

# Austria's New Capital Gains Tax

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## Introduction

Like in many other European countries, Austria's federal budget showed a steady and increasing deficit over the last years which was mainly due to the international financial crisis. As governmental spending was increased while tax revenues were shrinking at the same time, countermeasures had to come. Accordingly, Austria's federal governmental budget plans for the years 2011 to 2014, enacted on December 30, 2010 by the Federal Budget Implementation Act for the years 2011 to 2014,<sup>1</sup> provides for tax increases amounting to an estimated total of additional revenues of approximately €1 billion in 2011 increasing to approximately €1.8 billion in 2014.<sup>2</sup> Among other measures, Austria's Income Tax Act 1988 (ITA)<sup>3</sup> has been amended<sup>4</sup> as to include now a tax on so called "realised" capital gains stemming from the sale or redemption of certain capital assets, including securities, as well as from certain transactions in derivatives (*Einkünfte aus realisierten Wertsteigerungen von Kapitalvermögen und aus Derivativen*). Such profits are, in principle, subjected to a special tax rate of 25 per cent which will be deducted by the custodian bank or the paying office. In its international dimension, the tax applies in case the custodian bank or, under certain conditions, the paying office is located in Austria. Apart from some minor exceptions these are also responsible for the deduction of the tax and its transfer to the

respective Austrian tax office. The relevant amendments to ITA relating to the new capital gains tax will become effective on October 1, 2011<sup>5</sup> (it should be mentioned that this capital gains tax has recently been challenged by Austrian banks before the Constitutional Court of Austria (*Verfassungsgerichtshof*) and that therefore the new tax regime on capital gains may possibly be declared unconstitutional in certain parts). The present article examines Austria's newly enacted tax regime on capital gains with a strong emphasis on the taxation of profits stemming from realisation of securities.

## The concept of Austria's new capital gains tax

Pursuant to s.27 para.1 of the ITA as amended by BIA, there are two types of profits from capital assets which will effectively be taxed once Austria's newly enacted tax regime becomes operative:

- gains stemming from certain capital assets,<sup>6</sup> including securities, (e.g. current income such as dividends, interest payments, annuities and similar earnings) and
- "realised" gains stemming from the sale or redemption of such capital assets<sup>7</sup> as well as from certain transactions in derivatives.<sup>8</sup>

This broad definition of taxable capital gains ensures the taxation of profits from capital assets irrespective of whether they are held as business or non-business assets<sup>9</sup> and irrespective of whether the profits have been realised within a particular holding period.<sup>10</sup> Accordingly, s.30 of the ITA on the taxation of speculative gains, which requires that gains stemming from the sale of securities or certain transactions in derivatives being held as non-business assets must be realised within a holding period of one year (speculative period) in order to be taxed,<sup>11</sup> will cease to have effect on October 1, 2011 for securities and derivatives purchased on or after this date.<sup>12</sup> Furthermore, s.31 of the ITA pursuant to which certain profits from the sale of investments in equity (such as shares) being held as non-business assets are subject to taxation,<sup>13</sup> will expire entirely on this date.<sup>14</sup>

<sup>1</sup> *Budgetbegleitgesetz 2011*, Federal Law Gazette I 2010/111 (Federal Budget Implementation Act 2011 – "BIA").

<sup>2</sup> cf. the explanatory notes to BIA (ErlRV 981 BlgNR XXIV. GP) p.25.

<sup>3</sup> *Einkommensteuergesetz 1988*, Federal Law Gazette 1988/400 as amended (Income Tax Act – "ITA").

<sup>4</sup> Unless stated otherwise, references to ITA in this article relate to ITA as amended by BIA.

<sup>5</sup> ITA s.124b nos 181, 184 and 185.

<sup>6</sup> ITA s.27 paras 2 and 5. Pursuant to this provision, gains (profits) from, e.g. the following capital assets are taxable: shares in stock corporations (including non-voting share capital), shares in companies with limited liability, shares in silent partnerships, credits, loans, mortgages, debt instruments (such as bonds, zero-coupon bonds, commercial papers, certificates of deposit, debt certificates, etc) cash on bank deposits (current accounts, saving accounts) and allowances from Austrian private-law foundations (*Privatstiftungen*) and from comparable foreign trusts and foundations.

<sup>7</sup> ITA s.27 para.3.

<sup>8</sup> ITA s.27 para.4. Pursuant to this provision, gains (profits) from trades in the following derivatives are (among others) taxable: options, futures, swaps and index linked certificates.

<sup>9</sup> ITA s.27a para.6.

<sup>10</sup> cf. the explanatory notes to BIA p.8.

<sup>11</sup> cf. W. Doralt, and O. Kempf, 7th edn (2002) in W. Doralt (ed.) *Einkommensteuergesetz Kommentar* (looseleaf edition) (Vienna, 2010) vol.2 s.30 paras 1 et seq; W. Doralt, *Steuerrecht 2010/2011*, 12th edn, (Vienna, 2010) para.28.

<sup>12</sup> ITA s.124b no.184. For sales of debt instruments and derivatives purchased before October 1, 2011, "old" ITA s.30 on the taxation of speculative gains remains applicable until September 30, 2012. As regards the sale of shares in stock corporations and shares in mutual funds and real estate funds purchased before January 1, 2011, "old" ITA s.30 remains applicable until December 31, 2012.

<sup>13</sup> cf. W. Doralt and O. Kempf, 8th edn (2004) in W. Doralt (ed.) *Einkommensteuergesetz Kommentar* (looseleaf edition) (Vienna, 2010) vol.2 s.31 paras 1 et seq; W. Doralt, *Steuerrecht 2010/2011*, 12th edn (Vienna, 2010) para.29.

<sup>14</sup> ITA s.124b no.185 alinea b).

As a result of this conceptual change, a differentiation between current income from capital assets (such as dividends, interest payments, annuities) and income stemming from the “realisation” of their appreciation in value (by way of sale or redemption) will no longer be required.<sup>15</sup> This is so because pursuant to s.27a para.1 of the ITA all taxable capital gains<sup>16</sup> shall—beside some exceptions<sup>17</sup>—be subjected to a special tax rate of 25 per cent being deducted (*Kapitalertragssteuer*, “CPT”—Capital Proceeds Tax).

Under the conditions set forth in s.97 of the ITA as amended by BIA, this taxation is final (*Steuerabgeltung*) which means that capital gains from which CPT has been deducted are exempt from any further taxation. However, in case the tax payer applies for regular taxation<sup>18</sup> (*Regelbesteuerungsoption*) or for the offsetting of losses<sup>19</sup> (*Verlustausgleichsoption*) taxation is not final.

In its international dimension, Austria’s new capital gains tax will apply only if either the custodian bank (*depotführende Stelle*) handling the realisation of the profits or—under certain conditions—the paying office (*auszahlende Stelle*) is located in Austria<sup>20</sup> (see in more detail below). It is also them being responsible for the deduction of CPT and its transfer to the competent Austrian tax office (apart from the exceptions specified in ss.94 (*Ausnahmen von der Abzugspflicht*) and 95 para.2(a) of the ITA.

## The taxation of profits from securities

Pursuant to ss.27, 27a para.1, and 124b no.185 alinea a) of the ITA as amended by BIA, the taxation of profits stemming from securities will be twofold as at October 1, 2011.

On the one hand, s.27 para.2 nos 1 and 2 of the ITA requires that current income from securities (such as dividends, interest payments, annuities) is subjected to CPT. For securities held as non-business assets this is, however, nothing new.<sup>21</sup>

On the other hand, s.27 paras 3 and 4 of the ITA refers to so called “realised” capital gains from securities and to income from certain transactions in derivatives (such as swaps, options, futures, index linked certificates) which are now also subjected to CPT. This is a fundamental change to Austria’s tax regime on capital gains from securities, as such profits were previously only taxed if

held as non-business assets<sup>22</sup> and if realised within a holding period of one year (speculative period) pursuant to the previous version of s.30 of the ITA.<sup>23</sup>

According to the explicit wording of ss.27 paras 3 and 4, and 27a para.3 nos 2 and 3 of the ITA the “realised” capital gains include all profits from the sale or redemption of securities and derivatives which are the difference (surplus) between the proceeds of sale/redemption (i.e. their selling/redemption price) and the acquisition costs (i.e. their purchase price). Accordingly, the mere book value appreciation of securities and derivatives does not trigger CPT.

In addition, new para.6 no.1 alinea a) of s.27 of the ITA stipulates that the withdrawal or transfer of securities from their current investor securities account shall—as a rule—equally trigger CPT. In this case, the law assumes a sale or redemption<sup>24</sup> and the profit is represented by the difference (surplus) between their actual market value at the time of withdrawal or other transfer from the account and their acquisition costs.<sup>25</sup>

In case the securities are transferred to another securities account of the same taxpayer, s.27 para.6 no.1 alinea a) of the ITA contains a long list of exemptions which are based on the idea that no CPT shall be deducted, if the taxation of potential future profits from the sale or redemption of the transferred securities remains in fact possible.<sup>26</sup> Thus, no CPT is to be deducted in case the securities are transferred to a securities account held by the same taxpayer and maintained by the same custodian bank. Further, in case the securities are transferred to a securities account of the same taxpayer maintained with a different custodian bank which is located in Austria, taxation can be avoided if the securities’ acquisition costs are disclosed to the new custodian bank (which will need such information for the calculation of possible future CPT). In case the new custodian bank is located abroad, the respective Austrian tax office has to be informed and supplied with all information relevant for taxation (i.e. the taxpayer’s name, his or her tax or social security number, ISIN or other securities code, the securities’ acquisition costs and the name of the new custodian bank) in order to avoid CPT.

In case the transfer of securities occurs by way of inheritance or has been made as a gift, CPT may also be avoided, if evidence for the inheritance or the gift is produced by adequate documents to the custodian bank

<sup>15</sup> cf. the explanatory notes to BIA p.8.

<sup>16</sup> See ITA s.27 in which all taxable capital gains are specified.

<sup>17</sup> ITA s.27a paras 1 and 2.

<sup>18</sup> ITA s.27a para.5.

<sup>19</sup> ITA ss.27 para.8, 97 para.2.

<sup>20</sup> ITA s.93.

<sup>21</sup> cf. W. Doralt, *Steuerrecht 2010/2011*, 12th edn (Vienna, 2010) para.24.

<sup>22</sup> Capital gains from the sale of securities held as business assets were subject to (corporate) income tax (*Einkommenssteuer/Körperschaftsteuer*) and not to CPT. Further, the speculative period of one year (holding period) was not applicable in this case. cf. W. Doralt, and O. Kempf, 7th edn (2002) in W. Doralt (ed.) *Einkommensteuergesetz Kommentar* (looseleaf edition) (Vienna, 2010) vol.2 s.30 para 1.

<sup>23</sup> cf. W. Doralt, *Steuerrecht 2010/2011*, 12th edn (Vienna, 2010) para.28. “Old” ITA s.30 expires on October 1, 2011 for securities and derivatives purchased on or after this date (s.124b no.184 of the ITA). For sales of debt instruments and derivatives purchased before October 1, 2011, “old” ITA s.30 on the taxation of speculative gains remains applicable until September 30, 2012. As regards the sale of shares in stock corporations and shares in mutual funds and real estate funds purchased before January 1, 2011, “old” ITA s.30 remains applicable until December 31, 2012).

<sup>24</sup> cf. the explanatory notes to BIA p.118.

<sup>25</sup> ITA s.27a para.3 no.2 alinea b).

<sup>26</sup> cf. the explanatory notes to BIA pp.118 and 119.

located in Austria (e.g. by a notarial deed or a certificate of inheritance) or if the respective Austrian tax office is informed and supplied with the relevant information (see above). In case the securities have been transferred as a gift from a securities account maintained abroad, the respective Austrian tax office must be informed and supplied with all relevant information (including the transferee's name) in order to avoid CPT, irrespective of whether the transfer has been made to a foreign or Austrian securities account.<sup>27</sup>

In case the custodian bank providing the account from which the securities are transferred is located in Austria, it will be sufficient for the purpose of avoiding CPT that such custodian bank is instructed to pass the relevant information to the new custodian bank or, as the case may be, to the respective Austrian tax office.<sup>28</sup>

In this context it should be mentioned that the (mandatory) disclosure of information relevant for taxation foreseen in s.27 para.6 no.1 alinea a) of the ITA for the purpose of avoiding CPT potentially conflicts with the provisions on Austria's banking secrecy as stipulated in s.38 of the Austrian Banking Act.<sup>29</sup> In particular it is unclear, whether s.38 para.2 no.5 of the BA excepting from banking secrecy the case that the customer expressly and in writing consents to the disclosure, may serve as valid justification for the amendment. In any event, pursuant to s.38 para.5 of the BA the provisions on Austria's banking secrecy (s.38 paras 1–4 of the BA) which had been enacted as constitutional law may only be amended by parliament with at least one-half of the representatives in the *Nationalrat* (Austria's national assembly) present and with a two-thirds majority of the votes cast. This requirement was, however, not fulfilled as regards newly enacted para.6 no.1 alinea a) of s.27 of the ITA.

### The applicable tax rate to profits from securities

Pursuant to new s.27a of the ITA all taxable profits from securities and certain transactions in derivatives are subjected to a special tax rate of 25 per cent. If applied, this taxation is final under the conditions set forth in s.97 para.1 of the ITA.<sup>30</sup> This means that no further tax is imposed on such capital gains and that they do not have to be declared as income in other tax declarations of the same taxpayer.<sup>31</sup> For the taxpayer final taxation will be

profitable, in case his personal income tax rate according to the statutory gliding scale is higher than the 25 per cent rate. If not, he will apply for regular taxation (see below).

However, pursuant to new s.27a para.2 no.2 of the ITA the special tax rate of 25 per cent applies to profits from debt instruments (such as bonds, commercial papers, certificates of deposit, debt certificates) and to profits from shares in mutual funds only if such instruments have been offered to an undetermined number of people ("public offer" in the meaning of the CMA, see below).<sup>32</sup> This requires a public offer<sup>33</sup> in fact and in law, which can be made in Austria or abroad. Pursuant to Austrian tax authorities such public offer must:

- either be subject to the prospectus requirement set forth in s.2 of the Austrian Capital Markets Act,<sup>34</sup> or
- be exempt from such requirement due to one of the exemptions contained in s.3 of the CMA, or
- refer to securities already traded on a recognised securities market.<sup>35</sup>

Furthermore, the securities must have been offered to the public by banks, via the media or by means of recognised trading systems such as Reuter's, Telerate or Bloomberg.<sup>36</sup> In case the instruments are purchased within six months from the issue date by at least 100 different buyers, such offering is in any event qualified as public.<sup>37</sup>

Accordingly, in case the instruments have in the course of their issue not been offered to an undetermined number of people such profits are subjected to the regular, progressive income tax rate and no CPT may be deducted pursuant to s.93 para.1 of the ITA.

Consequently, banks—in order to assess whether CPT must be deducted or not—are faced with the difficult (and costly) task of determining whether the debt instruments and shares in mutual funds deposited on their customers' securities accounts have been issued in a public offering. This information is, in most cases, not easily available to the bank and requires a legal assessment. Thus, in order to comply with the statutory requirements, banks in most cases will be in the need to trace back the "history" of the instruments in order to assess whether CPT is to be deducted or not.

<sup>27</sup> cf. the explanatory notes to BIA pp.118 and 119.

<sup>28</sup> ITA s.27 para.6 no.1 alinea a).

<sup>29</sup> *Bankwesengesetz*, Federal Law Gazette 1993/532 as amended (Austrian Banking Act – "BA").

<sup>30</sup> According to ITA s.97 para.1, taxation is not final in case (i) application is made for regular taxation or (ii) for the offsetting of losses or (iii) in case the capital gains constitute operating income of certain corporations (such as stock corporations and companies with limited liability; see below). In these cases, the profits have to be declared in the respective tax declaration and an assessment for income tax will be carried out. cf. the explanatory notes to BIA pp.120, 123, 124 and 130.

<sup>31</sup> cf. the explanatory notes to BIA p.130.

<sup>32</sup> cf. the explanatory notes to BIA p.121.

<sup>33</sup> An offer is deemed to be public if made to more than 250 different persons.

<sup>34</sup> *Kapitalmarktgesetz*, Federal Law Gazette 1991/625 as amended, Austrian Capital Markets Act (CMA). The CMA implemented Directive 2003/71 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34 (Prospectus Directive) [2003] OJ L345/64.

<sup>35</sup> cf. the guidelines of the Austrian Federal Ministry of Finance regarding the application of ITA for the year 2000, lastly amended on February 2, 2011 (ITG 2000) para.7804.

<sup>36</sup> cf. ITG 2000 para.7806.

<sup>37</sup> cf. ITG 2000 para.7808.

## Option for regular taxation

New s.27a para.5 of the ITA allows any taxpayer to opt for regular taxation. Such option may be exercised independently from the option for the offsetting of losses (ss.27 para.8 and 97 para.2 of the ITA) by filing a respective request to the competent tax office. It leads to an assessment for income tax and to the application of the regular, progressive income tax rate (currently amounting to a maximum of 50 per cent for yearly taxable income exceeding €60,000)<sup>38</sup> on all taxable capital gains.<sup>39</sup> Accordingly, such request makes only sense, if the overall taxable income of the respective taxpayer (including capital gains) is subjected to a tax rate of less than 25 per cent, in which case the excess amount of CPT deducted will be reimbursed.<sup>40</sup> However, pursuant to s.20 para.2 of the ITA income related expenses and incidental acquisition costs (such as fees for selling/purchase orders or external funding costs) may not be deducted from the amount of taxable capital gains.

## Offsetting of losses from the sale of securities

Sections 27 para.8 and 97 para.2 of the ITA as amended by BIA provide for a limited possibility for the offsetting of losses stemming from the sale of securities and derivatives. Such losses may be offset with taxable capital gains subject to final taxation of the same tax period, except for interest payments from bank deposits and allowances from Austrian private-law foundations (*Privatstiftungen*) as well as from comparable foreign trusts and foundations.<sup>41</sup> The set-off of current losses with capital gains of future tax periods is not permissible (no tax loss carry forward).<sup>42</sup> Pursuant to s.97 para.2 of the ITA any offsetting of losses may only be carried out on request in the course of an income tax assessment.<sup>43</sup> It leads to the refund of the excess amount taxed and paid. The petition is to be filed with the competent tax office within a period of five years from the end of the respective year of assessment and may be exercised independently from the petition for regular taxation (see above).<sup>44</sup>

## Personal scope of application and affected securities

Austria's new capital gains tax applies to capital gains of individuals which are subjected to income tax (*Einkommensteuer*) and, accordingly, to CPT.<sup>45</sup> Their capital gains will be taxed irrespective of whether the respective capital assets (e.g. securities, derivatives) are held as business or as non-business assets (new s.27a para.6 of the ITA).<sup>46</sup>

Moreover, capital gains of corporations (e.g. associations, Austrian private-law foundations<sup>47</sup>) are equally subjected to CPT,<sup>48</sup> as s.7 para.2 of the Austrian Corporate Tax Act 1988 (CTA)<sup>49</sup> stipulates that their taxable corporate income comprises inter alia capital gains in the meaning of ss.2 para.3 no.5 and 27 of the ITA as amended by BIA.<sup>50</sup> However, pursuant to s.7 para.3 of the CTA the total taxable corporate income (including capital gains) of certain corporations, such as stock corporations (*Aktiengesellschaften*) and companies with limited liability (*Gesellschaften mit beschränkter Haftung*), by way of legal transformation qualifies as income from trade and business.<sup>51</sup> Accordingly, their corporate income from capital gains is not subjected to CPT and in case CPT should in the absence of a declaration according to s.94 no.5 of the ITA (*Befreiungserklärung*)<sup>52</sup> be nevertheless deducted, such taxation is not final (s.97 para.1 of the ITA).<sup>53</sup> Thus, capital gains of such corporations are ultimately exempt from Austria's newly enacted capital gains tax (but the corporate income tax of 25 per cent applies).

The new capital gains tax will become effective on October 1, 2011.<sup>54</sup> However, depending on the date of purchase, not all securities will be affected. As regards shares in stock corporations as well as in mutual funds including real estate funds, the new tax regime only applies, if the instruments have been purchased after December 31, 2010. In contrast thereto, debt instruments will be affected, in case they have been purchased after September 30, 2011. Otherwise, the present tax regime continues to apply.

<sup>38</sup> ITA s.33 para.1.

<sup>39</sup> cf. the explanatory notes to BIA pp.123, 124 and 130.

<sup>40</sup> cf. W. Doralt, and S. Kirchmayr, 8th edn (2004) in W. Doralt (ed.), *Einkommensteuergesetz Kommentar* (looseleaf edition) (Vienna, 2010), vol.3 s.97 para.61.

<sup>41</sup> cf. the explanatory notes to BIA p.120.

<sup>42</sup> This regulation might be qualified as unconstitutional.

<sup>43</sup> cf. the explanatory notes to BIA p.120. Thus, it is not accounted for in the deduction of CPT.

<sup>44</sup> cf. the explanatory notes to BIA pp.120, 123, 124 and 130.

<sup>45</sup> ITA s.1 para.1, s.2 para.3 no.5 and s.27.

<sup>46</sup> cf. the explanatory notes to BIA pp.115 and 124.

<sup>47</sup> Pursuant to s.22 paras 1 and 2 of the Corporate Tax Act 1988 the tax rate of 25% now equally applies to capital gains of Austrian private-law foundations, as the special interim income tax applicable to their capital gains has been increased by BIA to 25% (instead of 12.5%) with effect for corporate income tax assessments for the year 2011. cf. the explanatory notes to BIA p.133.

<sup>48</sup> cf. the explanatory notes to BIA pp.113 et seq.

<sup>49</sup> *Körperschaftsteuergesetz 1988*, Federal Law Gazette 1988/401 as amended, ("CTA").

<sup>50</sup> cf. J. Heinrich, 13th edn (2009) in P. Quantschnigg, B. Renner, G. Schellmann, R. Stöger (eds.) *Die Körperschaftssteuer* (looseleaf edition) (Vienna, 2010) vol.2 s.7 paras 28 et seq.

<sup>51</sup> cf. J. Heinrich, 13th edn (2009) in P. Quantschnigg, B. Renner, G. Schellmann, R. Stöger (eds.) *Die Körperschaftssteuer* (looseleaf edition) (Vienna, 2010) vol.2 s.7 paras 137 et seq.

<sup>52</sup> See section titled "The taxation of profits from securities in its international dimension".

<sup>53</sup> cf. the explanatory notes to BIA p.130.

<sup>54</sup> ITA s.124b nos 181, 184 and 185.

## The taxation of profits from securities in its international dimension

The application of Austria's new capital gains tax must be confined in its international dimension. This is primarily done by the provisions contained in ss.93 and 95 of the ITA as amended by BIA. Whereas para.1 of s.93 of the ITA contains the basic rule that—apart from capital gains listed in newly enacted s.27a para.2 of the ITA<sup>55</sup>—CPT shall only be deducted if the respective capital gains qualify as “domestic”, its para.2 sets up the conditions for such qualification.

Pursuant to ss.93 para.2 no.1, 95 para.2 no.1 alinea b) of the ITA current income from securities (i.e. interest payments and dividends) is considered domestic, if the paying office (*auszahlende Stelle*) is located in Austria. A paying office may be any organisational entity of a bank, which is capable to credit amounts of money to cash accounts of clients or to pay in cash. Thus, a paying office could be in the building of the headquarters of a bank, in the building of a branch office or in any office room wherever located performing the services described above. According to the definition contained in s.95 para.2 no.1 alinea b) of the ITA<sup>56</sup> and the explanatory notes to BIA,<sup>57</sup> the paying office is in essence the same as the former coupon paying office (*kuponauszahlende Stelle* referred to in “old” s.95 para.3 no.2 of the ITA) as regards the taxation of current income from securities (such as dividends or interest payments). In most cases, this will be the bank with which the ultimate investor will hold his securities. A bank which is not providing the respective securities account and which is only “formally” involved in the payments to the ultimate investor, is no paying office in this context.<sup>58</sup> In addition, dividend payments from shares are qualified domestic income, if the registered office or the place of effective management of the corporation liable for the dividend payments is located in Austria.<sup>59</sup>

As regards profits from the sale or redemption of securities and derivatives, these are qualified as domestic pursuant to ss.93 para.2 no.2, 95 para.2 no.2 alinea a) of the ITA, if the custodian bank (*depotführende Stelle*) is located in Austria. The term “custodian bank” refers to banks (or its branches and offices) providing the securities account for the ultimate investor and not to any other bank up in the holding chain. In addition, it is required that such custodian bank was involved in the handling of

the realisation of the profits.<sup>60</sup> According to the explanatory notes to BIA this is necessary as CPT may in fact only be deducted by the custodian bank, if all information relevant for taxation (such as the acquisition costs and the selling price) is available to it.<sup>61</sup> Although the required level of involvement is difficult to assess due to lack of any administrative practice and court decisions, the involvement probably includes any direct business relationship between the custodian bank and the selling investor in connection with the sale of the securities (such as the acceptance of selling orders).

In case the custodian bank is not located in Austria, no CPT will be deducted.<sup>62</sup> However, as an exemption to this rule ss.93 para.2 no.2, 95 para.2 no.2 alinea b) of the ITA prescribe that CPT must be deducted, if a custodian bank located abroad only “technically” effects the realisation of the profits. This is the case if a paying office, which is located in Austria, collaborates in the handling of the realisation of the profits with the foreign custodian bank being its branch or affiliate.<sup>63</sup> In this context, the explanatory notes to BIA give the following example (in our translation):

“A holds securities in his securities account with the Taiwanese X-bank. The X-bank is an affiliate (subsidiary company) of the Austrian bank of A, the Y-bank, his principal bank with which he maintains his banking connections. A always disposes of his Taiwanese securities deposit through the Austrian Y-bank. In case A sells his securities deposited with the Taiwanese securities deposit by giving the selling instructions through the Austrian Y-bank and the Austrian Y-bank then credits the sales proceeds, the tax deduction has to be made.”

In this case the Austrian Y-bank acted as paying office in the context of ss.93 para.2 no.2, 95 para.2 no.2 alinea b) of the ITA.<sup>64</sup>

CPT must be deducted and transferred to the competent Austrian tax office either by the custodian bank or, as the case may be, by the paying office located in Austria,<sup>65</sup> if the capital gains stemming from the securities qualify as “domestic” (and if no exception specified in ss.94 (*Ausnahmen von der Abzugspflicht*) and 95 para.2 no.1 alinea a) of the ITA applies).

<sup>55</sup> This exception pertains in essence to debt instruments and shares in mutual funds which have not been offered to an undetermined number of people (public offering) and which are therefore not subject to CPT but to regular taxation (see section titled “The applicable tax rate to profits from securities”).

<sup>56</sup> Pursuant to this provision a paying office is any bank or—in case no bank has been appointed by the issuer as “paying agent”—to pass on payments—the Austrian issuer making the payments directly to the respective holder of the securities.

<sup>57</sup> cf. the explanatory notes to BIA pp.126, 128 and 129.

<sup>58</sup> cf. W. Doralt and S. Kirchmayr 2004, 8th edn (2004) in W. Doralt (ed.) *Einkommensteuergesetz Kommentar* (looseleaf edition) (Vienna, 2010) vol.3 s.95 para.9.

<sup>59</sup> ITA s.93 para.2 no.1. In this case, the Austrian stock corporation is responsible for the withholding and transfer of CPT to the tax office pursuant to ITA s.5 para.2 no.1 alinea a).

<sup>60</sup> cf. the explanatory notes to BIA p.127.

<sup>61</sup> cf. the explanatory notes to BIA p.127.

<sup>62</sup> cf. the explanatory notes to BIA p.127.

<sup>63</sup> cf. the explanatory notes to BIA p.127.

<sup>64</sup> cf. the explanatory notes to BIA p.127.

<sup>65</sup> ITA s.95 paras 1 and 2 and s.96.

Deduction of CPT may be avoided pursuant to s.94 no.5 of the ITA for taxable domestic profits from securities<sup>66</sup> and derivatives representing operating revenues of an Austrian or foreign company (i.e. a corporation or a business partnership whose sole partner is a corporation),<sup>67</sup> if a pertinent declaration is made by the beneficiary to the custodian bank (or the paying office) and to the competent Austrian tax office (*Befreiungserklärung*). Since no CPT is deducted in such case, for corporations having either their place of effective management or their statutory seat in Austria (and which are therefore subjected to unlimited corporate income tax liability<sup>68</sup>), the capital gains qualify as taxable corporate income and must be declared in the corporate income tax declaration (ss.2 para.3 no.5, and 27 of the ITA and s.7 of the CTA).

Capital gains, which do not qualify as “domestic”, are not subjected to CPT.<sup>69</sup> Such capital gains are only taxable in Austria if received by a resident beneficiary (individual or corporation) subjected to unlimited (corporate) income tax liability,<sup>70</sup> in which case they must be included in the respective taxpayer’s Austrian income tax declaration.<sup>71</sup> The special tax rate of 25 per cent<sup>72</sup> applies equally.

If received by a non-resident beneficiary (individual or corporation) subjected to limited (corporate) income tax liability, in case such beneficiary is not engaged in

trade or business through a permanent establishment in Austria,<sup>73</sup> current income from debt instruments as well as profits stemming from their sale or redemption are not taxable in Austria and thus not subject to CPT. Further, all capital gains from shares in stock corporations of a non-resident beneficiary are equally not taxable in Austria and thus not subjected to CPT, if the stock corporation’s registered office and/or its place of effective management are not located in Austria.<sup>74</sup> In these cases, CPT being deducted may be avoided if the beneficiary demonstrates to the custodian bank or, as the case may be, to the paying office located in Austria that he qualifies as non-resident for tax purposes and that he is therefore subjected only to limited (corporate) income tax liability.<sup>75</sup>

In case of unlimited and limited (corporate) income tax liability Austria’s right to levy the new capital gains tax may be restricted by double taxation treaties.<sup>76</sup> Moreover and just to remember it should be mentioned that pursuant to s.1 of the Austrian European Union Withholding Tax Act<sup>77</sup> interest payments paid or credited by a paying office located in Austria relating to a beneficiary who is an individual resident in another Member State of the European Union may be subjected to a withholding tax, currently amounting to 20 per cent,<sup>78</sup> if no exception applies.

<sup>66</sup> In case of current income from shares (dividends) CPT may only be avoided if the stock corporation’s registered office or place of effective management is not located in Austria (ITA s.94 no.5).

<sup>67</sup> cf. ITG 2000 para.7732.

<sup>68</sup> Individuals having either their permanent domicile or their habitual abode in Austria qualify as Austrian residents and are subject to Austrian income tax on their worldwide income (unlimited income tax liability). Otherwise they are considered non-residents in which case they are subjected to Austrian income tax only on income from certain Austrian sources (limited income tax liability). The same distinction applies in principle to corporations. Corporations having either their place of effective management or their statutory seat in Austria qualify as residents and are subject to Austrian corporate income tax on their worldwide income (unlimited corporate income tax liability). Otherwise they are considered non-residents in which case they are subjected to corporate income tax only on income from certain Austrian sources (limited corporate income tax liability).

<sup>69</sup> cf. the explanatory notes to BIA p.126.

<sup>70</sup> Individuals having either their permanent domicile or their habitual abode in Austria qualify as Austrian residents and are subject to Austrian income tax on their worldwide income (unlimited income tax liability). Otherwise they are considered non-residents in which case they are subjected to Austrian income tax only on income from certain Austrian sources (limited income tax liability). The same distinction applies in principle to corporations. Corporations having either their place of effective management or their statutory seat in Austria qualify as residents and are subject to Austrian corporate income tax on their worldwide income (unlimited corporate income tax liability). Otherwise they are considered non-residents in which case they are subjected to corporate income tax only on income from certain Austrian sources (limited corporate income tax liability).

<sup>71</sup> ITA s.42 para.1 no.4. This applies in particular to capital gains (profits) from securities deposited on foreign securities accounts received by Austrian residents, if there is no paying office located in Austria.

<sup>72</sup> ITA s.27a para.1. cf. explanatory notes to BIA pp.121 and 125.

<sup>73</sup> ITA s.98 para.1 nos 3 and 5 alinea b) and CTA s.7 paras 1, 2 and 3.

<sup>74</sup> ITA s.98 para.1 no.5 alinea a) and e) and CTA s.7 paras 1, 2 and 3.

<sup>75</sup> cf. ITG 2000 paras 7775; see also the guidelines of the Austrian Federal Ministry of Finance regarding the application of CTA for the year 2001, lastly amended on April 6, 2010 (CTG 2001) para.1464.

<sup>76</sup> In such case deducted CPT might be partially or entirely refunded on request.

<sup>77</sup> *EU-Quellensteuergesetz*, Federal Law Gazette I 33/2004 as amended.

<sup>78</sup> It will be increased to 35% on July 1, 2011.