**Study on Aggressive Tax Planning**

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

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

**Filled in for Italy**





**QUESTIONNAIRE**

**Italy**

## Abbreviations

**IRAP** = Imposta Regionale sulle Attività Produttive (Regional Tax on Productive Activities)

**ITA** = Income Tax Act (Presidential Decree 22 December 1986, n. 917)

**MS** = Member State

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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? | 27.5% (Article 77 ITA).  IRAP is not a tax on corporate income, since it is levied on the value produced by the activities carried out in Italy by the taxable subject. Therefore, according to the Instructions to the Questionnaire, IRAP is out of the scope of the Italian corporate income tax system. |
| 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, 95% of distributed dividends are subject to a tax exemption (Article 89(2) ITA). |
| 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? | The 95% exemption only applies if dividends do not derive from a company resident in a low-tax jurisdiction included in the CFC black list. In this latter case, the exemption however applies if the recipient has demonstrated (and obtained a ruling thereon) that the holding of the shares in the non-resident company has not achieved the object of localizing the income in a low-tax jurisdiction (Article 89(3) ITA).  The Italian tax authorities clarified (circular letter n. 51/E/2010) that in order to avoid the artificial triangular scheme, dividends distributed by an EU subsidiary, which may in principle benefit from the Parent-Subsidiary Directive (90/435), are wholly taxable in Italy if:   * Such dividends are derived (fully or partially) from a low-tax jurisdiction included in the CFC black list; and * The holding of shares in the foreign company through the EU company is aimed at avoiding the less favourable tax regime.   The presence of such an abusive triangular scheme must be ascertained by using a case-by-case approach. |
| 1. Does this apply regardless of the level of shareholding or voting rights held in the distributing company? | The 95% exemption is not subject to any minimum holding requirement. |
| 1. Does this also apply if the dividends have been deducted by the distributing company in its taxable income? | No, the exemption only applies if the dividends are not deductible in the State of residence of the distributing company (Article 89(3) ITA). |
| 1. If yes to b, how will the recent amendment of Article 4 of the EU Parent/Subsidiary Directive, which requires Member States to tax dividends if they have been deducted by the subsidiary, affect your answer? | The rule introduced by the amendments is already part of Italian law. |
| ***Dividends paid*** | |
| 1. Is it possible for a company in your MS to distribute dividends to a foreign company without any withholding tax? | Yes, according to Article 27-*bis*(3) of the Presidential Decree 29 September 1973, n. 600, which has implemented the Parent-Subsidiary Directive.  According to Article 15 of the EU-Swiss agreement on taxation of savings, dividends paid to a company resident in Switzerland may be tax exempt under essentially the same conditions as those laid down in the EU Parent-Subsidiary Directive.  A reduced 1.375% withholding tax is levied on dividends paid to companies and other entities resident and subject to corporate income tax in another EU or EEA country that allows an adequate exchange of information with Italy (Article 27(3-*bis*) of the Presidential Decree 29 September 1973, n. 600). |
| 1. If yes to 5, |  |
| 1. Does this apply regardless of the amount or percentage of shares, which the foreign company holds? | Article 27-*bis*(1) of the Presidential Decree 29 September 1973, n. 600 requires a minimum holding of 10% for at least 1 uninterrupted year.  The 1.375% reduced withholding tax is not subject to any ownership requirement. |
| 1. Does this apply regardless of the tax residence of the foreign company, e.g. member state, treaty state, tax haven? | The exemption only applies if the foreign shareholder company is:   * resident in an EU Member State, without being considered resident in a third State according to a double tax convention; * has one of the legal forms listed in the Annex to the Parent-Subsidiary Directive * is subject to one of the taxes listed in the Annex to the Directive, without the possibility of benefiting from an exemption, unless temporarily or territorially limited (Article 27-*bis*(1) of the Presidential Decree 29 September 1973, n. 600).   (Similar requirements apply if the foreign shareholder is resident in Switzerland).  The reduced withholding tax only applies if the recipient is a company or other entity resident and subject to corporate income tax in another EU country or in an EEA country that allows an adequate exchange of information with Italy. |
| 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. | In case of dividends paid to a company controlled directly or indirectly by persons that are not resident in States of the European Union, the exemption under the Parent Subsidiary Directive applies provided that proof is given that the holding of the participation in the Italian company does not have the main or sole purpose of benefiting from such exemption regime. |
| 1. Is any other tax levied upon a distribution of a dividend by a company in your MS? | Dividends paid by a company resident in Italy to a non-Italian resident person are ordinarily subject to final withholding tax at the domestic 26% rate or at the lower rate provided by the applicable double tax treaty unless the requirements for the Parent-Subsidiary Directive or the for the application of the 1.375% rate described above are met. |
| 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. | Dividend equivalents are treated in the same way as dividends (Article 47(1), ITA).  Withholding tax is applicable on dividend equivalents in the same way as for dividends. The shareholder shall file a declaration attesting the tax basis of the participation (Article 27(1-*bis*) of the Presidential Decree n. 600 of 1973) in order to duly settle the “taxable base” upon which withholding tax shall be levied. |
| ***Interest income*** | |
| 1. Is interest income from a loan granted by a company in your MS to a foreign group member company taxable? | Interest income is subject to tax (Article 89(5) ITA). |
| 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. | Two possible situations could occur.  If the loan is free of interest or interest rate not set according to arm’s length-conditions, Article 110(7)-(9) ITA applies. According to this provision, the interest income is determined at the “normal value” (arm’s length) if the Italian subject controls (or is controlled by or is controlled by the same controlling person of) the non resident company.  For companies drafting their statutory accounts under international accounting standards (IAS/IFRS) qualification, timing accrual and classification criteria set forth by such accounting standards are relevant also for corporate income tax purposes (art. 83, ITA).  Therefore, to extent under IAS/IFRS the credit is measured at initial recognition at a fair value lower than its value at maturity, subsequent amortisation of such difference under the effective interest method is subject to corporate income tax as interest income in the hands of the creditor company. |
| 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). | Qualification of financial instruments in Italy shall be assessed according to Article 44(2)(a) ITA. An instrument is similar to shares if (regardless of its qualification as debt or equity from an accounting and civil law perspective) the income produced is wholly non-deductible in the foreign State. Assuming the case described in the Model ATP-Structure n. 2, considering that the income arising from MS C is deductible, it shall not be exempted in Italy. |
| 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. Subject to substantially to the same limitations that apply to interest on third party debt. |
| 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.  Interest deduction depends on two general rules and a cross-border provision.  The first general rule sets a deductibility limit up to the interest income accrued in the same tax period (net interest expenses) and for the excess up to 30% of the EBITDA (Article 96 ITA).  Special rules are applicable to banks and financial institutions. In these cases, interest income is deductible with the limit of 96% of the actual amount paid.  The second general rule is the transfer pricing discipline(Articles 110(7)and 9 ITA).  The cross-border rule concerns the non-deductibility of interest paid to low tax jurisdictions, unless proof is given that the foreign recipient carries out an effective business activity or that the transaction meets an actual economic interest and has been effectively carried out (Article 110(10) ITA). |
| 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? | No, as regards thin-cap rules. Yes, other interest deduction limitations-rules are: deduction of interest expenses is subject to (i) an EBITDA limitation rule, (ii) the transfer pricing rule and (iii) a special low tax jurisdiction rule apply (see n. 14). |
| 1. If yes to 15 |  |
| 1. Please briefly explain the general scope and mechanism of the rules. | Interest expenses are deductible up to the amount equal to interest income accrued in the same tax period (net interest expenses). Any excess over that amount is deductible up to 30% of the gross operating income (EBITDA). Any excess of interest expenses over 30% of EBITDA may be carried forward without time limitation. If, in a fiscal year, there is an excess of 30% of the EBITDA over the net interest expenses, such excess may be carried forward without limitation and may be used to increase the relevant threshold in the following tax years.  Further interest on bonds and commercial papers issued by limited liability companies (other than banks or companies whose shares are not traded on a regulated stock exchange of an EEA country included in the Italian white list) cannot be deducted for the portion that exceeds:   * 200% of the official discount rate, in the case of listed bonds or bonds offered to the public; or * 166% of the official discount rate, in the case of other bonds.   The limitation does not apply to bonds and commercial papers that are issued by unlisted companies (other than micro-enterprises, as defined in the recommendation of the EU Commission 2003/361/CE of 6 May 2003) if   * the bonds or the commercial papers were issued on a regulated stock exchange or a multilateral trading facility of an EEA country not included in the Italian black list; or * the bonds or the commercial papers are held by qualified professional investors that do not hold (directly or indirectly) more than [2%] of the capital of the issuer and provided that beneficial owner of the interest is resident in Italy or in States allowing an adequate exchange of information with the Italian tax authorities.   As already mentioned, the transfer pricing rules allow the tax administration to determine the “ordinary value” (arm’s length) of the interest.  The low-tax limitation prevents the deduction of interest paid to companies resident in black-list countries.  Special rules are applicable to banks and financial institutions. In these cases, interest costs is deductible with the limit of 96% of the actual amount paid. |
| 1. In particular, do the rules apply only to interest costs on inter-group debt or more generally to all interest costs? | The above rules applies to all interest costs. |
| 1. Do the rules take into account the worldwide debt ratio of the group of companies? | No.  If a company takes part to a domestic tax consolidation regime, any excess interest expenses (accrued after the inclusion in the domestic tax group) over 30% of EBITDA (or any interest carried forward) generated after the inclusion in the domestic tax group, may be used to offset the taxable income of another company within the tax consolidation up to the amount of (30% of) such company’s EBITDA that has not been used to deduct its own interest expenses.  Further for the purpose of computing the deductible amount of net interest expenses (30% of the EBITDA) the EBITDA of each non-resident company may be optionally taken into account, to the extent it exceeds the interest expenses borne by the same company, provided that:   * the Italian consolidating company owns directly or indirectly more than 50% of the stated capital, voting rights and profit participation rights of the non-resident company starting from the beginning of the relevant tax period; * the tax period of the non-resident company coincides with that of the Italian consolidating company; and * the financial statements of the non-resident company are audited. |
| 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. | Italian rules allow to prevent the basic ATP structures. They are not wholly effective in respect to more complex and evolved structures. |
| 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. | Where an item of income is paid in respect of a transaction engaged with a non-resident group member company, the transfer pricing applies. The rule states, obviously, that related parties’ transactions shall be assessed on an arm’s length basis (“normal value”).  The provision allows to consider decreases of the taxable base only as a consequence of a mutual agreement between tax administrations as regulated by the double tax conventions  For companies drafting their statutory accounts under international accounting standards (IAS/IFRS) qualification, timing accrual and classification criteria set forth by such accounting standards are relevant also for corporate income tax purposes (art. 83, ITA).  Therefore, to extent under IAS/IFRS the financial liability is measured at initial recognition at a fair value lower than its value at maturity, subsequent amortisation of such difference under the effective interest method is deductible for corporate income tax purpose as interest expense by the debtor company. |
| 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. There is no specific Italian tax law provision (nor case law precedents we are aware of) whereby the benefit to a debtor company represented by an interest free or non-arm’s length interest bearing loan originates a taxable benefit for the borrower company. |
| 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)? | 26%. |
| 1. Are there special withholding tax rules for interest paid on a loan from a group member company? | Article 26*-quater* of the Presidential Decree n. 600 of 1973 exempts interest income paid to companies of another MS, as qualified by the Interest and Royalties Directive.  The other requirements are stated in Article 26-*quater*(2) of the same Decree and concern the minimum holding period (1 year) and the minimum holding (25%).  If only the beneficial ownership requirement is not met, a reduced 5% withholding tax is applicable to the payments of interest income to non resident companies, only if those payment is aimed at funding the payment of interest on bonds issued by the recipient company that are traded in EU or EEA stock exchanges and secured by the interest paying company (or by another company of the same group). In such a case, an indirect 0.25% registration tax applies on the guarantee. |
| 1. Does this apply regardless of the tax residence of the creditor company, e.g. member state, treaty state, tax haven? | The exemption and the reduced tax rate apply exclusively if the recipient is resident in another MS (or EEA country). In the case of the Directive, the non resident company must not deemed to be resident outside the EU. |
| 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. The beneficial owner concept is adopted by Article 26-*quarter*(4)(c) of the Presidential Decree n. 600 of 1973, which implements the Interest and Royalties Directive, and by (almost all) the double tax conventions stipulated by Italy. |
| 1. Is such exemption, reduction or refund subject to other anti-avoidance requirements? If yes, please explain briefly. | Ordinary domestic anti-avoidance rule on interest payments falling within the scope of the Interest and Royalties Directive if made to companies controlled directly or indirectly by one or more persons that are not resident in a State of the European Union. |
| ***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. Italian resident companies and permanent establishments of non-resident entities may benefit from an allowance for corporate equity (ACE). The ACE regime provides for the deduction of the notional interest on the net (qualifying) equity increases occurred as from the tax period ending on or after 31.12.2010.  The Ministry of Finance determines the applicable ACE rate by 31 January of each year, taking into account government bonds’ average yields (2015: 4,5% and 2016: 4,75%).  The notional interest is deducted once the company’s net income has been calculated. This means that, in the case of tax losses carried forward from previous years, the notional interest may be deducted only once the net income of a given fiscal year has been netted of the tax losses carried forward from the previous fiscal years. The deduction of the notional interest cannot result in a tax loss for the company (it can only zero the company’s taxable income). Excess notional interest can be carried forward without time limitation. Alternatively, the company may obtain a tax credit equal to the IRES rate multiplied by the amount of the excess.  Various specific anti-avoidance provisions apply limiting the benefit of the ACE regime. In particular the net equity increases on which the notional deduction is allowed shall be decreased for (a) cash contributions made to entities of the same group (b) acquisitions of shareholdings in companies already qualified as related entities prior to the acquisition (c) acquisitions of businesses from group companies (d) receipt of cash contributions from non-resident companies, if the latter are controlled by Italian resident companies (e) cash contributions from entities resident in black-listed jurisdictions (f) financing related companies  Please note that (a), (b), (c), cases should refer only to contributions and acquisitions between resident companies.  In principle, the deduction can be claimed also against financial income. |
| 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? | A Patent Box regime has been introduced in 2015 (Law 23 December 2014, no. 190).  The Patent Box regime provides a 30% in 2015, 40% in 2016 and 50% 2017 and ff. exclusion of the taxable base of the income derived from patent, trademarks and other intangible assets. The exclusion is subject to the condition of the direct use or the licence of the intangible by the enterprise (or the individual).  In addition, the gains realized from the transfer of intangibles are wholly exempted if at least 90% of the proceeds are re-invested in R&D of such assets.  The Patent Box regime is applicable to both resident and non resident subjects. It applies irrespectively from the (domestic or foreign) source of income.  The benefit is granted, provided that the companies carries out research and development activities and in proportion to the ratio between (i) the research and development costs borne by the company and (ii) the overall costs borne to produce the relevant intangible.  The implementation of the above regime is subject to the enactment of the implementing ministerial decrees that have not been issued yet at the date hereof.  The regulation does not provide any specific anti-abuse provision. Therefore, GAAR applies. |
| 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? | According to Article 3, of the Law Decree n. 145 of 2013, a tax credit is granted (up to a maximum amount of 5 €/mio) for research and development investments to the extent of 25% of the excess over the average amount of investments undergone in the 3 taxable periods before 2015. |
| 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. | The tax credit is granted to any enterprise:   1. In respect of one of the investment listed in Article 3(4)(a) to (d) of the Act n. 190 of 2014 and, among the others, research aimed at reaching new knowledge to implement new products; 2. Where the activity does not entail ordinary business activities even when such activities lead to enhancement of products; 3. In respect of expenses for highly skilled employee; amortisation of costs suffered for acquiring instruments for research; funding to research institutions and Universities. In the latter case, costs cannot exceed 50% of the cost incurred.   Tax credit shall be claimed in the Tax Return. |
| 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 wording of the law provision seems to limit the credit to costs actually borne by the company. |
| 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. | The transfer is ordinarily taxed on the realized capital gains. There is no clear guidance in respect to hard-to–value intangibles.  If the Patent Box regime applies, capital gains are exempted if at least 90% of the income derived is invested in research and development in the 2 subsequent taxable periods. The 90% value shall be assessed according with a Ruling procedure to be implemented with the Inland Revenue. |
| 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? | No. |
| 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. Royalties paid for patents, trademarks, know-how and similar rights are deductible according to ordinary business income tax rules. |
| 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? | Not directly, but royalties are in principle not deductible if paid to companies resident in low-tax jurisdictions (Article 110(10) ITA). |
| 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)? | 30% (generally applied to 75% of the gross amount of the payment, resulting in an effective rate of 22.5%). |
| 1. Are there types of royalty payments which are not subject to withholding tax? | Outbound royalties are exempt from any Italian tax imposed on those payments, provided that the requirements established in the Interest and Royalties Directive are met (Article 26-*quater* of the Presidential Decree n. 600 of 1973). |
| 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. The beneficial owner concept is adopted by Article 26-*quarter*(4)(c) of the Presidential Decree n. 600 of 1973, which implements the Interest and Royalties Directive, and by (almost all) the double tax conventions stipulated by Italy. |
| 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. | Ordinary domestic anti-avoidance rule on interest payments falling within the scope of the Interest and Royalties Directive if made to companies controlled directly or indirectly by one or more persons that are not resident in a State of the European Union. |
| ***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.  Italian tax law provides for two different regimes of tax consolidation, i.e. the domestic tax consolidation and the worldwide tax consolidation.  Domestic (Articles 117 ff. ITA):  An eligible subsidiary is an Italian resident company in which the parent (i) holds, directly or indirectly, the majority of the voting rights that can be exercised at the shareholders’ meeting, (ii) holds, directly or indirectly, more than 50% of the subsidiary’s stated capital and (iii) is entitled, directly or indirectly, to more than 50% of the profits of the subsidiary. In addition, the following conditions must be met:   * the parent and the subsidiaries must have the same fiscal year; * the election must be made jointly by the parent and by each subsidiary; * the election for the domestic tax consolidation must be made in the tax return filed in the first fiscal year to which the consolidation applies; and * each subsidiary must elect to be domiciled for tax purposes at the domicile of the parent company.   Worldwide (Articles 130 ff. ITA):  Under article 130 ITA, Italian resident companies may elect to apply a worldwide tax consolidation to their non-resident subsidiaries. To this end, the resident company must be (i) listed on a regulated market or (ii) controlled by the government or other governmental entity or by Italian resident individuals who do not directly or indirectly control other resident or non-resident companies. The eligible non-resident subsidiaries are those companies in which the resident parent company holds, directly or indirectly, more than 50% of the stated capital, voting rights and participation in the profits.  The election for the worldwide tax consolidation also requires that:   * all non-resident subsidiaries be included in the worldwide tax consolidation (all-in, all-out principle); * the parent company and the subsidiaries have the same fiscal year, unless this is prevented by specific foreign laws; * the financial statements of the consolidated entities will be audited; and * the non-resident subsidiaries issue a statement containing the consent to the auditing of their financial statements and the undertaking to cooperate with the parent company in order to determine the tax consolidated income.   Article 115 ITA provides a specific optional group regime restricted to companies with a participation from 10 to 50%. In this case, income and losses are directly imputed to the participant irrespective of the actual distribution. |
| 1. If yes to 32, is group taxation restricted in situations where a (holding) company has solely been inserted in connection with a leveraged acquisition of the operating company (so-called debt push-down)? When responding, please consider Model ATP-Structures no. 1 – 3 and assume that C Holdco and B Hybrid are tax resident in your MS. | No.  However, the acquisition (leveraged debt push-down) falls under the scope of the SAAR provided by Article 37-*bis* of the Presidential Decree n. 600 of 1973. The Italian Supreme Court ruled out that such debt push-down is a legitimate business transaction  (Case n. 1372/2011). |
| ***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. | The profits realised by a non-resident company are deemed to be the profits of an Italian resident person (direct imputation) if:   * the resident person controls, directly or indirectly, also through trustee companies or interposed third persons, the non-resident company; and * the company is resident in black-list jurisdiction.   The black-list contains a list of the jurisdictions that (i) do not allow an adequate exchange of information with Italy and (ii) have a level of taxation materially lower than Italy (low-tax jurisdiction).  The scope of the CFC rules has been broadened and now also encompasses companies located in non-low-tax jurisdictions, which means that CFC rules may also apply to companies located in the European Union, provided that the following conditions are met:   * the actual income tax paid in the foreign jurisdiction is lower than 50% of the Italian corporate income tax that would be applicable to the company if it were resident in Italy; and * more than 50% of the proceeds of the controlled company derive from:   + the managing, holding or investment in securities, shares, receivables or other financial assets;   + the transfer or licensing of patents or copyrights; or   + the supply of intra-group services, including financial services.   The Italian-resident shareholder must apply for a tax ruling claiming the non-application of the CFC rules. To this end, the Italian-resident taxpayer must give evidence that:   * the CFC predominantly carries out, as its main business purpose, an industrial or business activity within the local market, i.e. within the market of the country where the company is located. The non-resident company must be economically and socially integrated in this market, and the presence of a real business organisation in such market is not enough (c. 51/E/2010). For banks, financial institutions and insurance companies, this evidence is deemed to be given if most of the funds, investments, and proceeds arise from the jurisdiction where these entities are located; or * the participation in the CFC does not achieve the result of shifting income to low-tax jurisdictions. |
| 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? | (1) Yes, if State B is a black-list country or, if not, whether the conditions described in n. 35 are met.  (2) Yes, if State B is a black-list country of, if not, whether the conditions described n. 35 are met.  (4) Yes, if the conditions described in n. 35 are met.  (6) Yes, if State E is a black-list country of, if not, whether the conditions described n. 35 are met. |
| ***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. | No. Italy qualifies all foreign entities (irrespective from their legal form and tax treatment) as “opaque” for tax purposes. In this sense, B Hybrid cannot ever be qualified in Italy as a transparent entity and the described situation cannot be replicated.  In the opposite situation, i.e. MS B qualifies B Hybrid as a transparent entity, Italy treats this transparent entity as “opaque” and therefore, at least in principle, any mismatch is avoided. |
| 1. Does your MS apply rules to counter another state’s mismatch in tax qualification of a legal entity (company) resident in your MS? If yes, please briefly explain the rules and their scope. When responding, please consider Model ATP-Structure no. 3 and assume that B Hybrid is established and tax resident in your MS. | No. |
| 1. Does your MS apply rules to counter another state’s mismatch in tax qualification of a transparent entity (partnership or similar) in your MS? If yes, please briefly explain the rules and their scope. | No.  The Italian authorities have indicated that according to the Italian Law, there is no alignment between the tax qualification of partnerships and other hybrid entities established in Italy and the qualification applied by the Member State in which the owners of entities are tax resident. They add that, however, according to article 23, paragraph 1, letter g), of the Italian Direct Tax Code, in case of partnerships (or similar entities) resident in Italy and owners resident outside Italy, the latters are always subject to tax in Italy (on the basis of the source state principle) irrespective of the qualification applied by the MS in which the owners of entity are tax resident. Hence the Italian authorities state that even if in principle the mentioned article 23 is not a provision aiming at countering another State’s mismatch in tax qualification of an Italian transparent entity, in practice it makes it possible to avoid any such mismatch. |
| ***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. | According to Article 73(3) ITA, a company is resident if it has in Italy (alternatively):   1. Its legal seat; 2. Its place of management; 3. Its main object of activity   for the major part of the year.  Therefore, a company incorporated in Italy must (necessarily) have the legal seat in Italy (and therefore be resident for tax purpose in Italy).  On this issue see also answer 41. |
| 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? | If Company B1, incorporated in Italy, transfers the legal seat in State E, then the Structure can work.  In addition, Company B1 must not have its main object of activity in Italy. |
| ***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. Article 8 of the Law Decree n. 269 of 2003 provides that enterprises carrying out “international activity” may apply for APA with regard to transfer pricing, interest, dividends and royalties.  The Italian authorities have stated the opinion that the answer to this question should have been 'no' because it specifically refers to unilateral rulings on interest or royalty spread and, in particular, to unilateral rulings used to “confirm an artificial flow through arrangement of interest or royalty and to agree what spread will satisfy the local tax authorities so that they abstain from challenging, for example, the arm’s length … character of the arrangements”.  They have highlighted that in no case Italy ‘offers’ tax rulings that “confirm non arm’s length transactions” or “confirm the amount of spread between interest or royalty income and cost in flow through structures” or “agree what spread will satisfy the local tax authorities”. In fact, according to article 8 of the Law Decree n. 269 of 2003 (recently abrogated by article 1, paragraph 1, of the Legislative Decree n. 147 of 2015), the Italian tax authority only stipulates APAs – on request by the taxpayers - grounded on the arm’s length principle, as developed in the OECD Guidelines.  As this resulted in a conflict with the initial assessment, the NTE was asked to consider his assessment in light of the explanations provided by the Italian Authorities. The response was:  *The aim of Article 8 of the Law Decree n. 269 of 2003 was to find an agreement, between the parts, on the method applicable in order to give the proper value to non-independent transactions. This agreement bound for five years the Taxpayer and the Tax Administration. The basis of the negotiation was the OECD Guidelines TP.*  *In this sense, the subject of the agreement was the method, not the value of the transaction, which was the result of the application of the agreement. This result would also have been, in rare cases, at non-arms’ length, but as a result - for example - of the choice of the comparable.*  *The provision, as mentioned in the document, has been abolished by the Legislative Decree n. 147 of 2015.*  As a result of this exchange, the authors of this report decided to maintain the original assessment of this 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? | Italian transfer pricing rules are grounded on the arm’s length principles, as developed in the OECD Guidelines. |
| 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. APAs aims at addressing the arm’s length value of transactions. The issue is clearly stated in the II Bulletin on the APA (p. 5) where the tax administration stresses that Article 9 DTC shall prevail over the internal rule. APA cannot grant exemptions unless tax treatment of dividends or similar income (also according with DTCs) is at a stake. Management fees (deemed expenses) can be also assessed under the APA. |
| ***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 described Structures may fall within the SAAR and GAAR.  The former is provided by Article 37-*bis* of the Presidential Decree n. 600 of 1973.  The latter is a creation of the Supreme Court case-law, who, in 2008, has stated that a general anti avoidance rule stems from Article 53 of the Italian Constitution (ability to pay principle).  Both rules are grounded on these requirements:   1. circumvention of (domestic or conventional) tax law; 2. purpose of obtaining an undue tax benefit; 3. lack of actual economic reasons.   The main difference between the two rules concerns the procedure. The tax assessment of the situations which fall within Article 37-*bis* follows a special procedure, which is not (expressly) extended to the GAAR.  The Legislative Decree No. 128 of August 2015 (published in the Official Gazette No. 190 of 18 August 2015 and entered into force on 2 September 2015), aims at providing certainty to taxpayers when dealing with the tax authorities and complying with their tax obligations.  This Legislative Decree reviews the current anti-avoidance legislation and abuse of law doctrine and jurisprudence, by introducing a legal definition of abuse of law, which takes also explicitly into account the EU Commission Recommendation 2012/772/UE on aggressive tax planning of 6 December 2012.  The Decree introduces a general anti-abuse/anti-avoidance rule to apply with respect to all taxes; in addition, it repeals Article 37-bis of Presidential Decree of 29 September 1973, no. 600.  As a fact, the new Article 10-bis concentrates in one provision the previous quasi-general anti-avoidance rule and abuse of law doctrine.  Under the new article 10-bis of Law No. 212 of 27 July 2000, one or more transactions constitute abuse of law where they lack economic substance and, even if formally consistent with tax law, they are essentially aimed at obtaining undue tax savings. Transactions are deemed to be lacking economic substance where they consist of facts, acts and contracts, also interconnected, which do not generate significant effects other than tax savings. Undue tax savings consist of tax benefits, even if not immediate, obtained in contrast with the purpose of tax provisions or the principles of the tax system.  Transactions do not constitute abuse of law where justified by valid and non-marginal non-tax reasons, including those aiming at improving the business organization or management. However, in order for the transaction to qualify as legitimate, the economic reasons shall not be negligible.  The new definition has become effective starting from the first day of the month following the entry in force of the Legislative Decree. |
| ***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. | The introduction of a GAAR by the Supreme Court in 2008 has given to the Tax Administration a powerful tool to fight against ATP. This rule can potentially cover any situation, as the evolution of case law demonstrates.  It might wonder whether the introduction of the exemption for foreign PE of Italian companies (currently under discussion by the Italian parliament) might generate new chances for ATP. |