**Study on Aggressive Tax Planning**

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

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

**Filled in for Belgium**





**QUESTIONNAIRE**

**Belgium**

## Abbreviations

**ITC: Income Tax Code**

|  |  |
| --- | --- |
| Questions | Answers |
| *Corporate tax rate* | |
| 1. What is the standard rate of corporate income tax applicable for the fiscal year 2015? | Up to 33.99 % (Constitute the maximum tax rate of 33 % and the surcharges of 3 %)  Under certain conditions, this maximum tax rate is progressively applied for specific types of companies up to 322.500 € of taxable income (see art. 215 of the ITC). |
| 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, as 95 % of the dividends may be tax exempt, cf. art. 204-205(2) of the ITC.  Dividends that qualify for the participation exemption (i.e. the 95 % dividend deduction) are first included in the taxable income. Then 95 % of the dividends are deducted from the taxable income. If the recipient company is in a loss position or its available profits are insufficient, the qualifying dividends may be deferred to later tax periods (see art. 205(3) of the ITC). |
| 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? | No, as dividends covered by the participation exemption (i.e. the 95 % dividend deduction) are subject to the following qualitative restrictions:   * The distributing company must be subject to similar tax in its country of residence as the Belgian corporate income tax (the rule is aimed at offshore tax regimes and preferential tax regimes or tax havens). * Dividends from treasury companies (as defined in art. 2(1)(5°)(e) of the ITC) are restricted * Dividends distributed by a company with offshore income, benefiting from a beneficial tax regime that differs from the ordinary tax regime in its country are restricted, cf. art. 203(1)(2°) of the ITC.   Dividends paid from companies resident in an EU member states are not subject to the above mentioned restrictions. |
| 1. Does this apply regardless of the level of shareholding or voting rights held in the distributing company? | No, as dividends covered by the participation exemption (i.e. the 95 % dividend deduction) are subject to the following qualitative restrictions:   * The parent company must own at least 10 % of the capital of the subsidiary or an investment value of at least 2.5 million EUR in the subsidiary. * The parent company must have full legal ownership of the shares for at least 1 year before dividends are distributed (uninterrupted period). If the ownership is less than 1 year when dividends are distributed the parent must undertake to maintain its ownership until the expiry of the 1-year period to apply the exemption regime. |
| 1. Does this also apply if the dividends have been deducted by the distributing company in its taxable income? | N/A |
| 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? | N/A |
| *Dividends paid* | |
| 1. Is it possible for a company in your MS to distribute dividends to a foreign company without any withholding tax? | Yes, cf. art. 106(5) and (6bis) RD ITC. |
| 1. If yes to 5, |  |
| 1. Does this apply regardless of the amount or percentage of shares, which the foreign company holds? | No. The parent company must have a shareholding of at least 10 % for at least 1 year. A provisional exemption from withholding tax is granted where shares have not been owned for at least 1 year when dividends are distributed, cf. art. 106 (5) and (6bis) of the RD ITC. |
| 1. Does this apply regardless of the tax residence of the foreign company, e.g. member state, treaty state, tax haven? | No. Dividends can only be distributed without any withholding tax, if the foreign shareholder company is resident in an EU member state or in a country, with which Belgium has an effective double tax treaty providing for exchange of information, cf. art. 106 (5) and (6bis) of the RD ITC.  Further, the parent company must be subject to corporate income tax or other similar tax, without being entitled to any tax regime which deviates from the general law (subject-to-tax test), cf. art. 106(5) of the RD ITC. |
| 1. Is the withholding tax exemption subject to a beneficial ownership requirement similar to that of the OECD model tax convention? | No |
| 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 |
| 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. | Yes. All income from shares and corporate rights, other than repayments of capital, and liquidation revenue is treated in a similar way as dividends, cf. art. 18 and 202 (1) and (2) of the ITC. |
| *Interest income* | |
| 1. Is interest income from a loan granted by a company in your MS to a foreign group member company taxable? | Yes |
| 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 cfr art. 26 ITC |
| 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). | The tax administration is generally fighting hybrid loans and the qualification of the income (interest or dividend). The tax administration Belgium still needs to adapt its legislation in respect with the amendment of Article 4 of the EU Parent/Subsidiary Directive. |
| 1. If yes to 11, |  |
| 1. Please briefly explain which requirements should be fulfilled. |  |
| 1. How will the amendment of Article 4 of the EU Parent/Subsidiary Directive affect your answer? |  |
| *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. |
| 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. | No. But see 14b). |
| 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. | Yes. Interest is not deductible if it is directly or indirectly paid to any foreign company, when, according to the law of the country where these are established or resident, they are not liable to income tax or are subject for this income to a tax treatment which is notably more favourable than that of Belgium.  In such situations, interest is only deductible if the taxpayer shows that the payment corresponds to a genuine business transaction and that the amount is not abnormally high. |
| 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. Two thin capitalization rules and a beneficial owner rule apply. |
| 1. If yes to 15 |  |
| 1. Please briefly explain the general scope and mechanism of the rules. | A 1:1 debt/equity ratio applies to loans granted by individual directors, shareholders and non-resident corporate directors to their company. Interest relating to debt in excess of this ratio is requalified as a non-deductible dividend.  A 5:1 debt/equity ratio applies to inter group debt and debt where the creditor (resident or non-resident) is exempt or taxed at a reduced rate in respect of the interest paid on the debt. Interest relating to the part of the debt in excess of this ratio is considered a non-deductible business expense.  Lastly interest is considered non-deductible if the loan is guaranteed by a third party or is funded by a third party that partly or wholly bears the risk related to the loans. The third party will be deemed the beneficial owner of the interest if the guarantee is merely put in place for the avoidance of taxation. |
| 1. In particular, do the rules apply only to interest costs on inter-group debt or more generally to all interest costs? | All interest costs are involved |
| 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. | In general these rules seem quite effective in countering ATP. |
| 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 D is tax resident in your MS. Moreover, please explain whether any deemed deduction would be contingent on a corresponding adjustment in the foreign state. | According to Belgian tax courts this is not possible. (Tax court of Antwerp, nov 6th, 2012) |
| 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? | N/A |
| 1. Does your MS levy any withholding tax on interest payments? | Yes. |
| 1. If yes to 19 |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | 25%. |
| 1. Are there special withholding tax rules for interest paid on a loan from a group member company? | Yes there is no withholding tax in parent subsidiary relations within the EU. (cf art 107 (6), RD ICT ) The parent company must own at least 25% of the capital of the subsidiary (see art. 105 (6°) (b), RD ITC). The parent company must have full legal ownership of the shares for at least 1 year before dividends are distributed (uninterrupted period). |
| 1. Does this apply regardless of the tax residence of the creditor company, e.g. member state, treaty state, tax haven? | No, only for EU-companies. |
| 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 |
| 1. Is such exemption, reduction or refund subject to other anti-avoidance requirements? If yes, please explain briefly. | The tax administration can always rely on the general anti abuse clause in Belgian tax law to counter every tax structure considered as harmful tax practices (see art. 344(1) of the ITC). |
| *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? | Yes. Resident companies may deduct a notional interest expense (déduction pour capital à risque, DCR/aftrek voor risicokapitaal, AVR) from their taxable profits. The notional interest deduction (NID) is also granted to non-resident companies that are subject to the income tax on non-residents in respect of their Belgian permanent establishment or immovable property located in Belgium.  The deduction is based on the net accounting equity of a company in its annual accounts according to Belgian Generally Accepted Accounting Principles (GAAP), at the end of the preceding accounting year with some adjustments.  The NID rate is based on the 10-year linear treasury bonds of the third quarter (July, August and September) in the year preceding the given year. The maximum fixed percentage may not exceed a rate of 3% (or 3.5% for small companies), and the annual increase or decrease of the percentage may not exceed 1%.  The general anti-abuse clause in Belgian tax law is applicable where the main purpose of entering into an operation was to obtain a notional interest deduction and obtaining this deduction in these circumstances would be contrary to the object of the measure. |
| 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? | Yes there is a specific Patent income deduction for companies**.** A deduction of 80% of qualifying gross patent income from thetaxable basis, resulting in an effective tax rate of maximum6.8% on this income.  This deduction applies for Belgian companies and Belgian establishments of foreign companies.  The eligible patents are:  - patents self-developed in a Belgian or foreign “R&D” center  - patents acquired (by purchasing, or license, …) provided  they are being further developed in a Belgian or foreign  R&D center.  The eligible income are license payments: milestone payments, upfront fees, a portion of the turnover of patented products and service*s* |
| 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? | There is an Investment deduction for R&D related investments and patents. The Tax deduction is 14,5% of the investment value of assets which aim to promote R&D of new products and advanced technologies that are environment friendly and for patents acquired or self-developed by the company.  In case of insufficient profits, only a portion of the deduction can be carried forward for an unlimited period, if the deduction amounts to more than 933,350 € (see here under).  **Amounts** **Deduction limit**  < 933,350 € None  933,350 to 3,733,390 € 933,350 € max  > 3,733,390 € 25%  The company may also choose at any time to benefit from a “tax credit” system in place of the “investment deductions” system for R&D related investments and patents (see art. 284quater of the ITC). When applied, that choice is irrevocable.  The tax credits may be carried forward for an unlimited period, but only in part if the amount is higher than 466,670 € (see here under)  **Amounts** **Limit to tax credit**  < 466,670 € None  466,670 to 1,866,700 € 466,670 € max  > 1,866,700 € 25% |
| 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. | 1° The company must prove on the basis of a contract that it has acquired a patent or the right to use it;  2° The company must bring the proof that the patent or the right to use it has never been assigned by any company to its business activity in Belgium (see art. 47bis RD ITC) |
| 1. Can such credits also be obtained for costs that are ultimately reimbursed by a group member company to the company in your MS? | Yes |
| 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 |
| 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 |
| 1. Would any R&D tax credits obtained in the past be reversed upon a disposal? | Yes, within the same limits detailed for tax credit deference in question 24. |
| 1. Can a ruling confirming the value of the IP be obtained? | Yes |
| *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 are generally fully deductible. If paid to an affiliated company, the royalty must correspond to that which parties dealing at arm’s length would charge. |
| 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? | Yes. Royalties are not deductible if they are directly or indirectly paid or attributed to any foreign company, establishment or individual when, according to the law of the country where these are established or resident, they are not liable to income tax or are subject for this income to a tax treatment which is notably more favourable than that of Belgium, cf. art. 54 of the ITC. |
| 1. Are there types of royalty payments which cannot be deducted? | No |
| 1. Does your MS levy any withholding tax on royalty payments? | Yes. |
| 1. If yes to 30, |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | 25%. |
| 1. Are there types of royalty payments which are not subject to withholding tax? | Under the domestic law implementing the provisions of the EU Interest and Royalties Directive (2003/49), outbound royalty payments are exempt from withholding tax, provided that the recipient 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. |
| 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? | No |
| 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. | The general anti abuse clause in Belgian tax law applies to every tax structure |
| *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). | No. |
| 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. | N/A |
| *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 Belgian tax administration applies its own criteria. A foreign legal entity managed from Belgian soil is considered to be a Belgian entity taxable in Belgium. |
| 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. | Yes the general anti abuse clause in Belgian tax law applies on every tax structure. |
| 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. | Yes, there is a proposal in Belgian parliament to implement a “Cayman-tax” in order to tax the Belgian beneficial owners of a legal entity on the income of transparent entities based in certain tax havens. |
| *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. | No |
| 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? |  |
| *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? | Yes |
| 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? | No |
| 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? | Yes, the excess profit rulings, which allows Belgium to unilaterally grant an advance ruling for downward adjustments e.g. for profits that are shifted from abroad to Belgium and would not have been realized if it were a standalone enterprise. |
| *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 general anti abuse clause applies on every tax structure considered by the tax administration as harmful tax practices. |
| *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 |