**Study on Aggressive Tax Planning**

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

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

**Filled in for Malta**





**QUESTIONNAIRE**

**Malta**

## Abbreviations

**ITA - Income Tax Act**

**ITMA – Income Tax Management Act**

**ME – Malta Enterprise Corporation**

|  |  |
| --- | --- |
| Questions | Answers |
| *Corporate tax rate* | |
| 1. What is the standard rate of corporate income tax applicable for the fiscal year 2015? | 35%. |
| 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. | Malta does not have any special offshore tax regimes. There are certain onshore tax exemptions granted subject to the applicable statutory conditions and these are referred to in the answers to the questions below. |
| *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. Dividends may be tax exempt through the participation exemption. |
| 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 participation exemption applies to dividends received from a participating holding if (Art. 12(1)(u) of the ITA) subject to certain anti-abuse conditions:   * The distributing company is resident or incorporated in a country or territory which forms part of the European Union; or * The distributing company is subject to any foreign tax of at least 15%; or * The distributing company does not derive more than 50% of its income from passive income (i.e. interest or royalties).   Where none of the above three conditions are fulfilled, the company must fulfil both of the following conditions for the participation exemption to apply to dividends received therefrom:   * The equity holding of the distributing company is not considered a so-called portfolio investment, and * The distributing company or its passive interest or royalties have been subject to any foreign tax at a rate of at least 5%. |
| 1. Does this apply regardless of the level of shareholding or voting rights held in the distributing company? | The participation exemption regime applies if the shareholder company (article 2 of the ITA):   * Holds directly at least 10% of the share capital, conferring entitlement to at least 10% of any 2 of: voting rights, profits available for distribution, assets available for distribution upon winding up; or * Is entitled at its option to call for and acquire all the equity shares not held by that shareholder to the extent permitted by the law of the country in which the equity shares are held; or * Is entitled to first refusal in the event of a proposed disposal, redemption or cancellation of all the equity shares not held by that shareholder; or * Is entitled either to sit on the board or appoint a person to sit on the board of that company as a director; or * Has invested a minimum sum of EUR 1,164,000 (or the equivalent sum in a foreign currency) in the company and that holding in the company is held for an uninterrupted period of 183 days; or * The holding of such shares is for the furtherance of the resident company’s own business and the holding is not held as trading stock for the purpose of a trade. |
| 1. Does this also apply if the dividends have been deducted by the distributing company in its taxable income? | If the payment is one of profits received further to a holding of equity, and therefore properly categorised as a dividend - yes, but this shall no longer be possible with effect from 1 January 2016.  If the payment relates to the holding of a debt instrument (including a hybrid loan) – no, as confirmed by the Revenue Guideline referred to in 11. below. |
| 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? | This amendment has already been transposed into Maltese law, effective 1 January 2016. |
| *Dividends paid* | |
| 1. Is it possible for a company in your MS to distribute dividends to a foreign company without any withholding tax? | Taxed profits – Malta operates a full imputation system of taxation and, accordingly, the tax paid on the distributed profits is fully imputed to the shareholder and there is no further Malta tax.  Untaxed profits – a 15% withholding tax applies to resident shareholders (other than companies) and to non-resident shareholders owned and controlled by, directly or indirectly, or acting on behalf of, an individual who is ordinarily resident and domiciled in Malta. |
| 1. If yes to 5, |  |
| 1. Does this apply regardless of the amount or percentage of shares, which the foreign company holds? | Yes. |
| 1. Does this apply regardless of the tax residence of the foreign company, e.g. member state, treaty state, tax haven? | The 15% withholding tax that applies to distributions of untaxed profits is levied where the recipient is a resident shareholder (other than a company) or a non-resident shareholder owned and controlled by, directly or indirectly, or acting on behalf of, an individual who is ordinarily resident and domiciled in Malta. |
| 1. Is the withholding tax exemption subject to a beneficial ownership requirement similar to that of the OECD model tax convention? | No. |
| 1. Is the withholding tax exemption subject to any other anti-avoidance requirements, e.g. based on substance of the recipient? If yes, please briefly explain. | No, subject to the GAAR (article 51 of the ITA). |
| 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. | Dividend equivalents (typically bonus shares and liquidation proceeds representing income) are treated in the same way as dividends. However a buy-back of shares and a capital reduction is considered to give rise to a capital gain for Maltese tax purposes. |
| *Interest income* | |
| 1. Is interest income from a loan granted by a company in your MS to a foreign group member company taxable? | Yes (article 4 of the 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. | No, although transactions should be executed on an arm’s length basis and, accordingly, such a transaction may be challenged by the Commissioner in terms of a general (art 51 of the ITA) or a specific anti-avoidance provision (article 5(6) of the ITMA). |
| 1. Is it possible that an interest bearing financial instrument (hybrid loan) granted by a company resident in your MS to a foreign group member company could be qualified as an equity investment in your MS with the result that the return on the investment (treated as deductible interest in the state of the debtor company) is considered a tax exempt dividend or similar? When responding, please consider Model ATP-Structure no. 2 and assume that B Holdco is tax resident in your MS (regardless of the non-MS assumption in the description of the Model). | No. In terms of a Revenue Guideline, income from a loan, including a hybrid-type loan, shall be taxed as interest and does not benefit from the participation exemption available with respect to profits received from companies in which the local taxpayer has an equity holding. |
| 1. If yes to 11, |  |
| 1. Please briefly explain which requirements should be fulfilled. | N/A |
| 1. How will the amendment of Article 4 of the EU Parent/Subsidiary Directive affect your answer? | N/A |
| *Interest costs* | |
| 1. Are inter-group interest payments on a loan granted by a foreign group member company tax deductible to a resident in your MS? | Yes. Interest is deductible if incurred wholly and exclusively in the production of taxable income.  This means that there must be a direct link between the expense incurred and the income derived from such an expense for the latter to be allowable. This rule in itself provides a material limitation when a given item of expense can be tax deductible.  This principle of deductibility applies across the board (all types of expenses), but in the 7 ATP structures, it can also be seen by reference to the first three structures w.r.t interest for example. These three Hold Cos are incurring expenses in connection with their investment they made in the subsidiaries. Such expenses can only be deductible against income this investment generates (dividends), but not against any other income the HoldCos may have. |
| 1. If yes to 13, |  |
| 1. Does the tax deductibility depend on how the interest income is qualified for tax purposes in the creditor’s state? If yes, please briefly explain. | No. |
| 1. In particular, would your MS still allow a tax deduction if the creditor state treats the corresponding interest income as a non-taxable dividend or similar, i.e. if the loan is a hybrid loan? When responding, please consider Model ATP-Structure no. 2 and assume that C Holdco is tax resident in your MS. | Yes. |
| 1. Is the tax deduction of interest cost on inter-group debt subject to any thin capitalisation-rules or other interest deduction limitations-rules? | No. (However, see answer to question 13). |
| 1. If yes to 15 |  |
| 1. Please briefly explain the general scope and mechanism of the rules. | N/A |
| 1. In particular, do the rules apply only to interest costs on inter-group debt or more generally to all interest costs? | N/A |
| 1. Do the rules take into account the worldwide debt ratio of the group of companies? | N/A |
| 1. In general, how effective do you consider these rules in countering ATP? When responding, please consider Model ATP-Structures 1 – 4 and assume that C Holdco, B Hybrid and OpCo are tax resident in your MS. | N/A |
| 1. If a loan is granted free of interest (non-arm’s length-condition) by a foreign group member company, could a debtor company resident in your MS claim any tax deduction for a hypothetical (deemed) interest cost? When responding, please consider Model ATP-Structure no. 4 and assume that FinanceCo C is tax resident in your MS. Moreover, please explain whether any deemed deduction would be contingent on a corresponding adjustment in the foreign state. | No. |
| 1. Would the benefit of such a loan compared to a normal interest-bearing loan on arm’s length conditions be taxable to the debtor company in your MS? If yes, how? | N/A |
| 1. Does your MS levy any withholding tax on interest payments? | Yes, a withholding tax is levied in relation to several types of interest payments. A non-resident may qualify for an exemption subject to these exceptions: (a) where a non-resident payee is engaged in business activities locally through a permanent establishment to which the debt claim is effectively connected, (b) generally, in the case of a non-resident payee, being the beneficial owner thereof, if it is directly or indirectly owned and controlled by individuals ordinarily resident and domiciled in Malta, or acts on behalf of such persons. |
| 1. If yes to 19 |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | Investment income – 15%. Other interest income - 35% - if paid to companies; 25% - if paid to other persons. |
| 1. Are there special withholding tax rules for interest paid on a loan from a group member company? | No. |
| 1. Does this apply regardless of the tax residence of the creditor company, e.g. member state, treaty state, tax haven? | Yes. |
| 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? | Beneficial ownership requirements emanating from any applicable tax treaty and the EU Interest/Royalty Directive have the force of law and are applicable as such. |
| 1. Is such exemption, reduction or refund subject to other anti-avoidance requirements? If yes, please explain briefly. | They are subject to the GAAR. |
| *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? | The ITA grants an exemption from tax on royalties, advances and similar income derived from patents in respect of inventions, copyright and trademarks, subject to the satisfaction of terms and conditions to be prescribed. In practice, this exemption is not currently available. |
| 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? | Investment aid tax credits may be obtained by companies engaged in the design, development, testing and technical analysis of new products and/or processes in terms of Incentive Guidelines published by ME. |
| 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 availability of investment aid tax credits is subject to the approval of ME, an autonomous government agency. In appraising a project proposal, the Corporation takes into account various factors including its viability, the processes involved, the size of the capital investment, the sources of finance and the employment to be generated.  Two types of such credits are available, subject to the company retaining its investment in Malta for a number of years:   * Tax credits calculated as a percentage of a company’s expenditure on qualifying tangible and intangible assets, or * Tax credits calculated as a percentage of wage costs for jobs directly created in Malta by the project in question. |
| 1. Can such credits also be obtained for costs that are ultimately reimbursed by a group member company to the company in your MS? | In order for the credits to be available, the relevant expenditure must be incurred by the claimant 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. | No tax on capital gains is paid on the transfer of ownership of such assets between a group companies, whether these are local or foreign. |
| 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? | N/A |
| 1. Does taxation arise as a result of an anti-abuse provision or similar? | N/A |
| 1. Would any R&D tax credits obtained in the past be reversed upon a disposal? | N/A |
| 1. Can a ruling confirming the value of the IP be obtained? | N/A |
| *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, but only if incurred wholly and exclusively in the production of the local taxpayer’s taxable income. |
| 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? | Royalty payments made otherwise than in the production of the local taxpayer’s taxable income. |
| 1. Does your MS levy any withholding tax on royalty payments? | Royalty income is subject to tax in Malta, in the hands of resident and non-resident payees alike. A non-resident payee may qualify for an exemption subject to the following exceptions: (a) where a non-resident payee is engaged in business activities locally through a permanent establishment to which the royalty payments are effectively connected, (b) in the case of a non-resident payee, being the beneficial owner thereof, if it is directly or indirectly owned and controlled by individuals ordinarily resident and domiciled in Malta, or acts on behalf of such persons. |
| 1. If yes to 30, |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | 35% - if paid to non-resident companies; 25% - if paid to other non-resident persons. |
| 1. Are there types of royalty payments which are not subject to withholding tax? | Subject to 30 above, the law does not distinguish between types of royalty payments for withholding tax purposes. |
| 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? | Beneficial ownership requirements emanating from any applicable tax treaty and the EU Interest/Royalty Directive have the force of law and are applicable as such. |
| 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. | No, but subject to the GAAR. |
| *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). | Group relief provisions allow for the surrender of tax losses between group companies.  Two companies are considered to be members of a group of companies if both of them are resident in Malta and not resident for tax purposes in any other country, and where one company is the 51% subsidiary of the other or both companies are 51% subsidiaries of a third company resident in Malta and not resident for tax purposes in any other country.  For the purpose of the group relief provisions contained in articles 16 to 22 of the [ITA](http://online.ibfd.org/linkresolver/static/cta_mt_abb_ita?WT.z_nav=crosslinks), a company is deemed to be a 51% subsidiary of another company (the parent company):   * if, and for so long as, more than 50% of its ordinary share capital and more than 50% of its voting rights are owned directly or indirectly by the parent company; and * the parent company is beneficially entitled either directly or indirectly to more than 50% of any profits available for distribution to the ordinary shareholders of the subsidiary company; and * the parent company would be beneficially entitled either directly or indirectly to more than 50% of any assets of the subsidiary company available for distribution to its ordinary shareholders on a winding-up. |
| 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. | The group loss provisions (contained in Art 16 – 22 of our Income Tax Act[ITA]) provide that only “allowable losses” as per 14(1)(g) can be surrendered. This article refers to trade losses; ie; only those losses incurred in “any trade, business, profession vocation” as per Art 4(1)(a) ITA can be surrendered.  Therefore, irrelevant whether C Hold Co (in Structure 1 and 2) or B hybrid (in structure 3) could constitute a group (with their subs underneath) as per 16-22 ITA, no loss surrendering can take place, as these companies are undertaking holding activities, and their losses do not constitute trade losses as per 14(1)(g) ITA. |
| *CFC rules* | |
| 1. Does your MS apply CFC rules to foreign subsidiaries of a parent company in your MS? | No. |
| 1. If yes to 34, please briefly explain the rules and their scope. | N/A |
| 1. Please consider the attached Model ATP-Structures no. 1, 2 and 4 - 6. Assuming that MNE Group is tax resident in your MS, would your MS’s CFC-rules be applied to the structures? If yes, what would be the likely effects? | N/A |
| *Mismatch in qualification of legal entities* | |
| 1. Does your MS’s tax qualification of a foreign legal entity (e.g. a partnership) follow that of the foreign state, or does it apply its own criteria? Please briefly explain. When responding, please consider Model ATP-Structure no. 3 and assume that MNE Group is tax resident in your MS. | No, the tax qualification of foreign legal entities is based on domestic criteria. |
| 1. Does your MS apply rules to counter another state’s mismatch in tax qualification of a legal entity (company) resident in your MS? If yes, please briefly explain the rules and their scope. When responding, please consider Model ATP-Structure no. 3 and assume that B Hybrid is established and tax resident in your MS. | No. |
| 1. Does your MS apply rules to counter another state’s mismatch in tax qualification of a transparent entity (partnership or similar) in your MS? If yes, please briefly explain the rules and their scope. | No. |
| *Tax residence of company* | |
| 1. Based on domestic tax rules, without the application of any tax treaty, can a company incorporated in your MS be considered non-tax resident if its management and control is situated in another state? If yes, please explain under which circumstances. | No. |
| 1. If yes to 40, please consider Model ATP-Structure no. 6. Would the Structure work if Company B1 is incorporated in your MS but managed and controlled abroad in an offshore-state? | N/A |
| *Tax ruling practices* | |
| 1. Some states offer tax rulings (incl. so-called APAs) that confirm non-arm’s length-transactions or the amount of spread between interest or royalty income and cost in various international flow through-structures. As an example, please refer to Model ATP-Structure no. 1. Does your MS offer this form of tax ruling practices or APAs? | It is not possible to apply for a tax ruling that confirms non-arm’s length transactions.  It is possible to apply for a tax ruling that deals with the amount of spread between interest or royalty income and cost, but it is expected that the agreed terms be on an arm’s length basis. |
| 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? | There are no transfer pricing rules locally, but transactions are to be executed on an arm’s length basis and, accordingly and such an arrangement may be challenged by the Commissioner in terms of general anti-avoidance provisions (GAAR) and more specific provisions in the Income Tax Management Act (article 5(6) of the ITMA). |
| 1. Can a company in your MS obtain a ruling or APA that a) provides for tax exemption of profits considered to exceed an arm’s length-income or considered to have been left to the company by its shareholders (capital contribution), or b) provides for the deduction of deemed expenses that would have been due under arm-‘s length conditions? | No. |
| *GAAR/SAAR* | |
| 1. Please consider Model ATP-Structures no. 1-7. Are you aware of any general or specific anti-avoidance rules or practice in your MS which could impede or counter the ATP objective of any of the structures? If yes, please describe briefly the scope of the rules/practice and how they could be applied to each of the structures. | The following anti-avoidance rules may be relevant to a number of the Model ATP-Structures:  1. In terms of a Revenue Guideline income from a loan, including a hybrid-type loan, shall be taxed as interest and shall not benefit from the participation exemption available with respect to profits received from companies in which the local taxpayer has an equity holding.  2. The recent amendment of article 4. of the  Parent-Subsidiary Directive has been transposed into Maltese, effective 1 January 2016.  3. The Malta GAAR (article 51 of the ITA) which includes the following provisions:   * Where any scheme which reduces the amount of tax payable by any person is artificial or fictitious or is in fact not given effect to, the Commissioner shall disregard the scheme and the person concerned shall be assessable accordingly. * Where any person, as a direct or indirect result of any scheme of which the sole or main purpose was the obtaining of any advantage which has the effect of avoiding, reducing or postponing liability to tax, or of obtaining any refund or set-off of tax, has obtained or is in a position to obtain such an advantage, the Commissioner shall, by order in writing, determine the liability to tax or the entitlement to a refund or set-off of tax of the said person, or of any other person, for any year of assessment, in such manner and in such amount as may be necessary, in the circumstances of the case, to nullify or modify the said scheme and the consequent advantage.   4. Article 5(6) of the ITMA, further to which where a non-resident person shall have carried on business with a resident person, and it appears to the Commissioner that, owing to the close connection between the resident person and the non-resident person and to the substantial control exercised by the non-resident person over the resident person, the course of business between those persons can be so arranged and is so arranged that the business done by the resident person in pursuance of his connection with the non-resident person produces to the resident person either no profits or less than the ordinary profits which  might be expected to arise from the business, the non-resident person shall be assessable and chargeable to tax in the name of the resident person as if the resident person were an agent of the non-resident person.  No data is publicly available as to the application of the GAAR locally, including therefore with respect to the types of situations to which the GAAR has been applied to date. |
| *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. | We are not aware of any such rules or practice. |