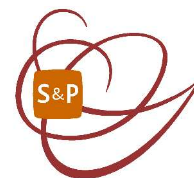

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SINCE 1851

Tax privilege for the self-employed inventor

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June 2004

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Austrian tax law (Section 38, Income Tax Act) provides that revenues derived from the utilisation of patented inventions are privileged by charging half the tax rate. Only the self-employed inventor himself is entitled to this preferential treatment, and it can be claimed neither by the heirs nor by the patent owner, in case the patent owner is not the inventor.

Patented inventions comprise only those inventions for which a granted and valid patent exists. Revenues from the utilisation of utility models do not enjoy tax privileges. The reason for this is the fact that in Austria as well as in many other countries utility models are not examined by the Patent Office for novelty and inventive step, i.e. these inventions are not considered to be legally ensured innovations. However, it should be mentioned that, in addition, research work enjoys tax privileges in the form of the tax-free allowance for research (Section 4(4) 4 and 4a, Income Tax Act).

For calculating the half tax rate for revenues derived from the utilisation of patented inventions, first of all the regular income tax for the total income (including revenues from the patent utilisation) is calculated. Half of the average tax rate calculated therefrom is then used to calculate the taxes to be levied on that income which originates from the revenues derived from the patent utilisation.

Tax previliged are revenues arising from the sale as well as from the licensing of a patent. Thereby the revenues (= income less the expenses incurred therefor) must be derived from the utilisation of the invention by a third party and not by the inventor himself. Third parties can be corporations and partnerships, involving also the inventor. The one-man business of the inventor therefore is not regarded as a third party, whereas the business of another person is, even if the other person is a close relative of the inventor.

Payments made by corporations (joint-stock companies and limited liability companies) to the inventor for using his invention are completely, i.e. 100%, tax privileged, irrespective of the extent to which the inventor participates in the corporation. However, if the inventor participates in the corporation and the remuneration for the inventor is higher than usual, a hidden profit distribution exists which does not enjoy tax privileges.

If the invention is utilised by a partnership, the extent of the tax privilege will depend on the extent to which the inventor participates in the partnership, whether or not a special remuneration has been paid by the partnership, and to which extent the revenues originate from persons other than the partnership. If the inventor-partner does not obtain a special remuneration for his invention from his own partnership, only those revenues will enjoy tax privileges which are paid by other persons to the partnership for the utilisation of the

patent, i.e. if the partnership sells the patent or grants licences to others. Then that percentage of the inventor-partner's income originating from the patent utilisation revenues will be privileged which corresponds to his share. If, however, the partnership pays the inventor a special remuneration, this remuneration in its entirety will enjoy tax privileges as long as this remuneration originates from the incomes of others. Yet if this remuneration is paid from the partnership's income originating from their own commercial utilisation of the patented invention, such remuneration will not be privileged to the percentage of the inventor's participation in the profit, but only what is in excess thereof. Of course, also a combination is possible, for instance that the partnership pays licence fees to the inventor-partner for their own utilisation of the patent and, furthermore, portions of revenues originating from sublicenses granted.

The revenues will only be tax privileged if they originate from a time period when the invention was protected by a patent, irrespective of the date of conclusion of the contract. At present, the beginning of the patent protection is considered to be that date at which the first application (priority date) of the tax-privileged invention occurred. In any event, the term of protection of a patent will end 20 years after the application has been made, or else by non-payment of an annual fee, by a renunciation of the patent by its proprietor, or by an annulment. If the utilisation occurs abroad, it will be sufficient for the invention to be protected by a patent in Austria. This is also applicable if the invention is not patentable abroad, e.g. if a patent is denied abroad. If the invention is only patented abroad, only revenues originating from the utilisation abroad will be tax privileged. In such a case, revenues derived from a utilisation in Austria and in other countries cannot enjoy the privilege of the half tax rate.

Proof of a valid patent protection shall be provided by the presentation of an excerpt from the register of patents of the Austrian Patent Office and has to be submitted for each assessment period. For foreign patents, proof has to be provided according to the respective national law. If at first only a patent application is available and a patent has not yet been granted for the invention, the privileged tax rate can be applied temporarily for the respective revenues. For, if at last no patent is granted for the invention for which the patent application has been filed, the reduced tax rate can by no means be granted for revenues resulting from the utilisation of this invention. In case of such a provisional assessment,the income tax payer is required to promptly inform the fiscal authorities about the result of the patent application proceedings.

Conclusion:
Based on this legal situation, it is in any event recommendable for a self-employed Austrian inventor to maintain a patent (not a utility model) valid in Austria for the time period during which revenues are received for the utilisation thereof in order to benefit from tax privileges for revenues originating from the worldwide utilisation of his inventions. This means also that initially in any case a patent application should be filed in Austria. Furthermore, it is recommendable that the inventor who at the same time is a partner in the company, stipulate a special remuneration for allowing the partnership to utilise his patent (or patent application), which remuneration must, however, be kept within justifiable limits. It is irrelevant whether the inventor himself is also applicant or proprietor of the patent. He should, however, at least be named as inventor, and his written consent to a utilisation of his invention by others, including an agreement regarding his remuneration, should be well documented.