**Study on Aggressive Tax Planning**

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

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

**Filled in for Ireland**





**QUESTIONNAIRE**

**Ireland**

## Abbreviations

**CGT: capital gains tax**

**DWT: dividend withholding tax**

**EU: European Union**

**EEA: European Economic Area**

**PAYE: Pay as you earn**

**PRSI: Pay related social insurance**

**PSD: Parent – Subsidiary Directive**

**SPV: special purpose vehicle**

**TCA 1997: Taxes Consolidation Act 1997**

|  |  |
| --- | --- |
| Questions | Answers |
| *Corporate tax rate* | |
| 1. What is the standard rate of corporate income tax applicable for the fiscal year 2015? | 12.5 % on trading profits and 25% on non-trading profits. |
| 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. Ireland charges to corporation tax all profits (income and gains) arising to an Irish-resident company, irrespective of the source of such profits. |
| *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)? | Foreign dividends received by Irish-resident companies are generally subject to tax at either 12.5% or 25%, dependent upon whether they are paid out of trading or non-trading profits.  Ireland operates a system of relief for foreign taxes, whether by virtue of the provisions of a double taxation agreement or, if this is not applicable, by a system of unilateral relief.  Corporation tax at a rate of 12.5% is applicable to foreign dividends paid out of EU/treaty jurisdiction trading profits where either the dividend paying company is, first, resident in the EU/treaty jurisdiction, or, secondly, is a publicly quoted company or 75% subsidiary of a publicly quoted company.  Corporation tax at a rate of 25% applies to foreign dividends sourced from other companies or from non-trading profits.  Ireland does not have a full participation exemption in respect of foreign dividends, but the system for granting foreign tax credits can minimise or eliminate Irish tax on dividend income.  Ireland provides for unilateral credit relief for foreign WHT and underlying taxes on dividends paid to an Irish resident company. A minimum 5% shareholding is necessary. The foreign tax is available as a credit against Irish tax and where the foreign tax exceeds the Irish tax on the dividend, the excess can be pooled and offset against Irish tax on other foreign dividends received in the same accounting period. Any unutilised balance can be carried forward to future accounting periods.  If a company has elected to tax trading dividends at the 12.5% rate, any excess foreign tax credits arising on trading dividends can only be applied against other trading dividends. Any excess credit from non-trading dividends (taxed at 25%) can be used to offset tax on both trading dividends and non-trading dividends. Relief can also extend to foreign tax suffered by a lower-tier subsidiary where the company paying the dividend has itself received dividends from the lower-tier subsidiary. A minimum 5% association is required as between the companies. Trading profits from lower-tier EU/treaty jurisdiction subsidiaries can also be traced through to the ultimate dividend received by an Irish company for the purposes of applying the 12.5% rate. |
| 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? | It is a requirement that the foreign taxes are borne by the paying company and arise in an EU Member State (not confined to the state of residence of the paying company). |
| 1. Does this apply regardless of the level of shareholding or voting rights held in the distributing company? | Additional relief for underlying foreign tax is only granted if the parent company, resident in Ireland, owns at least 5% of the share capital of the dividend paying company. |
| 1. Does this also apply if the dividends have been deducted by the distributing company in its taxable income? | No relief under Irish law is available unless the dividends have been, broadly, “subject to tax” in the jurisdiction of the paying company.  An amendment was introduced in 2013 to provide for an additional foreign tax credit in situations where the dividend received by the Irish company derives from untaxed profits of a paying company and is attributable, indirectly through other dividend paying companies, to profits that have suffered foreign tax. In this case the additional foreign credit is to be calculated by reference to the nominal rate of tax applicable to the profits of the company that have been subject to tax. |
| 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? | Under the amended PSD, profits distributed by a subsidiary to its parent company in another Member State will not be exempt from tax in the parent company Member State, to the extent that such profits are tax deductible by the subsidiary. This provision is effectively already in place in Ireland. |
| *Dividends paid* | |
| 1. Is it possible for a company in your MS to distribute dividends to a foreign company without any withholding tax? | Yes. Two exemptions are relevant. The first is an exemption introduced in accordance with the PSD (section 831 TCA 1997) and the second, broader exemption, relates to wider categories of non-resident dividend recipients who are exempt from DWT (section 172A TCA 1997).  Distributions falling within the scope of PSD are exempt from DWT (section 172B(6) TCA 1997) although they must be reported to the Irish Revenue by either the paying company or the Authorised Withholding Agent.  Dividends may be paid without DWT if they are paid to the following persons and such persons are beneficially entitled to the payment:   * A foreign company which is controlled (directly or indirectly) by persons who are resident in another EU Member State or in a tax treaty jurisdiction under the tax laws of the relevant jurisdiction. Those persons must not themselves be under the control (directly or indirectly) of persons who are not so resident; * A foreign company where the principal class of shares in the company (or of its 75%+ parent company) is substantially and regularly traded on a recognized stock exchange in another EU Member State, tax treaty jurisdiction, or on the Irish Stock Exchange. The 75%+ parent/subsidiary relationship must satisfy substantial economic ownership conditions. * A company which is resident in another EU Member State or in a tax treaty jurisdiction under the laws of the relevant jurisdiction and which is not controlled (directly or indirectly) by Irish resident persons. Thus, dividends paid to a company resident in another EU Member State but which is controlled by persons who are resident neither in the European Union nor in a tax treaty jurisdiction also qualify for exemption from the withholding tax.   A non-resident company must provide a declaration and prescribed information to the paying company or appropriate intermediary in order to claim the exemption from DWT. The declaration is effective for a period of up to 6 years, after which a new declaration must be provided for the exemption to apply. |
| 1. If yes to 5, |  |
| 1. Does this apply regardless of the amount or percentage of shares, which the foreign company holds? | See conditions summarised at 5 above in relation to the broader domestic exemption from DWT.  The exemption which complies with the PSD provides for an exemption from DWT only where the foreign shareholder company holds at least 5% of the share capital of the paying company. This ownership requirement may be substituted by a 5% voting power requirement and/or a 2-year minimum shareholding period where similar such requirements are contained in the tax treaty with the other Member State concerned (section 831 1997). |
| 1. Does this apply regardless of the tax residence of the foreign company, e.g. member state, treaty state, tax haven? | See conditions summarised at 5 above in relation to the broader domestic exemption from DWT.  The exemption implementing the PSD only applies if the foreign shareholder company is resident in an EU Member State or Switzerland. |
| 1. Is the withholding tax exemption subject to a beneficial ownership requirement similar to that of the OECD model tax convention? | The provisions of Irish law require that the recipient of the dividend must be “beneficially entitled” to the dividend in order to receive the dividend free from DWT.  The meaning of “beneficially entitled” has not been considered by the Irish courts in this context, but while not necessarily the same as “beneficial ownership”, does carry connotations of real legal and economic entitlement. |
| 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. | Implementation of the PSD may be denied where the majority of voting rights in the immediate parent company are controlled directly or indirectly by non-EU residents (other than residents of a tax treaty state), unless the parent company has been established for bona fide commercial reasons and not as part of any arrangement which has as one of its main purposes the avoidance of the withholding tax. |
| 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, DWT applies widely to dividends and other distributions, unless specifically exempt. |
| *Interest income* | |
| 1. Is interest income from a loan granted by a company in your MS to a foreign group member company taxable? | Yes, in principle, Ireland charges to corporation tax all profits (income and gains) arising to an Irish-resident company, irrespective of the source of such profits. |
| 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. | Irish transfer pricing legislation was introduced with effect from 1 January 2011.  It applies only to trading companies. Therefore, if Finance Co B (which is equity financed) in Model ATP – Structure 4 is advancing an intra-group, interest-free loan in the course of a trade, the provisions of the transfer pricing code will require the imputation of an arm’s length interest receipt by Finance Co B. If, on the other hand, Finance Co B is a non-trading holding company, it should remain outside the ambit of the transfer pricing rules. |
| 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). | As a general matter, the classification of the interest bearing financial instrument under Irish law will determine the tax treatment of the return. Where the financial instrument is classified as a loan under Irish law, then the return will be treated as interest.  If B Holdco was an Irish-resident company taxed under section 110 TCA 1997, it is likely to achieve tax neutrality by deducting the cost of funding and other related expenditure. This is the case even where the payments are dependent on the profitability of B Holdco, as the deemed distribution rules (results-dependent interest or interest in excess of a reasonable commercial return) are misapplied to SPVs taxable under section 110. These rules ensure that the SPV’s net taxable profit is generally maintained at a *de minimis* level as there is no minimum profit required for tax purposes under section 110 TCA 1997. |
| 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. In general, interest is deductible in computing taxable trading income in so far as it is incurred “wholly and exclusively” for the purposes of the trade. Certain interest payments may also be deducted as a charge.  There are a number of anti-avoidance provisions which deny or restrict relief for interest on related party borrowings for the acquisition of related entities, or the acquisition of assets or trades from a related party. These measures are subject to a number of conditions. “Recovery of capital” and other anti-avoidance measures also restrict relief for interest on both related and third party borrowings. |
| 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. | There are a number of circumstances in which the deduction for interest is limited by reference to a requirement for the receipt of such interest to be “subject to tax”.  For instance, in relation to SPVs taxable under section 110 TCA 1997, certain payments of profit-dependent interest or swap payments which are not subject to tax under the law of an EU / treaty partner jurisdiction will not be deductible. These provisions do not generally apply to payments of interest on “quoted Eurobonds” unless the interest is paid to a “connected person” in circumstances where the Irish SPV was aware, at the time it issued the quoted Eurobonds, that the interest would not be subject to tax in a tax treaty jurisdiction.  In other cases, a tax deduction is available for profit participating interest where the recipient is subject to tax on such interest in a tax treaty jurisdiction (or the recipient is an unconnected tax exempt person resident in such a jurisdiction, such as a pension fund or government body).  There are similar provisions in relation to exemptions from the obligation to withhold tax on interest, where the recipient of the interest must be subject to tax in the foreign jurisdiction. |
| 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. | Ireland does not have general anti-hybrid measures, although it does have targeted domestic provisions which, in general, limit the potential to avail of hybrid mismatches.  For example, if C Holdco in Model ATP-Structure 2 is taxable under section 110 TCA 1997, it will be permitted to treat interest on securities, the return on which depends on the results of the SPV (also known as profit participating debt) as a deductible expense in the calculation of its profits.  However, as noted at (a), this deduction is limited for SPVs for certain payments of profit-dependent interest / swap payments to non EU/treaty partner jurisdictions or to EU / treaty partner jurisdictions which do not impose tax on such payments. The ability of C Holdco to deduct interest will thus depend upon the treatment of the payment by the jurisdiction of the recipient. |
| 1. Is the tax deduction of interest cost on inter-group debt subject to any thin capitalisation-rules or other interest deduction limitations-rules? | Ireland does not have any general thin capitalisation rules or interest limitation rules as defined on page 59 of the Report.  It is noted (but does not change the MS assessment) that Ireland has other rules prohibiting the deduction of interest in certain circumstances. The Irish authorities have pointed to these rules in their comments (particularly section 65 of the Finance Act 2006 and section 37 Finance Act 2011, to section 247 of the Taxes Consolidation Act 1997 (TCA) and section 840A of the TCA, inserted by section 36 of the Finance Act 2011.) However, the authors do not consider such rules equivalent to general thin cap-rules nor to interest limitation rules as defined in the Report on page 59.. |
| 1. If yes to 15 |  |
| 1. Please briefly explain the general scope and mechanism of the rules. | A deduction will not be granted in respect of interest on intra-group (and back-to-back) loans, which are used to finance the purchase of fixed assets from another group company. However if Ireland were not able to tax income from the assets prior to the purchase interest can be deducted up to the taxable income generated in Ireland after the purchase. Exceptions do apply to qualifying IP. |
| 1. In particular, do the rules apply only to interest costs on inter-group debt or more generally to all interest costs? | Certain of the rules apply to both related party and third party debt. |
| 1. Do the rules take into account the worldwide debt ratio of the group of companies? | There are no specific rules (such as exist in the UK) relating to the overall group finance expense. |
| 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. | As a general matter, the Irish rules relating to interest deductibility have been reviewed relatively frequently over the past few years. While the provisions relating to related party debt are quite detailed and require care, there are no thin capitalisation or debt cap rules in Ireland.  However, certain targeted measures have been introduced, mainly in relation to SPVs taxed under section 110 TCA 1997, which now imposes an awareness test on SPVs to determine whether the receipt will be subject to tax in the foreign jurisdiction.  The concept of “subject to tax” is relatively new in Irish law, and there remains uncertainty as to the exact ambit of the concept. |
| 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. | There are no deemed deductions under Irish law. |
| 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? | Depending upon the exact circumstances, a transfer pricing adjustment might be made. |
| 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)? | 20%. |
| 1. Are there special withholding tax rules for interest paid on a loan from a group member company? | Yes |
| 1. Does this apply regardless of the tax residence of the creditor company, e.g. member state, treaty state, tax haven? | Interest paid by an Irish resident company to a non-resident person will generally be subject to withholding tax at 20%.  This is subject to exemptions from withholding tax, including where interest is paid by an Irish holding company in the ordinary course of its trade or business to a non-resident company that is resident in the EU or in a jurisdiction with which Ireland has concluded a double tax treaty or in a jurisdiction with which Ireland has signed but not yet ratified a double tax treaty. In addition to the residence requirement, in order to avail of the withholding exemption the jurisdiction in question must impose a tax that generally applies to interest receivable from sources outside that specific jurisdiction and the interest must not be paid to the non-resident company in connection with a trade or business carried on by it in Ireland through a branch or agency.  Ireland also allows for an exemption from interest withholding tax in the case of quoted Eurobonds. |
| 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, most Irish double tax treaties refer to the necessity for beneficial ownership.  As a matter of domestic law, however, exemptions from withholding tax on interest rely on the existence, rather than the content, of double tax agreements. The courts in Ireland have not addressed the issue of beneficial ownership in the context of domestic exemptions from withholding tax on interest. The exemption from withholding tax on royalties applies to payments made to associated companies resident in another EU Member State  Under an extra-statutory concession, the payment of patent royalties by an Irish company in respect of a “foreign patent” to any non-resident company (irrespective of its location) can now be made free of withholding tax, subject to prior approval of the Revenue. This concession specifically mentions the requirement for beneficial ownership. |
| 1. Is such exemption, reduction or refund subject to other anti-avoidance requirements? If yes, please explain briefly. | As above. |
| *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? | Ireland does not currently offer a patent box regime. However, the Government has announced that it intends to introduce a ‘Knowledge Development Box’, with the stated aim of making Ireland an attractive location for the development of intangible assets.  The current situation is that Ireland has a favourable treatment of capital expenditure on intellectual property.  Capital allowances can be claimed on capital expenditure incurred by companies on the provision of certain “specified intangible assets”. The definition of specified intangible assets is widely drafted and includes, inter alia, the acquisition of or the licence to use: patents and registered designs; trademarks, brands, brand names, domain names and services marks; copyright or related rights; know-how, generally related to manufacturing or processing, industrial, commercial or scientific experience whether protected or not; goodwill to the extent that it is directly attributable to specified intangible assets; computer software; customer lists and certain other rights.  The tax write off is granted as a capital allowance and the write off is available in line with the depreciation or amortisation charge for accounting purposes. Alternatively, a company can elect to take the write off against its taxable income over a 15 year period.  The capital allowances that are available can only be offset against income generated from exploiting intangible assets or as a result of the sale of goods or services that derive the greater part of their value from the intangible assets.  Revenue are prepared to give an advance opinion on whether activities involving the management and exploitation of intangible assets would constitute trading for the purposes of the 12½% corporation tax rate. Such a ruling will always be subject to the caveat that full disclosure of all material facts is necessary in order for the advance opinion to be relied upon.  The capital allowances can be claimed on capital expenditure only, although the intangible assets may be acquired from a related party or a third party.  The capital allowances on intangibles are given in relation to real capital expenditure. In general, there is no allowance for depreciation or amortisation under Irish law, and the special relief is designed to change this treatment for certain specified assets.  Where, therefore, expenditure on an internally developed intangible asset is treated as a revenue expense and is incurred wholly and exclusively for the purposes of the trade, it is deductible in the accounting period in which the expenditure is incurred. In principle, however, capital expenditure on internally generated intangible assets could qualify for capital allowances. |
| 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? | A company locating its R&D activities in Ireland may qualify for certain exemptions (subject to certain conditions and limitations). The two reliefs relate to expenditure on R&D and expenditure on buildings in which R&D is carried out. |
| 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. | A company that incurs expenditure on R&D may avail of a tax credit of 25% on the first €300,000 of R&D expenditure incurred on or after 1 January 2014. The R&D credit reduces a company’s corporation tax liability for the current year. The tax credit is in addition to the corporation tax deduction available at 12.5% for qualifying expenditure. The combined effect of these provisions is that it is possible to obtain tax relief at an effective rate of up to 37.5% of expenditure on R&D.  The tax credit is available for offset against the current year corporation tax liability of the company or to be paid as ‘tax free’ remuneration to certain ‘key employees’ and any unused credit can be carried forward indefinitely to future periods. Excess credits can also be carried back against corporation tax paid in the previous period. Alternatively, a company may, provided certain conditions are satisfied, claim to have any remaining excess credit paid to it by the Revenue. The maximum repayment which can be claimed is limited to the greater of: a) the corporation tax paid by the company for the preceding 10 accounting periods; or b) the payroll liabilities (i.e. PAYE, PRSI and levies) accounted for by the company in the accounting period in which the qualifying R&D expenditure was incurred.  Ireland also allows for a tax credit for capital expenditure on buildings or structures used for the purpose of carrying on R&D activity. Expenditure in this context extends to spending on the construction or refurbishment of a building or structure to be used to facilitate R&D. The tax credit amounts to 25% of the cost of the construction or refurbishment and is available on a proportional basis if at least 35% of the building is used for R&D facilities. The full R&D credit of 25% may be claimed in the year in which the expenditure was incurred. A 10 year claw back exists where the building or structure is sold or ceases to be used by the company for the purposes of R&D or for the purposes of the same trade. |
| 1. Can such credits also be obtained for costs that are ultimately reimbursed by a group member company to the company in your MS? | The R&D tax credit is available on a group basis in respect of group expenditure on R&D. However, where one member of the group is not within the charge to Irish tax, that member’s qualifying R&D expenditure is not taken into account when calculating qualifying group expenditure. In order to claim R&D tax credit, comprehensive records must be kept of, inter alia, the location of the R&D and the personnel involved. Relief is also available for a company that has not carried on all of the R&D itself:  A company which incurs expenditure on R&D can claim credit for certain amounts paid to a university to carry out R&D activities on its behalf. Relief in this case will be restricted to so much of the payment to the university as does not exceed the greater of €100,000 or 5% of the expenditure incurred by the company itself on R&D activities; and  A company which incurs expenditure on R&D can claim credit for certain amounts paid to another unconnected person (a person other than a university) to carry out R&D activities on its behalf. Relief in this case will be restricted to so much of the payment to the other person as does not exceed the greater of €100,000 or 15% of the expenditure incurred by the company itself on R&D activities.  There are certain limitations on a company claiming the R&D tax credit where that company subcontracts the research (either to a commercial entity or to a university). On the other hand, where a company receives funding from a third party to carry out research activities, its ability to claim R&D tax credits will continue to depend upon whether it incurred the expenditure. In certain circumstances, therefore, it may be possible for R&D tax credits to be claimed where all or part of the expenditure is funded by, for instance, a customer (either a related party or a third party). This is subject to the caveat that grants received from the Irish state, or any member state of the EU or EEA, must be deducted from qualifying R&D expenditure. |
| 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. | In principle, companies are chargeable to CGT at 33% in respect of gains arising on the disposal of capital assets, including intellectual property.  However, Ireland provides for a participation exemption from CGT on the disposal of shares in a qualifying company. There are a number of conditions, including, the company must hold at least 5% of the shares of the company being disposed of for a minimum of 12 months; the company being disposed of must be EU/ tax treaty resident and must not derive its value from land in Ireland and the company being disposed of or the group of companies must pass a ‘trading’ test at the time of the disposal.  This participation exemption may be utilised to dispose of shares in a company owning intellectual property.  The statute of limitations in relation to tax is, generally, four years and it would be open to the Revenue to challenge the valuation of the intellectual property during this period. |
| 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? | The R&D tax credit in respect of buildings is claimable as long as there is a minimum 35% usage of the building for R&D activity over a period of four years. The tax credit is clawed back if, within ten years of the accounting period for which a credit is claimed, the building or structure is sold, or is used for purposes other than either the carrying on of R&D activities or the same trade that was carried on by the company at the beginning of the specified relevant period and to which the R&D activity was related. Revenue will claw back both the tax credit already used to reduce tax, and withdraw any unused tax credits. |
| 1. Can a ruling confirming the value of the IP be obtained? | The view of Revenue is that there should be a very limited number of circumstances where a taxpayer should require an opinion/confirmation from Revenue in advance of a transaction or event actually taking place.  Any opinion/confirmation in relation to a proposed transaction or business activity is appropriate only where the circumstances are complex, or unusual, or information is not readily available, or there is genuine uncertainty in relation to the interpretation or application of the relevant tax/duty rules.  The Revenue specifically states that it will give an opinion on whether exploitation of intellectual property amounts to a trade.  In order to obtain an opinion/confirmation of the value of the IP, it would be necessary for the above criteria to be fulfilled. |
| *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. Royalties are generally deductible to the extent that they are incurred wholly and exclusively for the purposes of the company’s business (payments to associated companies, particularly those outside the scope of Irish tax, may be scrutinised more closely in this regard). Patent royalties are, however, generally deducted as a *charge* against total taxable profits rather than as a trading expense. |
| 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? | No |
| 1. Does your MS levy any withholding tax on royalty payments? | Yes (on patent royalty, not on other royalty). |
| 1. If yes to 30, |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | 20% (on patent royalty, not on other royalty) |
| 1. Are there types of royalty payments which are not subject to withholding tax? | Withholding tax does not apply to qualifying royalty payments made by a company in the ordinary course of its trade or business to a company resident in another EU Member State or in a treaty 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? | Yes, most Irish double tax treaties refer to the necessity for beneficial ownership.  Under an extra-statutory concession, the payment of patent royalties by an Irish company in respect of a “foreign patent” to any non-resident company (irrespective of its location) can now be made free of withholding tax, subject to prior approval of the Revenue. This concession specifically mentions the requirement for beneficial ownership. |
| 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 jurisdiction of residence of the recipient must also impose a tax on resident companies that generally applies to foreign-source royalties. The payment must be made for bona fide commercial reasons and not as part of a scheme or arrangement the sole or main purpose of which is the avoidance of liability to tax on income or capital gains (section 242A [TCA 1997](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_ie_abb_tca1997?WT.z_nav=crosslinks)). |
| *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 relief.  A corporation tax loss relief group consists of a parent company and its 75% subsidiaries. A loss relief consortium exists if five or fewer companies (the consortium) own at least 75% of the ordinary share capital of either (a) a trading company or (b) a holding company the business of which consists wholly or mainly of holding trading companies resident in a “relevant Member State” and which are its 90% subsidiaries.  A member of a loss group may, however, normally surrender all or part of any of the following to any other member of the same group:   * Irish trading losses; * excess trading charges; * excess capital allowances; or * excess management expenses of investment companies. |
| 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? | Ireland does not have CFC-rules as defined on page 59 of the Report.  It is noted (but does not change the MS assessment) that the Irish authorities in their comments pointed out that Ireland taxes dividends from foreign subsidiaries as well as foreign branch income. Ireland charges all foreign income and relieves any double taxation by giving credit against Irish tax for any foreign tax, i.e. by the credit method. According to Ireland, the absence of comprehensive CFC rules – in the context of dividend participation exemption regimes, adopted by most EU member states, and foreign branch exemption regimes – results in permanent tax-exemption of foreign income, and the absence of CFC rules in Ireland can only result in the deferral of tax on the profits of a foreign subsidiary, pending repatriation of the profits concerned. Finally, they have indicated that there is no deferral of tax on the profits of a foreign branch of an Irish company as these profits are fully included in the chargeable profits of the Irish company concerned.  The authors of the Report have taken notice of these comments but do not consider the tax mechanisms mentioned identical or equivalent to CFC-tax rules. In particular, CFC tax rules would tax income of a foreign CFC company regardless of whether a dividend is received. |
| 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. | In the Irish case of Quigley v Harris, the High Court approved the judgment of the UK Court of Appeal in IRC v Memec in relation to foreign entity classification. It is likely, therefore, that the following criteria will apply in Ireland to determine the transparency or opacity of a foreign entity: separate legal personality; issued share capital or equivalent; is the business distinct from its members; do members share in profits as they arise; responsibility for debts of business; and who enjoys beneficial ownership of the assets i.e. members or 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. | It is possible to seek guidance from the Revenue as to the correct classification, as a matter of Irish law, of a foreign entity. In this regard the criteria outlined above will be examined, including the foreign analysis of the entity as, for example, having a separate legal personality or issued share capital.  B Hybrid in Model ATP-Structure 3 will be considered Irish resident if it is incorporated in Ireland (and is not resident in a jurisdiction with which Ireland has a double tax agreement) or if its central management and control is in Ireland. Any mismatch in classification of B Hybrid is a matter for the jurisdiction of MNE Group. |
| 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. | See 38. |
| *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. | From 2015, a company incorporated in Ireland will be automatically considered resident in Ireland for tax purposes, unless it is considered resident in a jurisdiction with which Ireland has a double tax treaty.  This is subject to grandfathering provisions until December 2020.  Thus the rules is that an Irish-incorporated company is, prima facie, resident in Ireland unless considered to be resident in a jurisdiction with which Ireland has a treaty.  As Ireland has an extensive network of double tax agreements (approximately 72), it is thus possible that a company incorporated in Ireland will nonetheless remain resident in another jurisdiction by means of, for example, the exercise of central management and control of the company in that jurisdiction.  Additional info added Sept 15:  Residence changes in Finance Act 2014  From 1 January, 2015, a company incorporated in Ireland will be automatically considered resident in Ireland for tax purposes, unless it is considered resident in a jurisdiction with which Ireland has a double tax treaty (DTT).  This applies to all companies incorporated in Ireland after 1 January, 2015. There are transitional arrangements (noted below) for companies incorporated in Ireland prior to 1 January, 2015.  Ascertaining residence status for companies incorporated in Ireland prior to 1 January, 2015  Companies incorporated in Ireland prior to 1 January, 2015 will need to look at pre-existing legislation to determine residence status.  Under these rules, Irish-incorporated companies are regarded as resident in Ireland for the tax purposes.  This is subject to some exceptions, the most relevant being where the incorporated company or a related company carries on a trade in Ireland and either the company is ultimately controlled by tax resident of a European Union (EU) member state or a country with which Ireland has a DTT, or the company or related company are quoted companies ('trading exemption'). Where the conditions of the trading exemption are met, the company's location of tax residence is determined by the jurisdiction where the company has its place of central management and control.  This trading exemption is, in turn, limited by the so-called “stateless” anti-avoidance provisions introduced in 2013, which specify that the trading exemption does not apply if an Irish incorporated company's place of management and control is in a jurisdiction that only applies an incorporation test for determining residency (and the company would thus not be regarded as tax-resident in any jurisdiction). In these circumstances, incorporation in Ireland will establish Irish residence.  Companies incorporated in Ireland prior to 1 January, 2015 will need to monitor these rules to determine residence during the transitional period referred to below.  Residence changes in Finance Act 2014: transitional period  The general rule that incorporation will, save in the case where a DTT determines otherwise, equate to Irish tax residence is subject to grandfathering provisions. These grandfathering provisions specify a transitional period until the earlier of 31 December 2020 or the date (after 31 December 2014) of a change in ownership of the company where there is a major change in the nature or conduct of the business of the company within the relevant period. The relevant period is defined as a period beginning on the later of 1 January 2015 or the date which occurs one year before the date of the change in ownership of the company and ending 5 years after the date of that change in ownership.  These anti-avoidance aspects of the transitional arrangements ensure that it is not possible to buy a pre-incorporated “off the shelf” company to use post 1 January 2015. It is also the case that any merger and acquisition activity may have the effect of triggering the suspension of the transitional rules, depending upon whether the change in ownership is accompanied by a major change in the nature or conduct of the business. The Revenue give an example of a major change in the nature or conduct of the business; if a company holding assets such as a deposit account or shares were to acquire intangible assets for licensing to other companies, this could constitute a major change in the business of the company.  International groups are thus given a six year period to examine their group structures with the amended residence rules, relating to pre-2015 companies, coming into effect in December 2020. |
| 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? | It is difficult to identify a suitable offshore state with which Ireland has a treaty, but which exempts the relevant income. However, this is a matter for the law of the foreign jurisdiction, not Ireland. |
| *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? | There is no legislative procedure governing a request for advance clearance of the specific tax consequences of a transaction, although targeted clearance procedures may apply. In the absence of a specific legislative procedure, any rulings are likely to be caveated by reference to full disclosure of all material facts, and inapplicability to a tax avoidance transaction. The Revenue is also bound with the “care and management” of the tax acts, which has been interpreted by the courts as limiting its discretion to act other than in strict accordance with statute.  In cross-border transactions, it is possible for taxpayers to enter into an APA, agreeing with the Revenue the arm’s-length price for arrangements with related parties outside Ireland. *(The Irish authorities have added that unilateral APAs as such are not given, only non-binding advisory opinions which are less contractual of nature).* The Revenue will engage with taxpayers and negotiate bilateral and multilateral APAs with jurisdictions with which Ireland has double taxation treaties. The conclusion of an APA will provide the taxpayer with certainty that its transfer pricing arrangements agreed thereunder are in compliance with Ireland’s transfer pricing rules, and thereby result in fewer disputes.  Ireland has given non-binding rulings, referred to as Revenue opinions, to specific companies. One of these APAs (with Apple) is currently under investigation by the European Commission on the basis of being an illegal state aid. |
| 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? | Ireland’s transfer pricing legislation, introduced with effect from January 2011, incorporates the OECD arm’s length standard into Irish law.  Section 835D TCA 1997 refers to the principles for construing the Irish transfer pricing legislation in accordance with the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 1995 and subsequent amendments. |
| 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? | Taxpayer confidentiality in Ireland results in the absence of a public record of what rulings or APAs have been given by the Revenue (other than certain anonymised rulings on what constitutes trading for tax purposes published on the Revenue website).  Any rulings would have to comply with the provisions of domestic legislation incorporating Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 1995 and subsequent amendments. Prior to January 2011, however, there was no specific transfer pricing code in Ireland and specific rulings may have been obtained. A ruling must, as noted at 42, be intra vires the Revenue’s power to opine on legislation. |
| *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. | Ireland has a general anti-avoidance rule (GAAR) contained in section 811 TCA 1997. However, this applies to domestic tax avoidance transactions, rather than transactions involving avoidance of tax imposed by other jurisdictions. |
| *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 |