See also EAS 1075 = SWI 1997, 333; EAS 2361 = SWI 2003, 487. For a convincing critical position in respect of §22 BAO see Michael Lang, “VwGH zu Treaty Shopping”, 8 SWI 216 *et seq.* (1998); Michael Lang, “VwGH zur Verweigerung der Abkommensberechtigung”, 10 SWI 423, 427 (2000) (referring to the specific situation in the *Treaty Shopping II* case created by art. 28(7) of the 1974 Austria–Switzerland DTC).

<sup>61</sup> VwGH 15 December 1994, 93/15/0097, ÖStZB 1995, 495; VwGH 3 August 2004, 2001/13/0128, ÖStZB 2005/137.



and the transfer is to be viewed as a mere disposition of after-tax income.<sup>62</sup> A change in income attribution may, however, occur where the transfer of the right to future income streams simultaneously leads to a horizontal division of disposition capacities. In that respect, it is well agreed that, as in the case of a business is under lease, income attribution can be influenced by granting usufruct to another person if the usufructuary gains – legally and factually – the power to take advantage of market opportunities, to vary or refuse services, to disinvest, to terminate a tenancy, etc.<sup>63</sup> This determination becomes complex in the case of usufructs on securities and other interest producing assets. The existence of such power of disposition is especially doubtful in cases of usufructs in bonds or savings deposits where the usufructuary has no power to change or dispose of the investment.<sup>64</sup> In contrast, there is broad agreement that a shift in dividend income attribution can occur by granting a usufruct on shares.<sup>65</sup> Here, the tax administration generally takes the position that income from a usufruct on shares is attributed to the usufructuary if the usufruct entails the power to vote,<sup>66</sup> even if economic ownership remains unchanged.<sup>67</sup> It is, however, unclear whether the usufruct must be granted as for a certain period of time,<sup>68</sup> and whether the usufruct must also involve the right to vote for liquidation and to use the proceeds for other investments.<sup>69</sup>

<sup>62</sup> VwGH 30 May 1995, 95/13/0120, ÖStZB 1996, 6 (concerning wage income of a union official forwarded to a union's non-profit fund); VwGH 23 January 1996, 95/14/0139, ÖStZB 1996, 455 (concerning the transfer of income from advertising contracts by an athlete to a company in exchange for a "premium"); VwGH 21 July 1998, 98/14/0021, ÖStZB 1998, 869 (concerning a waiver of remuneration by the vice mayor for the benefit of local charity-like operations of the municipality); VwGH 20 July 1999, 93/13/0178, ÖStZB 2000/1 (concerning income from the installation of gambling machines on the taxpayer's business premises that was arranged to be paid directly to the taxpayer's wife); para. 107 EStR 2000 (concerning, *inter alia*, garnishment of wages).

<sup>63</sup> VwGH 12 November 1986, 86/13/0023, ÖStZB 1987, 272; VwGH 4 March 1986, 85/14/0133, ÖStZB 1987, 3; VwGH v 20 November 1990, 90/14/0139, ÖStZB 1991, 366. See also Nikolaus Zorn, "Einkünftezurechnung im Einkommen- und Körperschaftsteuerrecht", 15 ÖJT III/2 135, 149 (2004) (arguing that usufruct in an apartment building, where tenants are protected from termination by law, will not result in a different attribution of income).

<sup>64</sup> See para. 118 EStR 2000; VwGH 19 February 1992, 91/14/0216, ÖStZB 1992, 363; see also Michael Tanzer, "Einkünftezurechnung im Einkommen- und Körperschaftsteuerrecht", 15 ÖJT III/1 31 *et seq.* (2003).

<sup>65</sup> See BMF, ecolex 1992, 205 = RdW 1992, 95; para. 118 EStR 2000 (even if the usufruct is granted without valuable consideration); EAS 2294 = SWI 2003, 421; Eduard Lechner, "Fruchtgenuss an Aktien", 3 ecolex 194, 194 (1992); cf. VwGH 25 January 2001, 2000/15/0172, ÖStZB 2001/352.

<sup>66</sup> This is also the case if the legal owner of shares still participates in the voting but is internally bound to the instructions of the usufructuary; see e.g. BMF, ecolex 1992, 205 = RdW 1992, 95; EAS 2294 = SWI 2003, 421.

<sup>67</sup> Eduard Lechner, "Die Bedeutung des wirtschaftlichen Eigentums für die Zurechnung von Einkünften", in Michael Tanzer (ed.), *Die BAO im 21. Jahrhundert*, pp. 51, 62 (Vienna: Lexis-Nexis, 2005). Compare, however, BMF, FJ 2000, 225 (implying that the power to vote coincides with economic ownership) with BMF, ecolex 1996, 312 (suggesting that the right to usufruct and vote will not necessarily result in economic ownership of shares).

<sup>68</sup> BMF, ecolex 1996, 312.

<sup>69</sup> Nikolaus Zorn, "Einkünftezurechnung im Einkommen- und Körperschaftsteuerrecht", 15 ÖJT III/2 135, 148 (2004).

Quite different issues arise in the case of a transfer of future earnings. At the outset, and viewed economically, proceeds from the sale of income-producing assets are compensation for the loss of future income, where – at least theoretically – the sales price is determined according to the discounted value of prospective earnings streams. This raises questions concerning the character and timing of income. Two issues may be distinguished: first, the transfer of the potential, not yet realized or accrued income will generally result in a capital gain to the taxpayer; however, Austrian law foresees a specific treatment for the sale of future dividend and interest income without simultaneous transfer of the underlying shares or bonds and treats the seller as receiving ordinary income from capital.<sup>70</sup> Second, accrued, but yet unrealized income may be transferred, as will generally be the case in a sale of an interest-bearing claim between two payable dates. Such a sale, therefore, raises the issue of what kind of income the seller recognizes and whether such income is taxed at the time of the sale or when the interest flow to the purchaser occurs. These systematic questions are highly disputed: while some hold that the sale of accrued income generally results in immediate inflow and taxation of income in the amount of the selling price and of the character of the accrued income,<sup>71</sup> others dismiss this “principle of surrogation” and argue that taxation of the waived income should take place at the time the accrued income finally flows to the purchaser, irrespective of when and at what price the accrued income was sold.<sup>72</sup> This discussion, however, has lost much of its practical importance as legislation not only foresees explicit rules for the sale of accounts receivable on rental income,<sup>73</sup> but – since 2003<sup>74</sup> – also for accrued interest income that is compensated for in the purchasing price for interest-bearing assets.<sup>75</sup>

## 2. Specific attribution issues

### 2.1. Deemed attribution rules

From 2005 onwards, the traditional Austrian *Organschaft*<sup>76</sup> has been replaced by a new system of optional group taxation.<sup>77</sup> Unlike in a true consolidation, under

<sup>70</sup> §27(2)(3) EStG; see below section 2.2.1.

<sup>71</sup> For an extensive discussion and further references see Sabine Kirchmayr, *Besteuerung von Beteiligungserträgen*, pp. 278 *et seq.* (Vienna: Linde, 2004).

<sup>72</sup> See VwGH 5 July 1994, 91/14/0064, ÖStZB 1995, 98 (concerning the sale of an interest in a silent partnership); cf. Nikolaus Zorn, “Einkünftezurechnung bei Abtretung einer stillen Beteiligung”, 12 RdW 290 *et seq.* (1994).

<sup>73</sup> §28(1)(4) EStG (including such proceeds in rental income even if compensated for in the selling price of the real estate).

<sup>74</sup> By the Budget Supplementary Act 2003 (*Budgetbegleitgesetz* 2003), Federal Gazette I 71/2003.

<sup>75</sup> §27(2)(5) EStG; see below section 2.2.2.

<sup>76</sup> For this see Klaus Hirschler, Gerd Konezny and Christoph Urtz, Austria, in IFA (ed.), *Group Taxation*, vol. 89b, *Cahiers de Droit Fiscal International*, pp. 149 *et seq.* (2004).

<sup>77</sup> For an overview see e.g. Wolfgang Gassner and Werner Haidenthaler, “Group Taxation in Austria”, 14 SWI 43 *et seq.* (2004); Gerald Gahleitner and Stefan Ratzinger, “Austria: International Group Taxation: An Overview of Austria’s New Tax Incentive”, 45 *European Taxation*

§9 KStG the tax result of a group member is computed on a stand-alone basis in accordance with the general tax principles, and is then allocated to and aggregated with the taxable result of the higher-tier group member to which it is financially integrated, until eventually all taxable results of all corporations in the group have moved up the chain of financial control and are combined and taxed at the level of the group parent company. In a cross-border situation, such attribution of income to another company based on a domestic group taxation regime may, however, raise the issue of whether a group company will still be entitled to treaty benefits if income and liability to tax is attributed away from it for domestic tax purposes.<sup>78</sup> Here, for in- and outbound situations, Austrian practice adheres to an isolated treatment of each group company and assumes that such a regime leaves treaty residence and entitlement to treaty benefits unaffected.<sup>79</sup> This has two effects: first, members of a foreign group receiving Austrian sourced income will be entitled to claim treaty benefits, including a withholding tax reduction. Second, and conversely, an exemption or a treaty foreign tax credit will be available to a member of an Austrian group earning foreign income. This credit is, however, deemed to be attached to the credit-generating income and will thus move up the chain to the group parent that may eventually claim the credit.<sup>80</sup> In respect of credit limitation, the government takes the position that, if there is a total loss on any level of the chain, no credit would be available to the parent company,<sup>81</sup> while legal scholarship rightly argues that only the level of the group parent is decisive in calculating the credit limitation as this is the person that has to bear the consequences of income attribution.<sup>82</sup>

## 2.2. Income from assets

### 2.2.1. Dividends

Unlike interest income, which economically accrues over time, the very existence of dividend income is dependent on determination of profits and declaration of

*cont.*

509 *et seq.* (2005); Robert Schneider, "Austria: Group Taxation Regime: A Landmark Model", 8 DFI 118 *et seq.* (2006).

<sup>78</sup> See also Yoshihiro Masui, General Report, in IFA (ed.), *Group Taxation*, vol. 89b, *Cahiers de Droit Fiscal International*, pp. 21, 62 (2004).

<sup>79</sup> This practice is aligned with Germany (AÖF 1999/62; see also EAS 869; EAS 1376 = SWI 1999, 43) and Switzerland (AÖF 2000/34). As long as no lack of reciprocity becomes evident, this position is also applied in respect to all other treaty partners; see EAS 1075 = SWI 1997, 333 and EAS 2415 = SWI 2004, 165 (concerning Dutch group taxation). See for this also Josef Schuch, "Organschaft und Gruppenbesteuerung im Abkommensrecht", in Wolfgang Gassner, Michael Lang and Werner Wiesner (eds.), *Besteuerung von Unternehmensgruppen*, pp. 173 *et seq.* (Vienna: Linde, 1998).

<sup>80</sup> Chapter 6.4 of the Decree on Group Taxation, Official Journal of the Austrian Tax Administration [AÖF] 2005/99.

<sup>81</sup> *Ibid.*

<sup>82</sup> See Johann Mühlechner, "Anrechnung ausländischer Steuern bei Vollorganschaftsverhältnissen", 12 SWI 212 *et seq.* (2002), in respect of the old *Organschaft* rules. This conclusion is also implied by VwGH 7 August 2001, 97/14/0109, ÖStZB 2002/445 (granting a treaty tax credit for tax withheld on Japanese royalties that are part of a transparent partnership's loss if the credit-claiming partner has overall positive income).

a dividend by the distributing company. Attribution of dividend income is therefore not dependent on the economic accrual of distributable profits at the level of the corporation or to whom dividend payments are actually made,<sup>83</sup> but rather it is based on a taxpayer's power to participate in the voting on the declaration of the distribution of profits.<sup>84</sup> As the power to vote is also one main factor in determining economic ownership in capital assets under §24(1)(d) BAO,<sup>85</sup> the question of attribution of income is generally reduced to the question of economic ownership of the shares on which profit distributions are made at the time of the declaration of such distribution.<sup>86</sup> This also results, for example, in the attribution of dividend (or interest) to the borrower in stock (or securities) lending transactions.<sup>87</sup> If such economic ownership of shares is alienated,<sup>88</sup> the purchaser will be subject to the attribution of future, undeclared dividend income, while the seller realizes a capital gain. Only if the sale were effected between the declaration of the dividend and its payment would the seller realize ordinary dividend income under §27(1)(a) EStG to the extent of the declared dividend.<sup>89</sup>

Specific problems arise if the right to (future) distributions is separated from the underlying shares. In that respect, Austrian domestic law distinguishes three different situations in non-business profit, cash method settings. First, if a distribution has been declared but the dividend has not yet been paid, the isolated sale of the dividend right does not affect the attribution of the dividend income to the seller at the time of distribution, as he was the economic owner of the shares at the declaration date.<sup>90</sup> Second, if non-declared, future profits (e.g. dividend coupons) are transferred for valuable consideration without simultaneous transfer of the underlying shares, §27(2)(3) EStG provides a specific surrogation rule.<sup>91</sup> The sale proceeds are deemed to constitute dividend income to the seller and are taxable at the time of payment of the sales price, thus leading to "premature taxation" of future and yet undeclared profit distributions. It is,

<sup>83</sup> See e.g. EAS 759.

<sup>84</sup> VwGH 21 November 1995, 95/14/0035, ÖStZB 1996, 321 (also ruling that, despite differences in applicable corporate law, this is true irrespective of whether distributions are made by a stock company (AG) or a limited liability company (GmbH)). It is further irrelevant, whether the (minority) taxpayer's vote has decisive character; see Michael Lang and Johann Perthold, "Einkünftezurechnung bei Abtretung eines Investmentfondsanteils", 7 *ecolex* 303 *et seq.* (1996)

<sup>85</sup> VwGH 13 May 1986, 85/14/0169, ÖStZB 1987, 164; VwGH 9 May 1989, 89/14/0033, ÖStZB 1990, 57. For the specific case of usufruct see above section 1.3.

<sup>86</sup> VwGH 21 November 1995, 95/14/0035, ÖStZB 1996, 321; see also VwGH 26 May 1993, 90/13/0155, ÖStZB 1994, 330; VwGH 24 November 1987, 87/14/0011, ÖStZB 1988, 326; cf. EAS 1092 = SWI 1997, 338. For usufructs see, however, above section 1.3.

<sup>87</sup> See para. 6199 EStR 2000.

<sup>88</sup> See also BMF, FJ 2000, 225 (sale by a usufructuary). Granting an option to purchase is not viewed as an alienation of economic ownership (see e.g. VwGH 22 October 1991, 91/14/0147, ÖStZB 1992, 348), even when it is connected with a limitation of the right to dispose on the side of the seller of an option (see VwGH 13 May 1986, 85/14/0169, ÖStZB 1987, 164) or a blocking minority on the side of the owner of the option (see VwGH 9 May 1989, 89/14/0033, ÖStZB 1990, 57).

<sup>89</sup> Sabine Kirchmayr, *Besteuerung von Beteiligungserträgen*, pp. 268 *et seq.* (Vienna: Linde, 2004).

<sup>90</sup> Gunter Mayr and Michael Tumpel, "Veräußerung von Dividendenscheinen", 24 *RdW* 251, 252 (2006); Reinhold Beiser, "Verkaufte Ausschüttungen im Spannungsfeld der Endbesteuerung und Einmalerfassung", 24 *RdW* 471, 472 (2006); see already BMF, SWK 1991, A 1 120.

<sup>91</sup> See above section 1.3.

however, unclear to whom the subsequent actual profit distribution must be attributed. Some argue that because the purchaser of dividend coupons lacks the power of disposition over the shares the seller, and not the purchaser, should be the subject of attribution.<sup>92</sup> However, it seems preferable to view the surrogation rule under §27(2)(3) EStG not only as providing for advanced taxation of the seller, but also attributing the later dividend income to the purchaser.<sup>93</sup> Third, the right to future profit distributions may be transferred together with the shares' voting rights; this transfer might be structured as a usufruct or a sub-participation. While in this case the seller would be attributed the proceeds of the transfer under §27(2)(3) EStG,<sup>94</sup> the actual dividend income flowing from the underlying shares would be taxable to the transferee, as his vote furnishes him with the necessary power over the source of income to warrant attribution of income.<sup>95</sup>

Changing the perspective from a domestic to an international setting, Austria has traditionally taken the position that domestic principles of attribution of dividend income remain decisive<sup>96</sup> as long as the treaty partner's rules attribute the income to the same taxpayer in cases of impending double non-taxation.<sup>97</sup> Thereby, the treaty concept of "beneficial ownership" is basically interpreted synonymously with the Austrian concept of income attribution,<sup>98</sup> including the decisive domestic concept of economic ownership of the income-producing assets under §24(1)(d) BAO in the case of passive income.<sup>99</sup> These principles of attribution and also the interpretation of the treaty concept of "beneficial ownership" are, however, supplemented by the general anti-abuse rule under §22 BAO.<sup>100</sup> That said, from an Austrian perspective, treaty benefits with respect to dividends are

<sup>92</sup> On this view, double taxation at the level of the seller should either be avoided by declaring the actual dividend as not taxable under §27 EStG (see Sabine Kirchmayr, *Besteuerung von Beteiligungserträgen*, pp. 298 *et seq.* (Vienna: Linde, 2004)) or by retroactively exempting income under §27(2)(3) EStG to the extent of the actual distribution (see Reinhold Beiser, "Verkaufte Ausschüttungen im Spannungsfeld der Endbesteuerung und Einmal erfassung", 24 RdW 471, 472 (2006)).

<sup>93</sup> See para. 6227 EStR 2000 (also on the deduction of the price paid by the purchaser); cf. Mayr and Tumpel, *op. cit.*, 251, 253 (2006).

<sup>94</sup> VwGH 25 January 2001, 2000/15/0172, ÖStZB 2001/352; see also Andreas Kauba, "Fruchtgenussrechte an Kapitalanteilen und Kapitalgesellschaften bzw Stiftungen", 22 RdW 701 (2004). The administration's position is not entirely clear; compare BMF, *ecolex* 1992, 205 = RdW 1992, 95 (as here) with para. 119 EStR 2000 (assuming capital gain).

<sup>95</sup> See Eduard Lechner, "Fruchtgenuss an Aktien", 3 *ecolex* 194, 194 (1992); Mayr and Tumpel, *op. cit.*, 251, 252 (2006).

<sup>96</sup> See, in the area of dividends, e.g. EAS 381; EAS 759; EAS 788 = SWI 1996, 87; EAS 1092 = SWI 1997, 338; EAS 2294 = SWI 2003, 421; EAS 2476 = SWI 2004, 440; see also EAS 439; EAS 1155 = SWI 1997, 535; EAS 2395 = SWI 2004, 206.

<sup>97</sup> EAS 381; EAS 707; EAS 788 = SWI 1996, 87; EAS 2294 = SWI 2003, 421; see also section 3 below.

<sup>98</sup> Heinz Jirousek, Austria, in IFA (ed.), *Double Non-taxation*, vol. 89a, *Cahiers de Droit Fiscal International*, pp. 169, 172 *et seq.* (2004).

<sup>99</sup> EAS 1040 = SWI 1997, 277 (explicitly referring to the treaty concept of "beneficial ownership" by reference to §§21 to 24 BAO); see also EAS 1035 = SWI 1997, 188 (referring to §24 BAO); EAS 1075 = SWI 1997, 333, EAS 1092 = SWI 1997, 338, EAS 1113 = SWI 1997, 428, EAS 1143 = SWI 1997, 486, EAS 1155 = SWI 1997, 535; EAS 2415 = SWI 2004, 165; EAS 2476 = SWI 2004, 440.

<sup>100</sup> See EAS 1040 = SWI 1997, 277 (referring to §§21 to 24 BAO).

only available to the taxpayer who is the subject of attribution in respect of the income in question,<sup>101</sup> irrespective of the in- or outbound character of a transaction.<sup>102</sup> Once the subject of attribution is determined, the temporal delimitation of treaty application depends on the residence of the taxpayer in the moment of the dividend distribution, whereas the economic accrual of the distributed profits and the taxpayer's residence at the declaration date remain irrelevant.<sup>103</sup>

Past reported cases and rulings have basically dealt with Austrian source taxation and can be divided into three distinct fields. First, there is substantial authority that the right of a foreign dividend recipient to a withholding tax reduction or reimbursement under a tax treaty may be questioned if there are doubts as to whether the dividends can be attributed to the foreign recipient under domestic and treaty law, either because the economic power of disposition is not vested with the recipient or the interposition of the recipient is considered to be an abusive measure to gain treaty benefits.<sup>104</sup> Second, issues have arisen in the area of separation of the right to future, not yet declared<sup>105</sup> distributions from the underlying shares. For example, in a cross-border sale of shares in an Austrian corporation under reservation of a usufruct by the Austrian seller it has to be determined, under Austrian tax law, with whom the power to vote and influence the corporation's distributions is vested; only this taxpayer would be entitled to treaty benefits.<sup>106</sup> Similarly, Austrian ruling practice has dealt with "bootstrap acquisition"-type transactions in which the seller of shares has kept the contractual right to receive a future dividend distribution. Here, an early ruling has taken the tentative position that the reservation of the right to a future dividend distribution will not entitle the transferor of economic ownership to claim reduction of withholding taxation, because in that case the subsequent distribution will in reality be part of the purchase price.<sup>107</sup> However, a subsequent ruling retracted this view and ruled in favor of the seller provided that no treaty shopping was involved and the treaty partner's administration would attribute dividend income to the seller.<sup>108</sup> This latter solution is clearly preferable as it

<sup>101</sup> VwGH 10 December 1997, 93/13/0185, ÖStZB 1998, 568 (*Treaty Shopping I*); EAS 2294 = SWI 2003, 421; EAS 2467 = SWI 2004, 430; EAS 2470 = SWI 2004, 431 (ruling that in a case where the Canadian parent corporation and not its European subsidiary is the subject of attribution of Austrian-source dividends, such parent corporation may claim a withholding tax reduction under the Austria-Canada treaty).

<sup>102</sup> See EAS 038; EAS 569 = SWI 1995, 114 (citing also the administrative agreement with Germany on letter-box companies, published in SWI 1991, 197); EAS 1001 = SWI 1997, 92; EAS 1871 = SWI 2001, 368; see also VwGH v 10 December 1997, 93/13/0185, ÖStZB 1998, 568 (*Treaty Shopping I*).

<sup>103</sup> See EAS 107 = SWI 1992, 127 (concerning dividends to a taxpayer who moved from Germany to Austria); EAS 761 = SWI 1996, 32 and EAS 807 = SWI 1996, 147 (concerning dividends and interest payments to a taxpayer who moved from Austria to Italy).

<sup>104</sup> See above section 1.1; see also EAS 2361 = SWI 2003, 487; EAS 2467 = SWI 2004, 230.

<sup>105</sup> In the case of a sale between the declaration and the payment date, dividend income will be attributed to the seller (see EAS 381), even if the dividend is paid directly to the purchaser (see BMF, SWK 1991, A I 120).

<sup>106</sup> EAS 2294 = SWI 2003, 421.

<sup>107</sup> See EAS 759; similarly EAS 381.

<sup>108</sup> EAS 788 = SWI 1996, 87; see also EAS 742 (declining to rule that the purchaser of interest coupons will generally be the subject of attribution).

consistently applies the principle of advanced taxation of the sale of future profits without disposition of the underlying shares expressed in §27(2)(3) EStG to the reverse situation of retaining the rights to future profits in a disposition of the underlying shares. Third, there is some administrative guidance on “dividend stripping” transactions. Principally, the buyer of shares cum-dividend will be the subject of attribution of such dividend income and is entitled to claim repayment of overwithheld Austrian source tax. This is the case even if, due to unforeseeable circumstances, the actual transfer of shares takes place after the dividend payment, provided that no tax avoidance scheme is involved, the dividend is at least indirectly received by the buyer, and the tax administration of the treaty partner applies the convention accordingly.<sup>109</sup> The situation is, however, less clear in the case of “dividend stripping” when the purchase of shares cum-dividend is followed by a sale of the same or similar shares ex-dividend in a separate transaction, aiming at receiving treaty benefits which would not have been available to the original seller and creating a tax loss on the shares on the sale ex-dividend. While, in a comparable legal framework, the German *Bundesfinanzhof*<sup>110</sup> has ruled out abuse and assumed that the purchaser becomes the economic owner of the shares and therefore the subject of attribution of the dividend income, the Austrian tax administration is hesitant to accept such transactions, especially when the same shares are resold ex-dividend to the original seller.<sup>111</sup>

### 2.2.2. Interest

Interest income is to be attributed to the taxpayer that has dominion over the “source of income” by yielding funds, having the power to use market opportunities and to disinvest, etc. As a shortcut for attribution of interest income, focus is generally put on the economic ownership of the interest bearing claims under §24(1)(d) BAO during the period of interest accrual.<sup>112</sup> Thus, accrued interest sold to a third party is to be attributed to the selling taxpayer as interest income. This, and also the question of timing, is explicitly governed by §27(2)(5) EStG,<sup>113</sup> under which the broken-interest compensated for in the selling price for the interest-bearing bond, note, etc., will be interest income to the seller at the

<sup>109</sup> EAS 707.

<sup>110</sup> BFH 15 December 1999, I R 29/97, BFHE 190, 446, BStBl 2000 II 527; see also BFH 27 August 2003, I B 186/02, BFH/NV 2003, 1581; Hessisches Finanzgericht 30 August 2005, 4 K 2557/99, EFG 2006, 277.

<sup>111</sup> See EAS 742; cf. Helmut Loukota, “Einkünftezurechnung im Internationalen Steuerrecht”, 15 ÖJT III/2 101, 124 (2004). Also the German tax administration has issued a decree of non-acquiescence in respect of the BFH’s dividend stripping judgment; see BStBl 2000 I 1392. For a critical analysis of the administration’s approach see Tatjana Polivanova-Rosenauer, “Das Konzept des Nutzungsberechtigten aus abkommensrechtlicher Sicht”, 11 SWI 257 *et seq.* (2001).

<sup>112</sup> See Christian Stangl, “Zurechnungsfragen bei der unterjährigen Abtretung von Kapitalforderungen”, 23 RdW 719, 720 (2005), and the references therein; see also Wolfgang Gassner’s example (in “Grundsatzfragen der Einkünftezurechnung”, 56 ÖStZ 438, 443 (2003)) of the infant’s savings account and the attribution of interest income to her.

<sup>113</sup> Introduced by the Budget Supplementary Act 2003 (*Budgetbegleitgesetz* 2003), Federal Gazette I 71/2003; see above section 1.3.

time of the sale,<sup>114</sup> and by §27(2)(3) EStG, under which the *isolated* sale of unaccrued future interest (e.g. interest coupons) gives rise to interest income to the seller at the time of the sale.<sup>115</sup>

In an international context and leaving aside cases of abuse under §22 BAO,<sup>116</sup> economic ownership of the interest bearing claims under §24(1)(d) BAO is decisive for the attribution of interest income in in- and outbound situations,<sup>117</sup> and is viewed as being generally coextensive with the treaty concept of “beneficial ownership”.<sup>118</sup> Thus, for example, a resident assignor corporation of interest income will remain the economic owner of the underlying debt claim under §24(1)(d) BAO and the subject of attribution of the interest income,<sup>119</sup> irrespective of whether payments are made directly to the assignee.<sup>120</sup> Although not directly an issue of attribution, it may finally be mentioned that the temporal delimitation of treaty application also affects taxation under §27(2)(5) EStG, since for treaty purposes the residence of the taxpayer at the time of the interest payment is deemed to be decisive, whereas economic accrual and thereupon based payment of broken-period interest by a purchaser of the underlying interest bearing assets remain irrelevant.<sup>121</sup>

### 2.2.3. Royalties

Domestic tax law does not provide specific rules for the attribution of royalty income, leaving the determination to the general principles of market participation. As in the area of dividends and interest, these domestic principles on the attribution of royalty income remain decisive in a cross-border context,<sup>122</sup> although applied with the reservation that the treaty partner’s tax administration agrees with such attribution where double non-taxation would otherwise result.<sup>123</sup> Under this perspective, and irrespective of the actual recipient of payments,<sup>124</sup>

<sup>114</sup> As interest is usually subject to a 25 per cent final withholding tax under domestic law, the borderline in attribution is technically drawn by deducting withholding tax on the part of the selling price that constitutes accrued interest (§95 Abs 3 Z 2 EStG) and granting the purchaser a corresponding credit (§95 Abs 6 EStG); such credit offsets the otherwise impending double taxation resulting from the withholding tax imposed on the full amount of interest eventually paid by the debtor.

<sup>115</sup> See above section 2.1.2 for application of this rule in the area of dividends.

<sup>116</sup> See above sections 1.1 and 1.2.

<sup>117</sup> EAS 984 = SWI 1997, 90; EAS 2476 = SWI 2004, 440; see also para. 8020 EStR 2000.

<sup>118</sup> See EAS 406.

<sup>119</sup> See EAS 406 = SWI 1994, 138 (ruling that the assignee, a political subdivision of Austria, is not entitled to the 0 per cent withholding tax on Italian interest under art. 11(3)(b) of the 1981 Austria–Italy DTC; rather the Austrian assignor will be entitled to a withholding tax reduction to 10 per cent under art. 11(2) of this treaty).

<sup>120</sup> For this see e.g. EAS 406.

<sup>121</sup> See EAS 761 = SWI 1996, 32 and EAS 807 = SWI 1996, 147; EAS 2480 = SWI 2004, 485 (ruling that tax withheld on accrued interest before the change in residence from Austria to Germany will be reimbursed due to the 0 per cent treaty rate if the interest payment occurred after the change in residence).

<sup>122</sup> Irrespective of whether an in- or an outbound transaction is at issue; see EAS 1831 = SWI 2001, 202 (ruling on the legality of denying a certificate of residence).

<sup>123</sup> EAS 1048 = SWI 1997, 234 (concerning attribution of royalties to a German company).

<sup>124</sup> For this see e.g. EAS 1048 = SWI 1997, 234; EAS 1946 = SWI 2002, 153.



treaty benefits in respect to royalties are only available to the taxpayer who is the subject of attribution in respect of the income in question,<sup>125</sup> and thus the “beneficial owner” under the respective treaty.<sup>126</sup> Thereby, supplemented by the application of the general anti-abuse rule under §22 BAO, major weight is given to economic ownership of the licensed intangibles.<sup>127</sup> Again, for purposes of timing, the residence of the taxpayer at the time the royalty payment is deemed to be decisive.<sup>128</sup>

Based on these general considerations, Austrian ruling practice is mainly concerned with two types of transaction, namely parent–subsidiary shifts of royalty streams and back-to-back or conduit structures. The issue of parent–subsidiary shifts of royalty streams is created by a peculiarity of some Austrian treaties. While under current Austrian treaty practice royalties may generally only be taxed in the residence state, Austria has in some treaties retained the right to a 10 per cent source taxation if the recipient controls directly or indirectly more than 50 per cent of the capital of the company paying the royalties.<sup>129</sup> As Austria adheres to a literal reading of such provisions, entailing in a corporate setting only parent and grandparent companies,<sup>130</sup> there is some incentive for foreign parent companies to shift royalty income to another subsidiary, thereby avoiding Austrian source taxation on payments to such a sister company. Thus, ruling practice stresses the importance of investigating in each particular case whether the sister company is in economic reality the subject of attribution under §§21 to 24 BAO.<sup>131</sup> The sister company might not be the subject of attribution if a merely formal sub-licensing situation originating from the common parent company was involved, if no real transfer of rights from the common parent company to the sister company had taken place, or if the sister company was a mere letter-box or conduit company.<sup>132</sup> Problems in respect to back-to-back licenses and other conduit structures are mainly encountered in the Austrian–Dutch relations, based on the concern that Dutch base companies are used to receive tax-free royalty payments under the Austria–Netherlands treaty that are then forwarded to the Netherlands Antilles without any further Dutch withholding taxation.<sup>133</sup> As in the case of parent–subsidiary shifts of royalty streams, published rulings, in very

<sup>125</sup> EAS 1035 = SWI 1997, 188; see also EAS 1075 = SWI 1997, 333.

<sup>126</sup> See e.g. EAS 1040 = SWI 1997, 277.

<sup>127</sup> See EAS 886 = SWI 1996, 418; EAS 1035 = SWI 1997, 188; EAS 1075 = SWI 1997, 333; EAS 1113 = SWI 1997, 428; EAS 2037 = SWI 2002, 397; EAS 2415 = SWI 2004, 165.

<sup>128</sup> EAS 212 = SWI 1993, 50; EAS 1946 = SWI 2002, 153.

<sup>129</sup> See e.g. art. 9(2) of the 1961 Austria–Denmark DTC; art. 13(2) of the 1970 Austria–Netherlands DTC; art. 12(2) of the 1969 Austria–UK DTC.

<sup>130</sup> See EAS 886 = SWI 1996, 418 (Netherlands); EAS 1040 = SWI 1997, 277 (UK); EAS 1256 = SWI 1998, 298 (UK); EAS 2037 = SWI 2002, 397 (Netherlands); EAS 2415 = SWI 2004, 165 (Netherlands); see also EAS 1946 = SWI 2002, 153 (Denmark).

<sup>131</sup> EAS 886 = SWI 1996, 418; EAS 1946 = SWI 2002, 153; EAS 2037 = SWI 2002, 397.

<sup>132</sup> So explicitly EAS 886 = SWI 1996, 418; EAS 896 = SWI 1996, 414; EAS 1040 = SWI 1997, 277; EAS 2037 = SWI 2002, 397; EAS 2415 = SWI 2004, 165; see also EAS 1035 = SWI 1997, 188. Some weight is also given to the fact that the parent company and its royalty receiving subsidiary are connected by consolidation or group taxation; see EAS 1075 = SWI 1997, 333; EAS 2415 = SWI 2004, 165; cf EAS 1376 = SWI 1999, 43.

<sup>133</sup> For such situations see EAS 1035 = SWI 1997, 188; EAS 1075 = SWI 1997, 333; EAS 1143 = SWI 1997, 486; see also EAS 1113 = SWI 1997, 428; EAS 2415 = SWI 2004, 165.

general terms, ask for a factual inquiry on whether the Dutch company can exercise sufficient power over the licensed intangibles and, if not, suggest that based on §§21 to 24 BAO the royalties are to be attributed to the economic owner of the intangibles. In that case, the conduit company would not be entitled to treaty benefits,<sup>134</sup> irrespective of whether or not the foreign tax administration had issued a certificate of residency.<sup>135</sup> If, however, economic ownership is not vested with a merely formally interposed Antilles company, but rather with a parent company resident in a treaty partner state, the company may claim benefits under the applicable treaty.<sup>136</sup>

### 2.3. Intermediaries

Austrian income tax law does not contain specific rules on income attribution in case of fiduciary agreements (*Treuhandschaften*). However, §24(1)(c) and (d) BAO provide that economic ownership of assets held by the trustee (*Treuhänder*) will be vested with the trustor (*Treugeber*). These rules give expression to the underlying idea that – irrespective of the comprehensive legal rights of the trustee – the trustor is entitled to the economic benefits and increase in value of the property and also bears the risk of depreciation and loss; although the trustee exercises his ownership rights in his own name, this is done in the economic interest of the trustor, who also holds the right to restitution of assets and fruits, and will regain legal ownership rights by the termination of the agreement.<sup>137</sup> Although economic ownership under §24 BAO is not in and of itself decisive for income attribution, the trustor’s retained powers of disposition under domestic law are generally sufficient to exclude attribution of income to the trustee,<sup>138</sup> irrespective of whether or not the fiduciary agreement is disclosed to the market.<sup>139</sup> While income attribution to the trustee is also negated in international settings and under the “beneficial owner” concept in tax treaties,<sup>140</sup> Austrian ruling practice makes the trustor’s entitlement to treaty benefits in the source country depen-

<sup>134</sup> EAS 1035 = SWI 1997, 188; EAS 1075 = SWI 1997, 333; EAS 1113 = SWI 1997, 428.

<sup>135</sup> EAS 1113 = SWI 1997, 428; EAS 2415 = SWI 2004, 165.

<sup>136</sup> EAS 1035 = SWI 1997, 188; see also EAS 1075 = SWI 1997, 333.

<sup>137</sup> See VwGH 19 December 1990, 86/13/0136, ÖStZB 1991, 358.

<sup>138</sup> See e.g. VwGH 20 September 1988, 87/14/0167, ÖStZB 1989, 56; VwGH 16 March 1989, 89/14/0024, ÖStZB 1989, 345; VwGH 19 December 1990, 86/13/0136, ÖStZB 1991, 358. For a different view for the area of corporate taxation see Michael Tanzer, “Einkünftezurechnung im Einkommen- und Körperschaftsteuerrecht”, 15 ÖJT III/1 67 *et seq.* (2003).

<sup>139</sup> Where the existence of such agreement remains deliberately undisclosed, the trustee is referred to as nominee (*Strohmann*); see Peter Hallas, “Der Strohmann im Steuerrecht”, 2 *ecolex* 262 *et seq.* (1992).

<sup>140</sup> See e.g. EAS 1831 = SWI 2001, 202; Michael Lang, “VwGH zur Verweigerung der Abkommensberechtigung”, 10 SWI 423, 427 (2000); Jirousek, *op. cit.*, pp. 169, 182 *et seq.* (2004). Ruling practice also frequently refers to the concept of deemed fiduciary agreements to dismiss treaty benefits claims by the interposed “trustee” company. See for this argument e.g. EAS 896 = SWI 1996, 414 (concerning sub-licensing of software by a Maltese parent to its Austrian subsidiary); EAS 1040 = SWI 1997, 277 (concerning Austrian source royalties paid to a UK sister company after a parent–subsidiary shift through a sublicensing agreement); EAS 2476 = SWI 2004, 440 (concerning income from bonds and shares of a Bahamas company held by Austrian individuals).

dent on disclosure of the fiduciary agreement to both involved tax administrations.<sup>141</sup> That said, it should finally be noted that *Treuhand* under Austrian law is not necessarily concordant with the common law concept of a trust;<sup>142</sup> so depending on the specific structure at issue, from an Austrian perspective, income may be attributed to the foreign trust itself rather than to the beneficiary or grantor.<sup>143</sup>

## 2.4. Anti-avoidance law

For lack of controlled foreign company (CFC)-type legislation, abusive transactions undertaken to shift income attribution are generally countered by the application of Austria's general anti-avoidance provision under §22 BAO.<sup>144</sup> It should, however, be mentioned that Austria's tax regime on foreign investment funds is utilized as a tool to counter non-abusive sheltering of passive income in a foreign subsidiary. §42 InvFG<sup>145</sup> contains specific rules as to the tax treatment of income derived from a foreign legal entity that is considered an investment fund. Without regard to the legal form of the entity, a fund is deemed to exist if the foreign entity by law, statute, or fact structures its investments under the principle of risk diversification. Income earned by such a foreign fund is deemed to be the income to the owners of the fund, which is technically achieved by taxing fictitious distributions of retained profits. Giving this provision a tinge of CFC-type legislation,<sup>146</sup> the Austrian tax administration adheres to the view that a foreign corporation can be viewed as a foreign investment fund under §42 InvFG if it follows a risk-spreading investment strategy, even though it is wholly owned by a single parent company.<sup>147</sup> This may even be the case when a foreign holding company is interposed between the deemed investment fund and the Austrian parent company, as the principle of risk diversification can also be fulfilled "indirectly".<sup>148</sup> For lack of an OECD-wide solution, Austrian ruling practice obviously intends to extend this look-through taxation under domestic law to the treaty level, deeming the Austrian shareholders as subjects of attribution of income earned by a foreign corporation that is classified as an investment fund under §42 InvFG.<sup>149</sup>

<sup>141</sup> See EAS 2387 = SWI 2004, 52 (concerning a Spanish trustee company holding a participation in an Austrian corporation for the US trustor corporation, and also ruling that such holding will be considered "direct" for purposes of art. 10(2) of the 1996 Austria–USA DTC).

<sup>142</sup> VwGH 20 September 1988, 87/14/0167, ÖStZB 1989, 56.

<sup>143</sup> See specifically VwGH 20 September 1988, 87/14/0167, ÖStZB 1989, 56 (concerning income attribution to a foundation-like US trust).

<sup>144</sup> As §22 BAO plays one, if not the, decisive role in the discussion on attribution of income in Austria, the general features of the provision and its importance for the attribution of income have already been reported above in sections 1.1 and 1.2.

<sup>145</sup> *Investmentfondsgesetz* 1993 – Investment Funds Act 1993.

<sup>146</sup> See explicitly EAS 1980 = SWI 2002, 110.

<sup>147</sup> EAS 984 = SWI 1997, 90; EAS 1155 = SWI 1997, 535; EAS 1485 = SWI 1999, 407; see also EAS 1980 = SWI 2002, 110; EAS 2476 = SWI 2004, 440.

<sup>148</sup> See Helmut Loukota, "Einkünftezurechnung im Internationalen Steuerrecht", 15 ÖJT III/2 101, 119 *et seq.* (2004).

<sup>149</sup> See EAS 2409 = SWI 2004, 322 and EAS 2517 = SWI 2005, 2 (concerning §42 ImmoInvFG).

### 3. Conflicts in the attribution of income

#### 3.1. Source country taxation

The transposition of domestic income attribution principles by both the residence and the source state to the level of tax treaties may inevitably lead to double taxation or double non-taxation. As already mentioned, from an Austrian perspective treaty benefits are generally only available to the taxpayer who is the subject of attribution under domestic principles in respect of the income in question, irrespective of which taxpayer is identified as the subject of attribution by the other taxing jurisdiction.<sup>150</sup> This decisiveness of the source country's determination also underpins the Administrative Court's decisions in the *Treaty Shopping I*<sup>151</sup> and *II*<sup>152</sup> cases. There the Court held that a foreign corporation that is not subject of income attribution from an Austrian perspective will not be entitled to treaty withholding tax benefits,<sup>153</sup> even if – as was the case in *Treaty Shopping II* – the foreign company had been issued a certificate of residency and was thus deemed to be a resident of the other taxing jurisdiction.<sup>154</sup> Similarly, the isolated treatment of companies integrated in a foreign group taxation regime disregards income attribution under the domestic law of the treaty partner state,<sup>155</sup> even though such attribution could lead to an attribution to a person that would not be entitled to treaty benefits.<sup>156</sup> Despite the merits of this approach, such focus on the source country's perspective creates some unresolved tension with the principles of the OECD *Partnership Report*,<sup>157</sup> the Austrian treaty model<sup>158</sup> and Austrian ruling practice,<sup>159</sup> all of which suggest that in cases of conflicts in entity classification the residence state's attribution rules should be accepted by the source state.<sup>160</sup>

<sup>150</sup> A different position is, however, taken in cases of German investment funds that are treated as transparent for German tax purposes; if a certificate of residency is issued by the German tax administration, the fund will be entitled to a reduced withholding tax on Austrian dividends under the Austria–Germany DTC; see EAS 1766 = SWI 2001, 100; cf. Helmut Loukota, “Einkünftezurechnung im Internationalen Steuerrecht”, 15 ÖJT III/2 101, 119 *et seq.* (2004).

<sup>151</sup> VwGH 10 December 1997, 93/13/0185, ÖStZB 1998, 568 (*Treaty Shopping I*).

<sup>152</sup> VwGH 26 July 2000, 97/14/0070, ÖStZB 2001/57 (*Treaty Shopping II*).

<sup>153</sup> See also EAS 2294 = SWI 2003, 421; EAS 2467 = SWI 2004, 430; EAS 2470 = SWI 2004, 431 (ruling that when the Canadian parent corporation and not its European subsidiary is the subject of attribution of Austrian-source dividends, the parent corporation may claim a withholding tax reduction under the Austria–Canada treaty).

<sup>154</sup> See also Helmut Loukota, “Das zweite Treaty-Shopping-Erkenntnis des VwGH”, 10 SWI 420 *et seq.* (2000).

<sup>155</sup> Above section 2.1.

<sup>156</sup> Which might e.g. be the case if the head of the foreign group is a permanent establishment of a third-country resident.

<sup>157</sup> OECD, *The Application of the OECD Model Tax Convention to Partnerships*, Issues in International Taxation no. 6 (1999).

<sup>158</sup> See Heinz Jirousek, “Negotiations of Tax Treaties – an Update”, 13 SWI 309 *et seq.* (2003).

<sup>159</sup> See e.g. EAS 2362 = SWI 2003, 487 (ruling that a US partnership for which the box was checked and which is thus treated as opaque for US tax purposes will be considered to be a “resident” of the USA and will be entitled to withholding tax reduction under the Austria–USA treaty); see further EAS 1054 = SWI 1997, 238; EAS 1162 = SWI 1998, 50.

<sup>160</sup> See on this tension Michael Lang, “Taxation of Income in the Hands of Different Taxpayers from the Viewpoint of Tax Treaty Law”, 54 BIFD 596 *et seq.* (2000); cf. Michael Lang, “VwGH

That said, it might be stated that in the case of impending double non-taxation or a reduction of withholding taxation Austrian ruling practice tends to apply domestic attribution principles with the reservation that the treaty partner's domestic attribution rules identify the same taxpayer as the subject of attribution.<sup>161</sup> If this is not the case, the conflict will be resolved in a treaty's mutual agreement procedure,<sup>162</sup> and some Austrian treaties even explicitly refer to the attribution of income as one specific issue that may be addressed under this procedure.<sup>163</sup>

### 3.2. Residence country taxation

Problems of residence taxation are especially raised where the application of Austrian principles of income attribution leads to the identification of a taxpayer resident in Austria, which might – due to a different allocation under the treaty partner's rules – lead to (economic) double taxation. Austrian ruling practice, however, has made it quite clear that in the determination of whether a foreign company is subject to income attribution under general principles or after application of §22 BAO, Austria will not be bound by a deviating qualification by the foreign tax administration that has, for example, become explicit in the issuance of a certificate of residency for the company in question.<sup>164</sup> Rather, this conflict will only be resolved by a mutual agreement procedure initiated by the taxpayer in the partner state.<sup>165</sup> Consequently, and again creating some tension with the principles in the OECD *Partnership Report*,<sup>166</sup> the other state's determination is not deemed to be relevant if, for example, the foreign taxing jurisdiction deems the Austrian subject of attribution to be quasi-transparent for tax purposes, as might be the case if the income of an Austrian private foundation is attributed to its non-resident beneficiaries<sup>167</sup> or if foreign CFC- or other look-through rules are

*cont.*

zur Verweigerung der Abkommensberechtigung", *XX Steuer und Wirtschaft International* 423, 429 (2000).

<sup>161</sup> EAS 381 (concerning attribution of dividend income to the seller if the sale of underlying shares was effected between the declaration and the payment date); EAS 707 (concerning attribution of dividend income to the purchaser if shares were sold cum-dividend, but the actual transfer has taken place after the payment date); EAS 788 = SWI 1996, 87 (concerning attribution of dividend income to the seller of shares in case of a contractually retained right to a future, yet undeclared dividend); EAS 1048 = SWI 1997, 234 (concerning attribution of royalties to a German company); EAS 2294 = SWI 2003, 421 (concerning possible attribution of dividend income to the purchaser of shares if the seller has retained a usufruct).

<sup>162</sup> EAS 381.

<sup>163</sup> Arts. 25, 28(1)(a) of the 2000 Austria–Germany DTC; art. 24(3)(b) of the 1996 Austria–USA DTC.

<sup>164</sup> EAS 1113 = SWI 1997, 428; EAS 2415 = SWI 2004, 165.

<sup>165</sup> EAS 1035 = SWI 1997, 188 (concerning a royalty conduit); EAS 1113 = SWI 1997, 428 (concerning a royalty conduit); EAS 2415 = SWI 2004, 165 (concerning a parent–subsidiary royalty shift); EAS 2346 = SWI 2003, 445 (concerning income deflection to a Liechtenstein company); EAS 2037 = SWI 2002, 397 (concerning a parent–subsidiary royalty shift).

<sup>166</sup> Michael Lang, "Taxation of Income in the Hands of Different Taxpayers from the Viewpoint of Tax Treaty Law", 54 *BIFD* 596 *et seq.* (2000).

<sup>167</sup> As it is done for specifically defined family foundations under §15 of the German Foreign Relations Tax Act (AStG); for the tax treaty aspects of this rule from an Austrian perspective and further references see Georg Kofler and Ernst Marschner, "Österreichische Privatstiftung und deutsche Zurechnungsbesteuerung", 1 *taxlex* 472 *et seq.* (2005).

applied to an Austrian corporation. That said, especially the application of §22 BAO to an interposed foreign company and subsequent reattribution of income to its Austrian shareholders – as was, for example, the case in the recent *Dublin Docks* decisions<sup>168</sup> of the Administrative Court – may therefore lead to attribution conflicts and unrelieved double taxation if passive income is attributed to such a company and effectively taxed by the other taxing jurisdiction.<sup>169</sup> In such a case, the taxpayer to whom such income is attributed under Austrian domestic law may deduct, but not credit, foreign taxes paid by the interposed subsidiary as fictitious business expenses.<sup>170</sup>

However, conflicts in attribution may also raise the issue of unintended non- or low-taxation due to treaty relief in the residence state. A specific solution for this situation is foreseen in article 28(1)(a) of the Austria–Germany treaty, providing that the state of residence is, after an unsuccessful mutual agreement procedure, entitled to switch from the exemption to the credit method for avoiding double taxation if the contracting states attribute items of income to different persons and if this different attribution would have the result that the relevant items of income or capital were not taxed or were taxed too low.<sup>171</sup> Assume, for example, that one Austrian resident taxpayer grants to another Austrian resident taxpayer the right to usufruct in shares of stock in a German corporation and that the usufruct is effectively allocated to a German permanent establishment of the usufructuary. If Germany does not recognize a shift in dividend income attribution based in the usufruct<sup>172</sup> it will probably levy only a treaty-reduced withholding tax on the dividend flow to the taxpayer granting the usufruct; in contrast, if Austria accepts such shift in income attribution<sup>173</sup> and thus attributes income to the usufructuary and also accepts allocation to the German permanent establishment, it would in principle exempt the dividend income under articles 7 and 23 of the treaty. It is, however, likely that the tentative result caused by the attribution conflict will be considered as inappropriately low taxation and thus allow Austria as the state of residence to switch to the credit method in respect of such dividends, if a mutual agreement procedure has proved unsuccessful.

<sup>168</sup> VwGH 9 December 2004, 2002/14/0074, ÖStZB 2005/460 (*Dublin Docks I*), and VwGH 10 August 2005, 2001/13/0018, ÖStZ 2005/945 (*Dublin Docks II*).

<sup>169</sup> See also Michael Lang, “‘Treaty Shopping’ – Der Missbrauch von Doppelbesteuerungsabkommen”, 1 SWI 58 *et seq.* (1991).

<sup>170</sup> This position was taken by the tax administration in the *Dublin Docks I* case; cf. Georg Kofler, “Missbrauch bei Einschaltung einer Dublin Docks Gesellschaft”, 16 *ecolex* 321, 325 (2005).

<sup>171</sup> Art. 28(1)(a) of the 2000 Austria–Germany DTC; see also Wolfgang Gassner, “Methodenwechsel und Missbrauchsvorbehalte nach dem DBA-Entwurf Österreich-Deutschland”, 9 SWI 290 *et seq.* (1999). For a similar provision see para. 21 of the Protocol to the 1990 Germany–USA DTC and the US Treasury Department Technical Explanation on art. 23 (para. 13).

<sup>172</sup> For this position of the German tax administration see the decree on *Einkommensteuerrechtliche Behandlung des Niessbrauchs bei Einkünften aus Vermietung und Verpachtung und aus Kapitalvermögen*, BStBl 1983 I 508; for a different view see, however, FG Münster 14 January 2003, 7 K 2638/00 E, EFG 2003, 690.

<sup>173</sup> For the decisive criteria see above section 1.3.