**Study on Aggressive Tax Planning**

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

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

**Filled in for Germany**





**QUESTIONNAIRE**

**Germany**

## Abbreviations

AktG Aktiengesetz (Stock Companies Act)

AO Abgabenordnung (Fiscal Code)

AStG Außensteuergesetz (Foreign Relations Tax Act)

BFH Bundesfinanzhof (Federal Tax Court)

BFHE Amtliche Sammlung der Entscheidungen des Bundesfinanzhofes (Court Reporter)

BStBl. Bundessteuerblatt (Federal Tax Gazette)

CFC Controlled Foreign Corporation

DTC Double Taxation Convention

EBITDA Earnings before interest, taxes, depreciation and amortization

EEA European Economic Area

EFG Entscheidungen der Finanzgerichte (Court Reporter)

EStG Einkommensteuergesetz (Personal Income Tax Act)

EU European Union

FG Finanzgericht (Tax Court)

GewStG Gewerbesteuergesetz (Municipal Business Tax Act)

KStG Körperschaftsteuergesetz (Corportate Income Tax Act)

MAP Mutual agreement procedure

OECD MC OECD Model Tax Convention on Income and on Capital

SME Small and medium-sized enterprise(s)

UStG Umsatzsteuergesetz (VAT Act)

WHT Withholding tax

For up-to-date full texts of the above-mentioned “Federal Statuts”, visit

<http://www.gesetze-im-internet.de/aktuell.html>

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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? | Including the municipal business tax (municipal business tax), the average rate is 29.65 per cent. This number includes   * the corporate income tax (Körperschaft­steuer) at the rate of 15 per cent, according to section 23(1) of the KStG; * a federal solidarity surcharge at the rate of 0.825 per cent; * the municipal business tax at variable rates\*, but with an average of approx. 13.8 per cent.   The rate of Germany’s municipal business tax is at the discretion of the local municipalities (range between 7 per cent and approx. 20 per cent). It applies to a uniform tax base that correlates largely with the corporate income tax base but is supplemented by some add-ons and reductions (sections 8 and 9 of the GewStG). |
| 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, in accordance with the Parent-Subsidiary Directive, but not limited to intra-EU companies, 95 per cent of distributed dividends from qualifying shareholdings (see infra 4.b)) are subject to a tax exemption, cf. section 8b (1) and (5) of the KStG. |
| 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? | Yes, but there is an exception for certain dividends that form part of the ordinary trading profit of a bank, an insurance company or any other financial institution under Regulation 575/2013/EU of 26 June 2013: If the institution’s tax residence is outside of an EU or EEA Member State, the tax-exemption does not apply in certain cases, cf. section 8b (7)-(9) of the KStG. |
| 1. Does this apply regardless of the level of shareholding or voting rights held in the distributing company? | The exemption is limited to qualifying direct shareholdings of at least 10 per cent in the capital of the paying company from the beginning of the tax year concerned, cf. section 8b(4) of the KStG. |
| 1. Does this also apply if the dividends have been deducted by the distributing company in its taxable income? | No, dividends deducted by the distributing company are not subject to the exemption. |
| 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. |
| 1. If yes to 5, |  |
| 1. Does this apply regardless of the amount or percentage of shares, which the foreign company holds? | No. The exemption only applies if the foreign shareholder company holds at least 10 per cent of the capital of the subsidiary for at least 12 months, cf. section 43b of the EStG. |
| 1. Does this apply regardless of the tax residence of the foreign company, e.g. member state, treaty state, tax haven? | No. The exemption only applies if (section 43b of the EStG):   * The subsidiary is resident in Germany (i.e., subject to unlimited tax liability), * both the parent and the subsidiary have a corporate form mentioned in the Annex to the Parent-Subsidiary Directive, and * both the parent and the subsidiary are subject to a corporate income tax listed in article 2 of the Parent-Subsidiary Directive, without the possibility of an option or of being exempt.   Dividends paid to a shareholder company resident in Switzerland or Norway is also subject to the exemption under the same conditions those laid down for shareholder companies resident in an EU Member State (incl. the ownership requirement as mentioned under 6a), cf. Article 10 (3) DTC. |
| 1. Is the withholding tax exemption subject to a beneficial ownership requirement similar to that of the OECD model tax convention? | Regarding the beneficial ownership requirement, Section 43b (2) refers to the requirements of the EU Parent-Subsidiary Directive. |
| 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. | Section 50d (3) EStG neglects the tax exemption of Section 43b EStG in case of a functionless foreign company (whose purpose is only treaty or rule shopping); the Federal Fiscal Court (Bundesfinanzhof) does further apply the general national anti-avoidance rule (cf. Section 42 AO) in rare cases. |
| 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. | All capital gains covered by section 20 (1) no. 1 EStG are treated alike (e.g. participation rights, profit distributions). |
| *Interest income* | |
| 1. Is interest income from a loan granted by a company in your MS to a foreign group member company taxable? | Yes. German-resident companies are subject to corporate income tax on the basis of their world-wide income. This rule might be modified under Articles 23A(2) or 23B(1) OECD MC if both the DTC and domestic legislation of the source State provide for WHT in this State. |
| 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, according to Section 1 (1) of the AStG (cf. also Article 9 OECD MC). |
| 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). | No, see supra 4.c). Section 8b (1) cl. 2 of the KStG makes sure that the dividend exemption is only granted to payments that had not been deducted from the income of the payer. |
| 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, as a rule, but subject to the restrictions described infra 16.  Further restrictions apply to the municipal business tax. Even for non-excessive interest payments, ¼ of all interest payments above a de-minimis threshold of 100.000 € are non-deductible (section 8 No. 1a of the GewStG) This applies regardless of whether the interest has been paid to a group member or to any other creditor. |
| 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. |
| 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. |
| 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 interest limitation rules apply. |
| 1. If yes to 15 |  |
| 1. Please briefly explain the general scope and mechanism of the rules. | Firstly, interest on loans granted by shareholders or affiliated companies may constitute a “deemed distribution” (verdeckte Gewinnausschüttung) to the extent the rate charged exceeds the market rate for a similar loan. For determining the market rate, the interest rate prevailing in the country of the currency used is authoritative.  Secondly, according to the EBITDA rule of Section 4h of the EStG, read in connection with Section 8a of the KStG (Zinsschranke), interest expenses may be deducted up to the amount of interest income of the company. Any exceeding (negative) interest saldo may only be deducted up to 30 per cent of earnings before interest, taxes, depreciation and amortization (EBITDA). Non-deductible net interest payments may be carried forward indefinitely.  By way of a re-exception to the above-mentioned restrictions, interest expenses may be deducted without limitation if one the following safe-haven requirements applies:   * the above-mentioned saldo of interest expenses minus interest earnings is less than the exempt threshold of EUR 3 million. If the net interest payments exceed the threshold, the limitation applies to the full net interest payments. Consolidated corporate groups under German group taxation rules are deemed to be one business, therefore the minimum threshold may be applied only once for the whole group; or * the company does not belong to a group of related companies, or belongs to such a group only partially (stand-alone clause); and if intra-group interest payments do not exceed the threshold of 10 per cent of the above-mentioned overall interest saldo; or * the company belongs to a group of companies, but its ratio of equity over total balance sheet assets is not lower than 2 per cent compared to the overall ratio for the whole group; again subject to the condition that intra-group interest payments do not exceed the threshold of 10 per cent of the above-mentioned overall interest saldo.   Thirdly, a part of the deducted interest is re-added for purposes of the municipal business tax (see supra 13). |
| 1. In particular, do the rules apply only to interest costs on inter-group debt or more generally to all interest costs? | As a rule, to all interest costs. The safe-haven rules differ, however (see supra a). |
| 1. Do the rules take into account the worldwide debt ratio of the group of companies? | Yes (see supra a). |
| 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 Structures 1 and 2, C Holdco can deduct interest payments of 3,000,000 EUR plus interest payments at an amount equalling 30 per cent of its EBITDA. Assuming, however, that there is no or little EBITDA, this restriction functions as a ban on deduction (above the 3,000,000 EUR threshold) eventually. The safe-haven requirements are not met, as more than 10 per cent of the interest payments made by H Holdco are intra-group payments.  The same rules apply to B Hybrid in Structure 3 and to OpCo in Structure 4. Again, the result is an interest deduction on the level of these entities of 3,000,000 EUR plus 30 per cent of the EBITDA. |
| 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. | No. Germany does not have any such deemed deduction rules. The only (though unlikely) possibility is a corresponding adjustment on the basis of Art. 9(2) OECD MC if State B has included deemed interest earnings in the taxable base of FinanceCo B under Article 9(1) of its DTC with Germany. A clause corresponding to Art. 9(2) OECD MC is contained in many recent German DTCs (but has been missing esp. in earlier ones). |
| 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 if the loan is granted by a parent company to a subsidiary (like in Structure no. 4), see BFH, 26.10.1987 – GrS – 2/86, BFHE 151, 523 et seq. = BStBl II 1988, 348; and more recently, FG Nürnberg of 25 March 2010, 4 K 857/2009, EFG 2010, 1524 et seq.  By contrast, an interest-free loan granted by a subsidiary to its parent or grandparent company will be treated as a (hidden) profit distribution, i.e. a dividend. |
| 1. Does your MS levy any withholding tax on interest payments? | In purely domestic cases: Yes, but limited to interest owed by banks or other financial service institutions residing in Germany, or to interest if the underlying loan is listed in public registers. Tough this does not apply to intercompany loans. |
| 1. If yes to 19 |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | 25 per cent. |
| 1. Are there special withholding tax rules for interest paid on a loan from a group member company? | Interest payments on intercompany loans are outside the scope of the WHT. |
| 1. Does this apply regardless of the tax residence of the creditor company, e.g. member state, treaty state, tax haven? | No, outbound interest payments are subject to a special regime. Outgoing interest payments derived by a non-resident recipient do usually not qualify as domestic income, even if paid by a German bank or financial institution. By contrast, interest payments (including inter-company interest payments) are subject to WHT if the underlying loan is secured by immovable property situated in Germany or by ships registered in Germany (Section 49(1) no. 5 lit. c) aa) of the 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 (Section 50g(3) no. 1 of the EStG).  Moreover, there is a linking connection to the rules of the State where the recipient is resident on the personal attribution of profits. Under this rule, relief from German WHT is denied if there is a mismatch in the personal attribution of the payments among the different domestic legal orders and/or the applicable DTC (see Section 50d(1), cl. 11 of the EStG). |
| 1. Is such exemption, reduction or refund subject to other anti-avoidance requirements? If yes, please explain briefly. | Special rules on   * non-resident recipient companies without any active business in Germany, if they are controlled by shareholders who would not have been entitled to the WHT relief had they received the payments directly from the German-resident debtor (Section 50d(3) of the EStG); * hybrid mismatch arrangements (Section 50g(2) of the EStG); * non-arms’ length payments (Section 50g(2) of the EStG); * interest payments made by a EU PE. These payments will qualify only if the interest payments have been deducted on the side of the PE (Section 50g(3) no. 2 of the EStG); * prevention of a “double dip” in connection with a PE as debtor (Section 50g(3) no. 3 of the EStG); * cases where tax avoidance or tax abuse constitute the, one of the, main motive(s) for the interest payment (Section 50g(4) of the EStG). |
| *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? | No |
| 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? | No |
| 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. | n/a |
| 1. Can such credits also be obtained for costs that are ultimately reimbursed by a group member company to the company in your MS? | n/a |
| 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. There is no special capital gains tax in Germany, but the gain of the transfer is part of the regular corporate income tax base.  With regard to -Structure no. 5: The transfer of the IP should regularly be a transfer of function. Therefore the potential gain is taxable under Section 1(3) of the AStG.  As regards pricing: the decisive date for assessment of the “correct” transfer price is the date of transfer. This implies that, in theory, an ex-ante view applies. However the tax administration has the right to adjust the transfer price ex post view. Consequently, in practice the time of the audit (usually several years later) is decisive – which means that in practice, an ex post view applies. |
| 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, the transfer is taxed at the ordinary tax rates (see supra 1). |
| 1. Does taxation arise as a result of an anti-abuse provision or similar? | No. The taxation arises as a result of the application of the regular transfer pricing rules and the arm’s length principle. Additional there is a general anti-abuse rule which is regularly not amended in those cases. |
| 1. Would any R&D tax credits obtained in the past be reversed upon a disposal? | No, as there are no R&D tax credits in Germany. |
| 1. Can a ruling confirming the value of the IP be obtained? | No. Germany does normally not provide unilateral rulings in transfer pricing issues. |
| *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? | Royalty payments for the use of patents, copyrights, secret formulas or processes, commercial or industrial know-how and similar intangible property (whether or not protected) are generally deductible. Excessive royalty payments to shareholders or their affiliates are treated as non-deductible constructive dividends (“hidden profit distributions” under Section 8(3) of the [KStG](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_de_abb_kstg?WT.z_nav=crosslinks)). Moreover, a certain (fractional) amout of royalties remains non-deductible in both internal and cross-border cases for purposes of the municipal business tax (see Section 8 of the GewStG). |
| 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? | No. |
| 1. Are there types of royalty payments which cannot be deducted? | Except in connection with DTCs and the EU Interest Royalty Directive, the notion of “royalties” as such is not familiar to German tax law. Therefore, the deductibility of royalty payments depends on the ordinary rules on the delimitation between dividends (including constructive dividends and other types of hidden profit distributions; see Section 8(3) of the [KStG](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_de_abb_kstg?WT.z_nav=crosslinks)) and ordinary business expenses that meet arms’-length standards. It follows that excessive royalty payments to shareholders or their affiliates are non-deductible. |
| 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)? | 15 per cent (increased to 15.83 per cent by the 5.5 per cent solidarity surcharge). |
| 1. Are there types of royalty payments which are not subject to withholding tax? | No. |
| 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 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. | Yes, see supra 20 e). |
| *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. Group taxation (*Organschaft*) is possible in Germany for the purposes of corporate income tax, municipal business tax and VAT.  Both under the corporate income tax and under the municipal business tax, the separate companies are still treated as single units for tax purposes. Most notably, intra-group payments/profits/gains are not eliminated. However, the result (profit/loss) of the subsidiaries is attributed to the respective parent company for tax purposes if the group members have entered into a profit-and-loss pooling agreement.  Group taxation applies under the following conditions (which shall be met cumulatively):   * The subsidiary (*Organgesellschaft,* controlled company) must generally be a company incorporated under the laws of an EU/EEA Member State which has its place of effective management in Germany (Sections 14(1) and 17 of the [KStG](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_de_abb_kstg?WT.z_nav=crosslinks)). * The controlling parent (*Organträger*) must be a business enterprise carried on by an individual, a partnership or a company. The participation in the subsidiary must be held throughout the entire application period of the group taxation regime through a domestic permanent establishment within the meaning of Section 12 of the [AO](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_de_abb_ao?WT.z_nav=crosslinks). It is further required that the income attributable to such permanent establishment is taxable in Germany under domestic law as well as under an applicable tax treaty. Unlike in the passt, a tax group must not have more than one controlling parent. * According to former provisions, the subsidiary had to be financially, economically and organizationally integrated into the controlling parent. Economic and organizational integration is not necessary for corporate income tax purposes and business tax purposes; financial integration is sufficient (section 14(1) No. 1 of the KStG and section 2(2) of the [GewStG](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_de_abb_gewstg?WT.z_nav=crosslinks)). However economic and organizational integration are still necessary for VAT reasons (section 2(2) of the UStG). * The required integration must be in place at the beginning of the financial year of the subsidiary for which group taxation is sought to apply (section 14(1) No. 1 of the KStG).   To achieve group taxation for corporate income tax and municipal business tax purposes, a profit-and-loss pooling agreement (*Ergebnisabführungsvertrag*) according to section 291(1) of the AktG must be concluded for the duration of at least 5 years and be executed for the whole period (sections 14(1) and 17 of the KStG and section 2(2) of the GewStG). |
| 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. |
| *CFC rules* | |
| 1. Does your MS apply CFC rules to foreign subsidiaries of a parent company in your MS? | Yes. |
| 1. If yes to 34, please briefly explain the rules and their scope. | Under the Foreign Relations Tax Act (Außensteuergesetz), a resident taxpayer (company or individual) may be deemed to have received dividends paid out of certain retained profits treated as passive income (*passive Einkünfte* or *Zwischeneinkünfte*) of an intermediary CFC (*Zwischengesellschaft*) resident in a low-tax jurisdiction (sections 7-14 of the [AStG](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_de_abb_astg?WT.z_nav=crosslinks)). The provisions apply if (cumulatively):   * one or more German residents hold in total more than 50 per cent of the share capital in the intermediary company. For specific capital investment income (*Zwischeneinkünfte mit Kapitalanlagecharakter*) the provisions apply already if one German resident holds at least 1 per cent of the share capital of the intermediary company (see below). The rules apply to direct and indirect participations (Section 14 of the AStG); * the intermediary company yields passive income (other income than listed in Section 8(2) of the AStG); * the passive income was subject to a tax rate of less than 25 per cent (Section 8(3) of the AStG); and * the passive income constitutes more than 10 per cent of the intermediary company’s total income and the deemed resident taxpayer’s/taxpayers’ received total amount would not exceed 80.000 €.   The deemed dividends are not treated as “normal” dividends, thus rules with any tax relief do not apply. The foreign subsidiary’s profits are determined according to German tax law (without tax reliefs) not by laws of the low-tax jurisdiction. Paid taxes by the foreign subsidiary might be deducted from the resident taxpayer’s tax due.  If a resident taxpayer is indirectly holding a foreign subsidiary (Untergesellschaft) through another foreign intermediary entity, passive income of that subsidiary might be attributed to the intermediary subsidiary and taxed accordingly in the hands of the German resident taxpayer (Section 14 of the AStG).   * German CFC taxation does not apply if the foregoing requirements are not fulfilled or if the taxpayer proves that (Section 8(2) of the AStG) (cumulatively):the CFC is resident in an EU or EEA country and carries out a genuine economic activity; * the passive income otherwise subject to CFC taxation is derived in connection with such activities; and * the EU Directive on Mutual Assistance (2011/16) or a similar agreement is applicable between Germany and the respective MS or EEA country. |
| 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? | Structure no. 1: CFC rules are applicable. Interest received by Offshore Co is deemed to be received dividends by MNE Group from Offshore Co. Expenses in connection with shareholding might be deducted from the taxable base. Deemed dividends are added to income of MNE Group, subject to corporate income tax and municipal business tax.  Structure no. 2: application of CFC rules depends on whether the payment from C Holdco to B Holdco qualifies as dividends or as interest payment according to German tax law. If this payment is qualified as dividends it is not subject to CFC rules as this income is qualified as active income. If it qualifies as interest payment: tax effects as in case No. 1, additional 5 per cent of paid dividends from B Holdco to MNE Group are subject to tax of CIT and 100 per cent of municipal business tax.  Structure no. 4: CFC rules are applicable. As MNE Group is indirectly holding FinanceCo D through FinanceCo B, income of FinanceCo D derived from received interest payments from OpCo is attributed to FinanceCo B and as passive income taxable in the hands of MNE Group. Tax effects as in case No. 1, additional 5 per cent of paid dividends from FinanceCo D to MNE Group are subject to tax of CIT and 100 per cent of municipal business tax.  Structure no. 5: application of CFC rules depends on licenced IP-rights. Royalties paid to Company B for IP-rights transferred from MNE Group to Company B are passive income and thus taxable in the hands of MNE Group. Tax effects as in case No. 1, additional 5 per cent of paid dividends from Company B to MNE Group are subject to tax of CIT and 100 per cent of municipal business tax.  Royalties for future IP-rights as a result of research and development activities of Company B will qualify as active income and will not be taxable in Germany.  Structure no. 6: CFC rules are applicable. Royalties paid to Company B1 for IP-rights transferred from MNE Group to Company B1 directly as a sale are passive income and thus taxable in the hands of MNE Group. Other and future royalties for (future) IP-rights transferred pursuant to a cost-sharing agreement or CCA are passive income of Company D (Untergesellschaft) deriving from royalty payments from Company B2 to Company D and might be attributed to Company B1 (Zwischengesellschaft) and thus are taxable in the hands of MNE Group as deemed dividends. As Company D performs no functions and bears little/no risks royalties obtained from Company B2 cannot be qualified as active income most likely, thus Company D will not be able to prove that CFC rules should not apply. Tax effects as in case No. 1, additional 5 per cent of paid dividends from Company B1 to MNE Group are subject to tax of CIT and 100 per cent of municipal business tax. |
| *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. | Germany applies its own criteria regarding the classification of a foreign legal entity, but the foreign state’s rules might be considered. The foreign legal entity is compared to German corporations and partnerships (Typenvergleich). If it is more comparable to one of these forms overall – considering its organisational structure, particularly management, liabilities, transferability of shares, profit distribution, capital structure, time of existence, requirements of establishment – it will be classified as this form of legal entity.  Considering Structure no. 3: There is no legal entity in Germany which could be classified as this transparent that interest payments to MNE Group would be ignored for tax purposes. According to German law, partnerships require at least two partners, thus B Hybrid could not be classified as a partnership. Classified as a corporation, interest payment from B Hybrid is subject to tax of CIT and municipal business tax. If B Hybrid would be qualified as a permanent establishment of MNE Group in MS B, the interest payment would be taxable in Germany applying the separate entity approach and arm’s-length-principle according to Section 1(5) of the AStG and thus subject to tax of CIT and municipal business tax. |
| 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.  Income of a foreign (legal) entity deriving from a German entity is subject to non-resident taxation. |
| 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. | No. A corporation is a tax resident if either its management or its registered seat is in Germany.  If registered seat and management both are transferred to a MS the corporation is no longer tax resident.  If registered seat and management both are transferred to a non-MS the corporation is dissolved. |
| 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? | Germany does not offer any unilateral rulings in cases where a Double Taxation Convention is concluded. Additional there is actual no ruling in cases where a DTC was not concluded with the other state.  However it is possible to apply for a bilateral APA (acc. to Art. 25 OECD-MC), which is not a unilateral ruling, as in question. |
| 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? | Germany is following the OECD standard and therefore only structures which are designed according to that are possible. Hence it is possible to have those structures, when they are in line with the OECD TP standard. |
| 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? | No. |
| *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. | If an inappropriate legal structure is chosen that leads to a tax advantage for which the taxpayer cannot provide significant non-tax reasons, cf. section 42 of the General Tax Code (AO).  A legal structure is considered inappropriate if the taxpayer or a third party generates a tax benefit that is not intended by the law.  Indicators for an inappropriate legal structure are:   * if a third party, on considering the economic facts and effects of the structure, would not have chosen the same legal structure without the generated tax benefit; * the interposition of relatives or other closely related persons or companies solely for tax purposes; or * the transfer or shifting of income or capital assets to other legal entities solely for tax purposes. |
| *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. | Tax laws seem to be relatively water-proof. It is true that administrative practice shows deficits with regard to SME where audits are rare. By contrast, typical ATP enterprises are being audited continuously, year by year. |