**Study on Aggressive Tax Planning**

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

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

**Filled in for Poland**





**QUESTIONNAIRE**

**Poland**

## Abbreviations

**CITL** = Ustawa o podatku dochodowym od osób prawnych (Corporate Income Tax Law)

|  |  |
| --- | --- |
| Questions | Answers |
| *Corporate tax rate* | |
| 1. What is the standard rate of corporate income tax applicable for the fiscal year 2015? | 19%. |
| 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. (There is a special tax exempt regime for collective investment vehicles under article 6(1)(10a) and (11a) CITL) |
| *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 covered by the participation exemption implementing the Parent-Subsidiary Directive are tax exempt. |
| 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 implementing the Parent-Subsidiary Directive only applies for dividends paid from companies resident in an EEA Member State or Switzerland. Further, the subsidiary must be subject to corporate income tax in the other EEA Member State/Switzerland on the worldwide income. |
| 1. Does this apply regardless of the level of shareholding or voting rights held in the distributing company? | The participation exemption implementing the Parent-Subsidiary Directive only applies if the parent company has held at least 10% of the shares in the subsidiary’s share capital for an uninterrupted period of a minimum of 2 years, cf. paragraphs 3 and 9 of article 20 CITL.  The required minimum participation of the Polish parent in Swiss subsidiaries is 25%, cf. paragraph 12(2) of article 20 CITL. |
| 1. Does this also apply if the dividends have been deducted by the distributing company in its taxable income? | The participation exemption implementing the Parent-Subsidiary Directive will not apply if the dividends are deducted from the income, tax liability or in any other way decrease the taxable base of the distributing company, c. paragraph 16 of article 20 CITL. |
| 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 amendment is already part of Polish 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, paragraph 4 of article 22 CITL. |
| 1. If yes to 5, |  |
| 1. Does this apply regardless of the amount or percentage of shares, which the foreign company holds? | The exemption only applies, if the foreign shareholder company holds at least 10% (25% for Swiss parent) of the capital of the Polish subsidiary for an uninterrupted period of at least 2 years. |
| 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 EEA member state or Switzerland and is subject to corporate income tax in its state of residence. |
| 1. Is the withholding tax exemption subject to a beneficial ownership requirement similar to that of the OECD model tax convention? | The exemption applies only to the company which is the legal owner of the shares (entitled to the dividend).  Referring to the tax treaties, as a rule Poland, being an OECD member country, follows the OECD Model Convention. Therefore, agreements for avoidance of double taxation in general followa beneficial ownership requirement similar to that of the OECD model tax convention**.** |
| 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. | The exemption applies if the company holding the shares is the legal owner of the shares, or in relation to income derived from the shares held under:  a) ownership,  b) a title other than ownership, provided that the income would benefit from the exemption, if ownership of the shares has not  been transferred (paragraph 4d of article 22 CITL).  In accordance with the Polish policy concerning tax treaties, in particular the principal purpose test is applied. |
| 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. Accordingly, withholding tax is generally levied on dividend-equivalents to the same extent a distribution of dividends would have been subject to withholding tax (article 22 and article 10 paragraph 1 CITL). |
| *Interest income* | |
| 1. Is interest income from a loan granted by a company in your MS to a foreign group member company taxable? | Yes. |
| 1. If such a loan is granted free of interest (i.e. on non-arm’s length-conditions), would the creditor company resident in your MS have to include any deemed interest income in its taxable income? When responding, please consider Model ATP-Structure no. 4 and assume that FinanceCo B is tax resident in your MS. | In general no but if transfer pricing rules apply, the creditor company must include an arm’s length interest income (a deemed interest income) in its taxable income (primary transfer pricing adjustment), cf. article 11 paragraph 1 CITL. |
| 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 general this is unlikely as dividend income is considered a return on equity for Polish tax purposes. Thus, if the debtor company does not consider the hybrid loan as an equity investment, the return cannot be qualified as a dividend for Polish tax purposes.  Even if a hybrid mismatch occurred (e.g. in a situation where the state of the debtor company considers the hybrid loan as an equity investment for civil law purposes but treats the financial return as deductible interest for tax purposes), dividends received by a Polish company are not tax exempt if the dividends have been deducted by the distributing company in its taxable income, cf. paragraph 16 of article 20 CITL. |
| 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? | The rule introduced by the amendment is already part of Polish law. |
| *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 accrued and paid is deductible if incurred for the purpose of earning income. |
| 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, there is no anti-abuse rule preventing deductibility of interests on hybrid debt. Accordingly, if the creditor state qualifies the hybrid loan as an equity investment, interest expenses are still deductible for Polish tax law purposes. |
| 1. Is the tax deduction of interest cost on inter-group debt subject to any thin capitalisation-rules or other interest deduction limitations-rules? | Yes. A thin capitalization rule or an asset rule. |
| 1. If yes to 15 |  |
| 1. Please briefly explain the general scope and mechanism of the rules. | Interest is not deductible in the part in which a debt-to-equity ratio of 1:1 (borrower’s equity – not share capital) is exceeded and the loan is granted:   * by a shareholder directly or indirectly owning at least 25% of the share capital or by a group of shareholders owning in aggregate at least 25% of the share capital; or * between companies in which another company owns at least 25% of the share capital (article 16 paragraph 1(60) and (61).)   Taxpayers are entitled to opt for an alternative method of calculation of a deductible interest limit. Under this method, interest on qualifying loans granted by related and unrelated parties will be deductible up to an amount not exceeding the tax value of assets (except for intangible assets) multiplied by the reference rate (plus 1.25) of the National Bank of Poland on the last day of the preceding tax year, provided the interest does not exceed 50% of the taxpayer’s operational profit in a given tax year (article 15c CITL).  The rule entitles a 5 year carry forward access. |
| 1. In particular, do the rules apply only to interest costs on inter-group debt or more generally to all interest costs? | Interest costs on inter-group debt – in case of thin capitalization rule.  All interests costs from loans – in case of assets rule. |
| 1. Do the rules take into account the worldwide debt ratio of the group of companies? | No. |
| 1. In general, how effective do you consider these rules in countering ATP? When responding, please consider Model ATP-Structures 1 – 4 and assume that C Holdco, B Hybrid and OpCo are tax resident in your MS. | Given the low ratio of debt-to equity (1:1) and inclusion of direct and indirect shareholding, the Polish interest limitation rules can be considered effective in this regard. |
| 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. | Generally no. Beside a few exceptions, only interests actually paid are tax deductible. |
| 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? | Yes. Such a benefit may be consider as a revenue of resident company (revenue in the form of a gratuitous benefit). |
| 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, withholding tax is not levied on interests paid to a foreign related entity (requirement of owning 25% of share capital) if the Polish interest taxation is reduced or eliminated according to the EU Interest/ Royalties Directive or a tax treaty. |
| 1. Does this apply regardless of the tax residence of the creditor company, e.g. member state, treaty state, tax haven? | The exemption only applies if the foreign shareholder company is resident in an EEA member state. Tax is reduced, where applicable, if the creditor company is resident 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? | No.  Referring to the tax treaties, as a rule Poland, being an OECD member country, follows the OECD Model Convention. Therefore, agreements for avoidance of double taxation in general followa beneficial ownership requirement similar to that of the OECD model tax convention**.** |
| 1. Is such exemption, reduction or refund subject to other anti-avoidance requirements? If yes, please explain briefly. | Exemption does not apply to the revenues which are deemed as:  1) revenues from division of profits or repayment of capital of a company paying the receivables  2) revenues due to receivables carrying a right to a share in the debtor's profits,  3) revenues due to receivables that entitle the creditor to exchange their entitlement to receive interest for a right to participate in the debtor's profits,  4) revenues due to receivables that do not result in an obligation to repay the principal amount thereof, or where repayment falls due after no less than 50 years from the date the receivables came into being.  Moreover, where as a result of a special relationship, between the entity paying and the entity receiving payment, with regard to the receivables conditions are agreed or imposed that differ from the conditions that would have been agreed upon between independent parties, and, as a result of such a relationship, the value of the receivables being paid is higher than one would expect had this relationship not been in place, the exemption shall apply only to such a value of receivables that is determined without taking into account the conditions resulting from such a relationship.  In accordance with the Polish policy concerning tax treaties, in particular the principal purpose test is applied. |
| *Allowance for corporate equity* | |
| 1. Does your MS offer any tax deduction for a notional (fictitious) interest cost on the share capital of a company? If yes, please briefly explain and include any anti-avoidance provisions. In particular, can the deduction be claimed against financial income? | No. |
| 1. Does your MS offer any tax deduction for dividends declared or paid? If yes, please briefly explain. | No. |
| *Royalty and other income from intangible property* | |
| 1. Please consider Model ATP-Structure no. 5 and assume that Company B is tax resident in your MS. Does your MS offer any preferential tax regime (compared to the standard corporate income tax) for income from patents and other intellectual property rights? If yes, please briefly explain its main scope, characteristics and any anti-avoidance provisions. In particular, can the preferential tax treatment be applied to income from patents or other IP which has not been developed by the taxpayer (company) itself? Must the company have its own substantial R&D activities? Can the preferential tax treatment be applied also to income from other taxpayers in your MS? | No, Polish tax law does not offer any patent box regime or similar preferential tax regimes. |
| 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? | “New technology tax relief” allows companies that do not operate in SEZs for deducting up to 50% of costs incurred on the acquisition of innovative technology from the corporate income tax base.  R&D Centers: monthly deductions of up to 20% of revenues earned in a given month from the tax base and exemptions from property, agriculture and forestry tax of up to 200,000 euro over 3 consecutive years.  There are 14 Special Economic Zones in Poland. Income earned from the activity conducted in the SEZs is exempt from CIT in relation to investment expenses or created employment. |
| 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. | New technology tax relief applies to costs of acquisition of technological know-how in the form of intangible assets, in particular the results of research and development, which enables the production of new or improvement of products or services, and which is not used in the world for a period longer than the last 5 years, as confirmed by an independent research unit.  The taxpayer loses the right to deduction in connection with the acquisition of new technology, if within three fiscal years from the end of the tax year in which the new technology was introduced in the register of assets the taxpayer:  1) provides in any form or part the right to the new technology to other entities; except where the transfer of rights results from a transformation of legal form or a merger or division of existing businesses, or  2) is declared bankrupt including liquidation of assets, or  3) receives reimbursement of costs of this technology in any form, or  4) the tax capital group loses its taxpayer status.  Earning the R&D center status: the qualification requirements involve net revenues of EUR 1.2 million and at least 20% of the revenues generated from the sale of R&D services or industrial property rights.  SEZ CIT exemption requirements:  a) not to transfer, in any form, ownership of the assets to which investment expenses related, for a period of five years (three years in the case of small and medium-sized enterprises);  b) to run the business for a period of not less than five years (or three years MSE)  c) to keep newly created jobs for a period of not less than five years from the date of their creation (three years MSE).  The required number of employees and value of the investment is indicated in a concession to conduct business in the SEZ. |
| 1. Can such credits also be obtained for costs that are ultimately reimbursed by a group member company to the company in your MS? | Not within three years from acquisition. |
| 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. | Generally No. In fact jurisprudence allows such a transfer through in-kind contribution. |
| 1. If no to 26, i.e. your MS would impose tax on the disposal, |  |
| 1. Is the relevant capital gains tax rate lower than the standard rate? | No. |
| 1. Does taxation arise as a result of an anti-abuse provision or similar? | No. |
| 1. Would any R&D tax credits obtained in the past be reversed upon a disposal? | Yes. |
| 1. Can a ruling confirming the value of the IP be obtained? | No. |
| *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. |
| 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. |
| 1. If yes to 30, |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | 20%. |
| 1. Are there types of royalty payments which are not subject to withholding tax? | Royalty payments to associated EEA companies and permanent establishments of associated EEA companies situated in another EU Member State are exempt from tax. |
| 1. In connection with an exemption, reduction or refund of withholding tax under a tax treaty or the EU Interest/Royalty Directive, is it common tax practice to apply a beneficial ownership requirement similar to that of the OECD model tax convention? | No.  Referring to the tax treaties, as a rule Poland, being an OECD member country, follows the OECD Model Convention. Therefore, agreements for avoidance of double taxation in general follow a beneficial ownership requirement similar to that of the OECD model tax convention. |
| 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.  In accordance with the Polish policy concerning tax treaties, in particular the principal purpose test is applied. |
| *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. Resident companies with an average share capital of at least PLN 1 million may form a tax group. Non-resident companies may not be part of a tax group in Poland. A tax group must be formed for a period of at least 3 tax years.  The following requirements apply:   * the parent company must own at least 95% of the shares of the subsidiaries (excluding shares obtained by employees of a company under the Law on Privatization of State Enterprises); * the ratio of total net income of the tax group to the total gross income of all companies forming the tax group must be at least 3%; * the subsidiaries may not own shares of the other companies in the group; and * the companies may not be exempt from corporate income tax.   The taxable base of the tax group is the difference between the aggregated profits and aggregated losses of all 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. Thin capitalization- and interest limitation-rules apply intra group. |
| *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. | A CFC is defined as a non-resident company, which:   * has a seat or place of management in a listed low-tax jurisdiction; or * has a seat or place of management in a country with which Poland or the European Union has not concluded an agreement allowing the exchange of information; or * has a seat or place of management in any other jurisdiction and meets jointly the following “control test” criteria:   + a Polish taxpayer (company or individual) holds for an uninterrupted period of a minimum of 30 days, directly or indirectly, at least 25% of the share capital, voting rights or share in profits of the non-resident company;   + at least 50% of the non-resident company’s profits is derived from passive income; and   + such passive income is subject to tax in the country of the non-resident company's seat or place of management at the rate of at least 25% lower than the corporate tax rate in Poland (i.e. lower than 14.25%) or is exempt from tax, unless exempt on the grounds of EU Directive 2011/96/EC on the common system of taxation, applicable in the case of parent companies and subsidiaries of different EU Member States. |
| 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? | Yes, the Polish CFC rules would apply in Model ATP-Structures no. 1, 2 and 4 – 6 if MNE Group were a Polish resident parent company.  Model ATP-Structure no. 1: OffshoreCo is subject to CFC taxation if D is a non-treaty country or if 50% OffshoreCo’s profits are derived from passive income.  Model ATP-Structure no. 2: B Holdco is subject to CFC taxation.  Model ATP-Structure no. 4: FinanceCo B and FinanceCo D are subject to CFC taxation if at least 50% of their income is passive income and the tax rate applicable to at least one item of their income is less than 14.25%. As the income for CFC purposes is assesed in accordance with Polish tax legislation, a deemed interest payment between FinanceCo B and FinanceCo D should be taken into account. Thus, the taxable net financial income in FinanceCo D may by low due to a low interest spread.  Model ATP-Structure no. 5: Company B is subject to CFC taxation if at least 50% of its income is passive and the applicable tax rate under the preferential tax regime in state B is less than 14.25%  Model ATP-Structure no. 6: Company B1 is subject to CFC taxation. Company B2 and Company D are subject to CFC taxation if at least 50% of their income is passive income and the tax rate applicable to at least one item of their income is less than 14.25%. The taxable net financial income in Company B2 and Company D may be low due to a low royalty spread. |
| *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. | CITL applies to entities with a legal personality, including foreign legal entities. Poland’s tax qualification of a partnership follows that of the foreign state (article 1.3.2 CITL). |
| 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? | No. |
| *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? | No. |
| 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? | Yes, if the income assessment is in accordance with the OECD’s arm’s length principle. |
| 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 to a.  No to b. |
| *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. | No. |
| *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. |