

ITPG Abuse of Law

Vienna, 19 October 2017

GAAR–General Anti Avoidance Rule

COUNCIL DIRECTIVE (EU) 2016/1164 of 12 July 2016 – Art 6 Anti-Tax Avoidance Directive (ATAD)



Article 6 General anti-abuse rule

1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or **one of the main purposes** of obtaining a **tax advantage** that **defeats the object or purpose of the applicable tax law**, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.
2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be **calculated in accordance with national law**.

Art 6 ATAD

Goals

- Tackle abusive tax practices that have not yet been dealt
- Fill in gaps, which should not affect the applicability of specific anti-abuse rules
- Functioning of the internal market

Scope of Application

- All taxpayers that are subject to corporate tax
- In domestic situations, within the Union and vis-à-vis third countries in a uniform manner: scope and results of application in domestic and cross-border situations do not differ

GAAR in Austria

Specific Rule in § 22 Federal General Tax Code



(1) Through an **abuse of legal forms** and methods under civil law the **tax liability can neither be avoided nor reduced.**

(2) When an abuse has been identified, **taxes shall be levied as if a legal way which is reasonable** with regard to the economic activities, facts and circumstances **had been chosen.**

According to the Austrian tax administration and the Supreme Administrative Court (VwGH) art 22 BAO shall be applied in addition to other regulations. It is relevant both **for domestic and cross-border cases.**

Implementation GAAR in Austria

Article 288 TFEU: **Implementation by Member States effective 1.1.2019 at the latest**

Alternatives for transformation:

- Introduction of new GAAR in addition to art 22 Federal General Tax Code (BAO)
- Adoption of new GAAR instead of art 22 Federal General Tax Code (BAO)
- Interpretation of art 22 Federal General Tax Code (BAO) in accordance with art 6 ATAD

Depending on which alternative will be chosen various questions for differentiation and interpretation as well as problems in terms of constitutional law will have to be solved.

European Court Decisions will become **more important** for Austrian anti-abuse doctrine.

Art 22 BAO: Court decisions

Establishment of a new group company to optimize the use of investment premium (VwGH 30.4.2015, 2012/15/0162) - 1/3

- Bonus of 10% for increase of capex in tangible assets
- Prolongation with new law
- Concentration of purchase of IT-Hardware in newly established group company
- Lease contracts with other group companies
- Articles of association signed **one day after tax law** passed parliament but **before** decision of Federal Council and publication

Art 22 BAO: Court decisions

Establishment of a new group company to optimize the use of investment premium (VwGH 30.4.2015, 2012/15/0162) - 2/3

Decision by Supreme Administrative Court (VwGH)

- “Is the arrangement unusual with regard to the aspired economic benefit and can it be explained with the purpose of tax avoidance?”
- “It has to be reviewed, if the chosen way seems reasonable even if the tax advantage is not taken into consideration or if it is completely absurd without the tax benefit.”

Art 22 BAO: Court decisions

Establishment of a new group company to optimize the use of investment premium (VwGH 30.4.2015, 2012/15/0162) - 3/3

- Based on **evidence** presented by the tax office
 - new company has no employees
 - no real changes in the acquisition and implementation process of IT-Hardware
 - economic benefit is not reasonable without premium
- **Judgement as tax abuse** according to art 22 Federal General Tax Code (BAO)
 - “Formation of the new company before finalization of the legislative procedure does not exclude that the expectation for the prolongation of the investment premium was the reason for the new structure.”

Art 22 BAO: Court decisions

Involvement of a foreign entity without economic reasons (VwGH 20.5.2010, 2006/15/005)- 1/2

- Austrian sales representative
- Main commission income from an agreement with one Austrian company (commercial partner)
- Formation of a Liechtenstein Establishment
- Contract between Liechtenstein Establishment and the commercial partner
- No changes in business process
- No evidence for new business opportunities (additional costumers)
- Tax office classifies the Liechtenstein Establishment as an entity without any economic content and considers the income as personnel Austrian income of the sales representative

Art 22 BAO: Court decisions

Involvement of a foreign entity without economic reasons (VwGH 20.5.2010, 2006/15/005)- 2/2

Decision by Supreme Administrative Court (VwGH)

- Judgement as tax abuse according to art 22 Federal General Tax Code (BAO)
 - “For the qualification as abuse it is not relevant whether or not many others too, choose a certain legal arrangement but if such **legal arrangement is legally reasonable.**”
 - “Art 22 Federal General Tax Code (BAO) **does not violate the freedom of establishment** when artificial arrangements, which are chosen against any economic reason for the sole purpose of avoiding taxes, are disallowed .”

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