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EAS 2919

**Profit distributions to the Dutch silent partner of an Austrian asset management company**

According to Article 12 para. 1 of the Austro-Dutch Double Taxation Convention the taxation right with respect to profit distributions to a Dutch resident under a silent partnership agreement concluded with an Austrian "enterprise" (an enterprise whose place of management is situated in Austria) is allocated to Austria.

The term "enterprise" is not defined in the Convention so that in accordance with Article 3 para. 2 of the Convention recourse to domestic law has to be taken. Under Austrian domestic law all companies are deemed to carry on a business, regardless whether or not they perform genuine business activities or merely asset holding functions. As a result, Article 12 of the Austro-Dutch tax treaty allocates the taxing right on distributions under silent partnership agreements to Austria also in cases where the distributing Austrian company is a mere asset holding company (vermögensverwaltende Kapitalgesellschaft). The source taxation right granted under Article 12 is executed in Austria under the tax withholding regime which requires the levy of the 25% capital yields tax.

The term "enterprise" is also used in Article 5 of the Convention and it is true that according to the Austrian administrative practice mere asset management is not sufficient to create a permanent establishment under Article 5. However, this interpretation is not based on a denial of the "enterprise-status" to an asset management company but is due to the fact that no "business" (in the sense of business activity - betriebliche Tätigkeit) is carried on at the location. Hence, the interpretation given to the term "permanent establishment" in Article 5 has no repercussion on the interpretation of the term "enterprise" as used in Article 12 of the Austro-Dutch treaty.

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