**Study on Aggressive Tax Planning**

*Specific contract No13 under FWC TAXUD/2012/CC116*

**Appendix 1 - Questionnaire to national tax experts**

**Filled in for Austria**





**QUESTIONNAIRE**

**Austria**

## Abbreviations

* AG – Aktiengesellschaft: Stock Corporation
* BAO – Bundesabgabenordnung: Federal Fiscal Code
* BGBl – Bundesgesetzblatt: Federal Gazette
* EAS: Express Answer Service of the Austrian Ministry of Finance
* EStG – Einkommensteuergesetz: Income Tax Act
* EStR – Einkommensteuerrichtlinien: Income Tax Guidelines of the Austrian Ministry of Finance
* GmbH – Gesellschaft mit beschränkter Haftung: Limited Liability Company
* KStG – Körperschaftsteuergesetz: Corporate Income Tax Act
* VPR – Verrechnungspreisrichtlinien: Transfer Pricing Guidelines of the Austrian Ministry of Finance

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| Questions | Answers |
| *Corporate tax rate* | |
| 1. What is the standard rate of corporate income tax applicable for the fiscal year 2015? | 25 %. |
| 1. Some states offer special offshore tax regimes, providing for corporate tax-exemption of certain mobile income types (e.g. royalty) from abroad. Does your MS offer such a tax regime? If yes, please briefly explain, including the conditions to be met. | No |
| *Dividends received* | |
| 1. Is it possible for a company in your MS to receive dividends from a foreign company free of tax (or at a greatly reduced rate of tax, e.g. 95% tax-exemption)? | Yes, if certain requirements are met (see question 4.), dividends can be received tax exempt. |
| 1. If yes to question 3: |  |
| 1. Does this apply regardless of the tax residence of the distributing company, e.g. Member State, treaty state, tax haven? | I. Participation exemption regime  Dividends from shares >= 10 % are, in general, tax exempt regardless of the tax residence of the distributing company. However, both the shareholder and the distributing company have to meet certain requirements for this regime to apply. The shareholder has to be subject to the commercial accounting rules due to its legal form. The distributing company, on the other hand, must be either (1) comparable to an Austrian AG or GmbH or (2) a company listed in the Annex of the Parent-Subsidiary Directive (cf. section 10(2) KStG [corporate income tax act]).  However, in the case of possible abuse there is a switch-over provision according to which such dividends are not tax exempt, but instead an indirect tax credit is provided (cf. Section 10(4) and 10(6) KStG). An abuse is considered to be at hand particularly if the distributing companies’ main business focus is to generate “passive income” (interest, royalties, capital gains, certain kind of rental income) AND the distributing company is subject to “low taxation”. Low taxation is assumed if the average tax burden relating to the distributing company’s income (calculated according to Austrian rules) is below 15 % (cf. BGBl II 295/2004).  II. Exemption regime for portfolio dividends  If the participation exemption regime does not apply, dividends (so-called portfolio dividends) are still tax exempt provided that the distributing company either (1) meets the requirements of Art. 2 Parent-Subsidiary Directive (cf. section 10(1)(5) KStG) or (2) is comparable with a domestic company that would be – due to its legal form – subject to the commercial accounting rules and, moreover, is resident in a country with which Austria has concluded a comprehensive agreement on exchange of information in tax matters (cf. section 10(1)(6) KStG).  However, there is a switch-over provision according to which such dividends are not tax exempt, but instead an indirect tax credit is provided (cf. Section 10(5) and 10(6) KStG). The switch-over provision applies if (1) the foreign distributing company is neither directly nor indirectly subject to a foreign tax that is comparable with the Austrian corporate income tax, or (2) the profits of the foreign distributing company are subject to a foreign tax that is comparable with the Austrian corporate tax, but the applicable (nominal) tax rate is below 15 %, or (3) the foreign distributing company is subject to a comprehensive personal or objective tax exemption. |
| 1. Does this apply regardless of the level of shareholding or voting rights held in the distributing company? | I. Participation exemption regime  The shareholding has to be at least 10 %. The shares have to be held for at least one year, but the regime would already apply within that year, if – overall – the holding period requirement is fulfilled. There is no minimum voting rights requirement.  II. Exemption regime for portfolio dividends  There is no minimum holding requirement, no minimum voting rights requirement and no minimum holding period requirement. |
| 1. Does this also apply if the dividends have been deducted by the distributing company in its taxable income? | No, i.e. dividends deducted by a foreign (not by domestic) distributing company are fully taxable; no switch-over (cf. Sec. 10 (7) KStG). |
| 1. If yes to b, how will the recent amendment of Article 4 of the EU Parent/Subsidiary Directive, which requires Member States to tax dividends if they have been deducted by the subsidiary, affect your answer? | The rule introduced by the amendments is already part of Austrian law (cf. Sec. 10(7) KStG). |
| *Dividends paid* | |
| 1. Is it possible for a company in your MS to distribute dividends to a foreign company without any withholding tax? | Yes, if the receiving company meets the requirements of Art. 2 Parent-Subsidiary Directive and the shares have been held for at least one year (cf. Sec. 94(2) EStG [income tax act]). |
| 1. If yes to 5, |  |
| 1. Does this apply regardless of the amount or percentage of shares, which the foreign company holds? | No. This only applies if the receiving company holds at least 10 % of the Austrian distributing company’s share capital (cf. Sec. 94(2) EStG). |
| 1. Does this apply regardless of the tax residence of the foreign company, e.g. member state, treaty state, tax haven? | No. The receiving company has to meet the requirements of Art. 2 Parent-Subsidiary Directive. |
| 1. Is the withholding tax exemption subject to a beneficial ownership requirement similar to that of the OECD model tax convention? | To combat tax avoidance (especially “directive shopping”), the exemption from withholding tax by immediate exemption at source is in certain cases only received by the method of tax refund. Whether tax avoidance is at hand has to be determined in line with the Austrian GAAR (cf. Sec 22 BAO). In general, this is not based on the beneficial ownership requirement of the OECD MC.  No tax avoidance will be assumed by the tax authorities, if the subsidiary company possesses an undoubted declaration of the parent company stating that the activities of the parent go beyond the mere administration of assets, the non-resident company employs its own staff and has a business office at its disposal (cf. BGBl II 56/1995). |
| 1. Is the withholding tax exemption subject to any other anti-avoidance requirements, e.g. based on substance of the recipient? If yes, please briefly explain. | No (see already 6. c)). |
| 1. Is any other tax levied upon a distribution of a dividend by a company in your MS? | No. |
| 1. Are dividend equivalents (typically a buy-back of shares, a capital reduction-payment or a payment of liquidation proceeds) treated in a similar way as dividends and subject to withholding tax when paid to a foreign company? Please refer to question 4 and 5 above. | It depends on whether the “dividend equivalent” is considered to be a “dividend” as defined by the Austrian income tax act (cf. Sec. 27(2)(1)(a) EStG). If yes, then the rules already described apply accordingly. However, liquidation proceeds (cf. Sec. 27(6)(2) EStG) as well as a capital reduction-payments (cf. Sec. 4(12) EStG), for example, are treated like capital gains. Nevertheless, capital gains are also subject to the withholding tax regime, if there is domestic custodian bank (or a domestic branch of a bank) or a domestic disbursing body. However, the withholding tax exemption regime for dividends (see already 5. And 6.) does not apply in the case of capital gains. There is another way of avoiding a withholding tax to be levied at source. The receiving company has to explain – and provide evidence of its identity – to the person that is obliged to withhold the tax that the capital gains are part of the business income of a domestic or a foreign business and, furthermore, the person that would be obliged to withhold the tax has to transfer this written statement to the competent tax office (cf. Sec. 94(5) EStG). |
| *Interest income* | |
| 1. Is interest income from a loan granted by a company in your MS to a foreign group member company taxable? | Yes (cf. Sec. 7(2) and 7(3) KStG as well as Sec. 23(1) [respectively Sec. 27(2)(2) EStG]). |
| 1. If such a loan is granted free of interest (i.e. on non-arm’s length-conditions), would the creditor company resident in your MS have to include any deemed interest income in its taxable income? When responding, please consider Model ATP-Structure no. 4 and assume that FinanceCo B is tax resident in your MS. | Yes. The creditor company must include an arm’s length interest income (a deemed interest income) in its taxable income (cf. Sec. 6(6) EStG and Sec. 8(1) KStG). |
| 1. Is it possible that an interest bearing financial instrument (hybrid loan) granted by a company resident in your MS to a foreign group member company could be qualified as an equity investment in your MS with the result that the return on the investment (treated as deductible interest in the state of the debtor company) is considered a tax exempt dividend or similar? When responding, please consider Model ATP-Structure no. 2 and assume that B Holdco is tax resident in your MS (regardless of the non-MS assumption in the description of the Model). | Although it is possible that a hybrid loan is considered to be equity for tax purposes in Austria whereas it is treated as debt in another MS, the return on the investment would not be tax exempt in Austria, if it is treated as deductible interest in the state of the debtor company (cf. Sec. 10(7) KStG). |
| 1. If yes to 11, |  |
| 1. Please briefly explain which requirements should be fulfilled. | N/A |
| 1. How will the amendment of Article 4 of the EU Parent/Subsidiary Directive affect your answer? | N/A |
| *Interest costs* | |
| 1. Are inter-group interest payments on a loan granted by a foreign group member company tax deductible to a resident in your MS? | Yes. Interest paid on loans which are economically connected with any type of income or used for the purchase of business assets is generally deductible. |
| 1. If yes to 13, |  |
| 1. Does the tax deductibility depend on how the interest income is qualified for tax purposes in the creditor’s state? If yes, please briefly explain. | To a certain extent, yes. If the creditor’s state considers the income to be a tax-exempt dividend, the interest payment would not be deductible in Austria (cf. Sec. 12(1)(10) KStG). |
| 1. In particular, would your MS still allow a tax deduction if the creditor state treats the corresponding interest income as a non-taxable dividend or similar, i.e. if the loan is a hybrid loan? When responding, please consider Model ATP-Structure no. 2 and assume that C Holdco is tax resident in your MS. | No (cf. Sec. 12(1)(10) KStG). |
| 1. Is the tax deduction of interest cost on inter-group debt subject to any thin capitalisation-rules or other interest deduction limitations-rules? | Yes. |
| 1. If yes to 15 |  |
| 1. Please briefly explain the general scope and mechanism of the rules. | Interest is not deductible if it is incurred to generate tax-free income, such as tax-exempt dividends (cf. Sec. 12(2) KStG). However, interest on loans taken to acquire shareholdings in resident or non-resident companies is deductible even where the participation exemption applies (cf. Sec. 11(1)(4) KStG). This does not apply to any other expenses. However interest on loans taken to acquire shares that are not part of the business assets of the buyer or to acquire shares directly or indirectly from a company which is part of the same group of companies as the acquiring company is not deductible (cf. Sec. 12(1)(9) KStG). The deduction is also not granted if the shares are acquired directly or indirectly from a shareholder with a controlling influence over the acquiring company. The same principles apply to debt-financed capital increases or subsidies linked to the acquisition of shares acquired directly or indirectly from a company being part of the same group or from a controlling shareholder (cf. Sec. 12(1)(9) KStG).  Further interest paid to a resident or non-resident corporate entity which is directly or indirectly part of the same group or directly or indirectly controlled by the same shareholder will not be deductible anymore if (1) the income of the recipient is not taxed due to a personal or objective tax exemption, or (2) subject to a nominal tax rate of less than 10%, or (3) due to a tax relief, which is also (!) provided for interest income, subject to an effective tax rate of less than 10%, or (4) due to a tax refund, either for the receiving company or for the shareholders (cf. the system in Malta), subject to an effective tax rate of less than 10% (cf. Sec. 12(1)(10) KStG). |
| 1. In particular, do the rules apply only to interest costs on inter-group debt or more generally to all interest costs? | Sec. 12(2) KStG: applies to all costs (not only interest)  Sec. 12(1)(9) KStG: applies to all intra-group interest costs  Sec. 12(1)(10) KStG: applies to intra-group interest and royalties as defined in the interest and royalties directive. |
| 1. Do the rules take into account the worldwide debt ratio of the group of companies? | No. |
| 1. In general, how effective do you consider these rules in countering ATP? When responding, please consider Model ATP-Structures 1 – 4 and assume that C Holdco, B Hybrid and OpCo are tax resident in your MS. | ATP-Structure 1: It depends whether B Holdco is the beneficial owner of the interest income. If not, the income would be attributed to OffshoreCo and since this company is tax exempt, the interest would not be deductible in Austria (cf. Sec. 12(1)(10) KStG).  ATP-Structure 2: Since B Holdco treates the payment as an tax-exempt dividend, the interest would not be deductible in Austria (cf. Sec. 12(1)(10) KStG).  ATP-Structure 3: It is unclear whether this situation would be covered by Sec. 12(1)(10) KStG. If not, the Austrian GAAR might be applicable, depending on the concrete circumstances (cf. Sec. 22 BAO [federal fiscal code]). Otherwise, the interest would be deductible.  ATP-Structure 4: As in ATP-Structure 1, it first depends whether FinanceCo D is the beneficial owner of the interest income. If not, the income would be attributed to FinanceCo B. However, it is unclear whether the missing corresponding adjustment in MS B would trigger Sec. 12(1)(10) KStG.  Overall, the Austrian rules are effective with regard to ATP-Structures 1 and 2, whereas it is not yet clear whether ATP-Structures 3 and 4 would be covered by the Austrian “anti-ATP rules”. |
| 1. If a loan is granted free of interest (non-arm’s length-condition) by a foreign group member company, could a debtor company resident in your MS claim any tax deduction for a hypothetical (deemed) interest cost? When responding, please consider Model ATP-Structure no. 4 and assume that FinanceCo C is tax resident in your MS. Moreover, please explain whether any deemed deduction would be contingent on a corresponding adjustment in the foreign state. | Yes. In general, the deemed deduction is not contingent on a corresponding adjustment in the foreign state.  If the foreign state – based on Art. 9 of the respective tax treaty - increases the foreign group member company´s taxable profit by the deemed arm´s length interest income, Austria will correspondingly recognize a deemed arm´s length interest expense at the level of the Austrian resident debtor company. However based on the GAAR, Austria does not allow for a deduction of the deemed interest cost, if there is no corresponding adjustment abroad and if the transaction is qualified as abusive and artificial or if the „loan“ is considered as a „hidden equity“ (cf. Sec. 22 BAO; see also EStR 2000, Rz 2518; VPR 2010, Rz 6; EAS 974 [2. 12. 1996]; EAS 2109 [2. 9. 2002]). |
| 1. Would the benefit of such a loan compared to a normal interest-bearing loan on arm’s length conditions be taxable to the debtor company in your MS? If yes, how? | No, it would be considered as a tax-neutral “hidden” capital contribution of the creditor company (cf. Sec. 8(1) KStG). |
| 1. Does your MS levy any withholding tax on interest payments? | No. |
| 1. If yes to 19 | N/A |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | N/A |
| 1. Are there special withholding tax rules for interest paid on a loan from a group member company? | N/A |
| 1. Does this apply regardless of the tax residence of the creditor company, e.g. member state, treaty state, tax haven? | N/A |
| 1. In connection with an exemption, reduction or refund of withholding tax under a tax treaty or the EU Interest/Royalty Directive, is it common tax practice to apply a beneficial ownership requirement similar to that of the OECD model tax convention? | N/A |
| 1. Is such exemption, reduction or refund subject to other anti-avoidance requirements? If yes, please explain briefly. | N/A |
| *Allowance for corporate equity* | |
| 1. Does your MS offer any tax deduction for a notional (fictitious) interest cost on the share capital of a company? If yes, please briefly explain and include any anti-avoidance provisions. In particular, can the deduction be claimed against financial income? | No. |
| 1. Does your MS offer any tax deduction for dividends declared or paid? If yes, please briefly explain. | No. |
| *Royalty and other income from intangible property* | |
| 1. Please consider Model ATP-Structure no. 5 and assume that Company B is tax resident in your MS. Does your MS offer any preferential tax regime (compared to the standard corporate income tax) for income from patents and other intellectual property rights? If yes, please briefly explain its main scope, characteristics and any anti-avoidance provisions. In particular, can the preferential tax treatment be applied to income from patents or other IP which has not been developed by the taxpayer (company) itself? Must the company have its own substantial R&D activities? Can the preferential tax treatment be applied also to income from other taxpayers in your MS? | There is no preferential tax regime for income from patents or other intellectual property rights in Austria. |
| 1. Can a company in your MS obtain R&D tax credits (typically enhanced tax deduction or tax refund) for costs incurred, e.g. in developing IP rights? | Until 2011, there was a tax-exempt amount that was granted if actual R&D expenses have been incurred. However, since 2011, the only tax incentive remaining for R&D activities is an “invention premium” (Forschungsprämie) (cf. Sec. 24(6) KStG and Sec. 108c EStG) of 10 % of the expenses for in-house R&D activities and – capped with an amount of EUR 1.000.000 – for contract R&D activities.  As of 2016 the premium rate is 12 %. |
| 1. If yes to 24, |  |
| 1. Please briefly explain the requirements which have to be met, e.g. requirements for certain activity or successful development, etc. | It is only considered to be a R&D activity, if it is conducted systematically and by using scientific methods. The aim has to be to increase the status of knowledge and develop new application for this knowledge. The R&D activities have to be conducted in an Austrian business or an Austrian PE.  In the case of contract R&D, further requirements have to be met: (1) The R&D activities have to be contracted out by an Austrian business or an Austrian PE. (2) Only intra-EU or intra-EEC facilities are entitled as contractual partners. These facilities also have to be concerned with research activities or experimental development activities. (3) The contractor must not be a controlled by the ordering party. Furthermore, both parties must not be member of a tax group (cf. Sec. 9 KStG). (4) Only expenses in the amount of a maximum of EUR 1.000.000 are eligible for the premium. (5) With regard to the activities, for which the ordering party claims an invention premium, the contractor cannot claim an invention premium on its own. (6) Expenses for in-house R&D activities exclude the enforcement of an invention premium for contract R&D activities. |
| 1. Can such credits also be obtained for costs that are ultimately reimbursed by a group member company to the company in your MS? | There is no special rule that would exclude that. However, in the case of contract R&D, it has to be kept in mind that the contractor and the ordering party must not be members of the same tax group in the sense of Sec. 9 KStG.  In order to claim the "invention premium" for contract R&D, the R&D activities have to be contracted out by an Austrian business or an Austrian PE. However, in ATP-Structure 7 this does not seem to be the case, since Company B neither has an Austrian business nor a PE in Austria. Therefore, Company B would not be entitled to claim the "invention premium". It has to be kept in mind, however, that according to Section 108c(2)(2) mark line 5 EStG, MNE Group is prevented from claiming the "invention premium" itself only insofar as the ordering party (here: Company B) notifies the contractor (here: MNE Group) about the amount of expenses for which the ordering party makes use of the "invention premium". In ATP-Structure 7, Company B is not entitled to claim the "invention premium". Therefore, MNE Group can claim the "invention premium" itself (cf. EStR 2000, Rz 8209b-8209c), if all other requirements of Section 108c EStG are fulfilled.  However, since MNE Group is part of the CCA, the question arises whether - and if yes, how - this influences the cost allocation within the CCA. In the literature, it is disputed whether the "invention premium" reduces the costs that have to be allocated among the members of the CCA or whether - because it is a premium and therefore does not directly reduce the R&D expenses - the respective pool member itself (here: MNE Group) and alone fully benefits from the "invention premium". The Austrian Transfer Pricing Guidelines are not precise in this respect (VPR 2010, Rz 120). Overall, the legal situation is therefore not completely clear. Practitioners recommend taking this aspect into consideration within the CCA contract by including a specific clause dealing with this issue. |
| 1. Can a company in your MS transfer ownership of a patent, trademark or other IP right to a foreign group member company without incurring capital gains tax? When responding, please consider Model ATP-Structure no. 5 and assume that MNE Group is tax resident in your MS. Please also assume that the IP has no significant fair market value at the time it is transferred but it becomes highly valuable shortly (1-2 years) after. | No. Taxation would be based on the market value of the IP right at the time of the transfer. A later increase in market value will not result in a reopened tax assessment unless there are strong indications that the market value was higher already at the time of the transfer. |
| 1. If no to 26, i.e. your MS would impose tax on the disposal, |  |
| 1. Is the relevant capital gains tax rate lower than the standard rate? | No. |
| 1. Does taxation arise as a result of an anti-abuse provision or similar? | No. Selling a patent, trademark or other IP rights triggers capital gains taxation in the same way as selling movable property would. Between related parties, the arm’s length principle has to be adhered to. |
| 1. Would any R&D tax credits obtained in the past be reversed upon a disposal? | No. |
| 1. Can a ruling confirming the value of the IP be obtained? | Only if it concerns a question of transfer pricing (cf. Sec. 118 BAO). |
| *Royalty and other IP costs* | |
| 1. Is royalty paid by a company in your MS to a group member company in another MS or for utilization of IP tax deductible? | Yes. Royalty payments for the use of patents, copyrights, secret plans or processes, commercial or industrial know-how and similar intangible property (whether or not protected) are deductible by the payer company. Excessive royalty or service fee payments to shareholders or affiliates are treated as non-deductible hidden profit distributions (cf. Sec. 8(2) KStG). |
| 1. If yes to 28, |  |
| 1. Is the tax deduction dependent on whether the royalty income is taxed in the hands of the IP-licensor/IP-owner? | Royalties paid to a resident or non-resident corporate entity which is directly or indirectly part of the same group or directly or indirectly controlled by the same shareholder are not deductible if (1) the income of the recipient is not taxed due to a personal or objective tax exemption, or (2) subject to a nominal tax rate of less than 10%, or (3) due to a tax relief, which is also (!) provided for royalty income, subject to an effective tax rate of less than 10%, or (4) due to a tax refund, either for the receiving company or for the shareholders, subject to an effective tax rate of less than 10% (cf. Sec. 12(1)(10) KStG). |
| 1. Are there types of royalty payments which cannot be deducted? | No. |
| 1. Does your MS levy any withholding tax on royalty payments? | Yes (cf. Sec. 99(1)(3) EStG). This concerns particularly payments for the use of, or the right to use, e.g. patents, trademarks, designs or models, copyrights, plans, secret formulas or process or information concerning industrial, commercial or scientific experience. |
| 1. If yes to 30, |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | 20 % (35 % if the recipient is an individual person who has opted for deduction of related expenses) (cf. Sec. 100 EStG). |
| 1. Are there types of royalty payments which are not subject to withholding tax? | Under the domestic law provisions implementing the EU Interest and Royalties Directive, outbound interest and royalty payments are exempt from withholding tax, provided that the beneficial owner of the interest is an associated company of the paying company and is resident in another Member State or such a company’s permanent establishment situated in another Member State (cf. Sec. 99a EStG). |
| 1. In connection with an exemption, reduction or refund of withholding tax under a tax treaty or the EU Interest/Royalty Directive, is it common tax practice to apply a beneficial ownership requirement similar to that of the OECD model tax convention? | Yes. Both the domestic law provisions implementing the EU Interest and Royalties Directive (cf. Sec. 99a EStG) as well as the Austrian tax treaties, typically, include a beneficial ownership requirement similar to that of the OECD model tax convention. |
| 1. Is the tax exemption/reduction/refund subject to any other anti-avoidance requirements, e.g. based on a test of the substance of the recipient? If yes, please explain briefly. | All transactions may be scrutinized with regard to whether they are abusive (cf. Sec. 22 BAO). Whether there is enough substance or not may be an indication of abuse. However, abuse can only be determined based on all the facts and circumstances. |
| *Group taxation* | |
| 1. Does your MS allow for group taxation of local group member companies with the effect that profits and losses of different companies are set-off against each other? If yes, please briefly explain. (Please note that group taxation also includes other standard arrangements offered to replicate the benefits of group taxation, e.g. group contributions from a profitable company to a loss-making group member company). | Yes. In general, group taxation requires a – direct or indirect – participation of more than 50 % and a minimum group taxation period of 3 years.  To be eligible for group taxation, the subsidiary must be a resident stock company (AG), limited liability company (GmbH) or cooperative, or a comparable non-resident company. With effect from 1 March 2014, foreign companies are only entitled to join an Austrian tax group if the foreign company is resident in (i) an EU Member State or (ii) in a third country with which Austria has concluded a comprehensive administrative assistance agreement regarding the exchange of information.  As a consequence of group taxation, the total profits or losses of a group subsidiary (second-tier group member) are attributed to the group parent (first-tier group member), irrespective of the extent of the shares held. With regard to foreign group subsidiaries (second-tier group member), however, only losses are attributed to the group parent and only to the extent of the shares held. Furthermore, such foreign losses can only be taken into account up to the amount of 75 % of all domestic group members’ income. Moreover, foreign losses are subject to a recapture mechanism.  The Austrian group taxation regime is optional. It can be freely decided which - domestic or foreign - subsidiaries should be included as group members, as long as the requirements for including them are fulfilled (in detail, the rules are, more complex than outlined above). Therefore, it is also possible to only include certain subsidiaries, but not to include others. Be aware, though, that foreign sub-subsidiaries (meaning that a foreign subsidiary owns more than 50 % of the shares as well as the voting rights (!) in another foreign company) cannot be included. Foreign subsidiaries can hence only be included if more than 50 % of the shares as well as the voting rights are - directly or indirectly - held by an Austrian resident company (but not if more than 50 % of the shares as well as the voting rights are held by a non-resident group member). |
| 1. If yes to 32, is group taxation restricted in situations where a (holding) company has solely been inserted in connection with a leveraged acquisition of the operating company (so-called debt push-down)? When responding, please consider Model ATP-Structures no. 1 – 3 and assume that C Holdco and B Hybrid are tax resident in your MS. | No. However, depending on the circumstances, it might be an issue whether this constitutes abuse (cf. Sec. 22 BAO). In this case, the shares in the Target would be deemed to have been acquired directly by B Holdco (1, 2) or by MNE Group (3). |
| *CFC rules* | |
| 1. Does your MS apply CFC rules to foreign subsidiaries of a parent company in your MS? | No. |
| 1. If yes to 34, please briefly explain the rules and their scope. | N/A |
| 1. Please consider the attached Model ATP-Structures no. 1, 2 and 4 - 6. Assuming that MNE Group is tax resident in your MS, would your MS’s CFC-rules be applied to the structures? If yes, what would be the likely effects? | N/A |
| *Mismatch in qualification of legal entities* | |
| 1. Does your MS’s tax qualification of a foreign legal entity (e.g. a partnership) follow that of the foreign state, or does it apply its own criteria? Please briefly explain. When responding, please consider Model ATP-Structure no. 3 and assume that MNE Group is tax resident in your MS. | The qualification of a foreign legal entity is based on the so-called “Typenvergleich”, i.e. a comparability test is applied, which determines the comparability of the non-Austrian entity with Austrian legal entities of private law at an economic and legal level. The comparability test is applied on a case-by-case basis and does not consider the tax status in the other country and the legal personality under foreign laws to be decisive for the qualification of the entity. |
| 1. Does your MS apply rules to counter another state’s mismatch in tax qualification of a legal entity (company) resident in your MS? If yes, please briefly explain the rules and their scope. When responding, please consider Model ATP-Structure no. 3 and assume that B Hybrid is established and tax resident in your MS. | No. |
| 1. Does your MS apply rules to counter another state’s mismatch in tax qualification of a transparent entity (partnership or similar) in your MS? If yes, please briefly explain the rules and their scope. | No. |
| *Tax residence of company* | |
| 1. Based on domestic tax rules, without the application of any tax treaty, can a company incorporated in your MS be considered non-tax resident if its management and control is situated in another state? If yes, please explain under which circumstances. | A company is resident if it has either its legal seat (place which is designated as such in its statutes) or its place of effective management in Austria. For the place of effective management test, the location of the strategic management (i.e. where the leading decisions are made), and not that of the day-to-day management, is decisive. So if a company’s management and control is situated in another state, it would still be subject to unlimited tax liability, if its seat is in Austria. |
| 1. If yes to 40, please consider Model ATP-Structure no. 6. Would the Structure work if Company B1 is incorporated in your MS but managed and controlled abroad in an offshore-state? | N/A |
| *Tax ruling practices* | |
| 1. Some states offer tax rulings (incl. so-called APAs) that confirm non-arm’s length-transactions or the amount of spread between interest or royalty income and cost in various international flow through-structures. As an example, please refer to Model ATP-Structure no. 1. Does your MS offer this form of tax ruling practices or APAs? | No. You can apply for a ruling with regard to transfer pricing issues (cf. Sec. 118 BAO). However, such a ruling would not confirm non-arm’s length transactions or abusive transactions. |
| 1. Do your local transfer pricing-rules allow for the stripping of income from a domestic company by taking away legal ownership of functions, assets and risks? In other word, is it accepted that relatively small amounts of the group’s income is taxed in your MS on the basis of low risk, few assets held and only few functions performed in your MS? | In theory yes, if the income assessment is in accordance with the OECD’s arm’s length principle. The view of the Austrian Ministry of Finance is demonstrated in the “Guidelines on Transfer Pricing”  (Verrechnungspreisrichtlinien, VPR 2010). |
| 1. Can a company in your MS obtain a ruling or APA that a) provides for tax exemption of profits considered to exceed an arm’s length-income or considered to have been left to the company by its shareholders (capital contribution), or b) provides for the deduction of deemed expenses that would have been due under arm-‘s length conditions? | Generally, although the ruling practice in Austria is rather young, I suppose the ruling would be based on how to achieve arm’s length conditions, rather than stating what would happen, if the transaction was not at arm’s length.  a) In principle, yes. If, for example, a foreign subsidiary pays interest to its Austrian parent company which exceeds the arm’s length amount, the ruling would consider the arm’s length amount as taxable interest income and the exceeding amount as a “hidden profit distribution”, which is treated as a dividend according to Austrian domestic rules (see questions 3. and 4.). If, for example, a foreign parent company pays interest to its Austrian subsidiary which exceeds the arm’s length amount, the ruling would consider the arm’s length amount as taxable interest income and the exceeding amount as “hidden capital contribution”, which is treated as a capital contribution according to Austrian domestic rules, i.e. it is, in principle, to be disregarded for tax purposes (cf. Sec. 8(1) KStG).  b) If a transaction is not at arm’s length, the deduction of deemed expenses is possible (see, already, question 17.). |
| *GAAR/SAAR* | |
| 1. Please consider Model ATP-Structures no. 1-7. Are you aware of any general or specific anti-avoidance rules or practice in your MS which could impede or counter the ATP objective of any of the structures? If yes, please describe briefly the scope of the rules/practice and how they could be applied to each of the structures. | The Austrian GAARs/SAARs that might be relevant in those cases have already been described in the previous sections. |
| *Other ATP indicators* | |
| 1. Are you aware of any tax rules, tax practice or lack of tax rules (loopholes) – other than those discussed in the preceding answers - which could facilitate your MS’s role in ATP? If yes, please briefly explain. | No. |