**Study on Aggressive Tax Planning**

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

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

**Filled in for Portugal**





**QUESTIONNAIRE**

**Portugal**

## Abbreviations

**APA (Advance Price Agreements)**

**ATP (Aggressive Tax Planning)**

**CFC (Controlled Foreign Company)**

**CIT (Corporation Income Tax)**

**CIRC (Código do Imposto sobre o Rendimento das Pessoas Coletivas)**

**CIRS (Código do Imposto sobre o Rendimento das Pessoas Singulares)**

**EBITDA (Earnings Before Interest, Tax, Depreciation and Amortization)**

**EU (European Union)**

**EEA (European Economic Area)**

**IP (Intellectual Property)**

**IRC (Imposto sobre o Rendimento das Pessoas Coletivas)**

**LGT (Lei Geral Tributária)**

**R&D (Research & Development)**

**WHT (Withholding Tax)**

|  |  |
| --- | --- |
| Questions | Answers |
| *Corporate tax rate* | |
| 1. What is the standard rate of corporate income tax applicable for the fiscal year 2015? | 21%. |
| 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. | Yes[[1]](#footnote-2). Under article 33º para. 4 and 5 a) of the Tax Benefits Statute both interest and royalties income derived from non-resident sources is exempted from corporation income tax (CIT) for entities set up in the offshore of Madeira and Santa Maria Island. |
| *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 so-called participation exemption regime are tax exempt, cf. article 51 of the Corporate Income Tax Code (CIRC)[[2]](#footnote-3).  It is a requirement that the receiving (resident) parent company is not subject to the tax transparency regime and that the paying company is not set up in a blacklisted jurisdiction (i.e. list of countries, territories and regions that provide a more favorable tax regime according to article 63.º D of the General Tax Law and, settled by Ministerial Order - Portaria 150/2004, of 13 February, amended by Portaria 292/2011, of 8 November) [[3]](#footnote-4). |
| 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 regime only applies, if:   * The distributing subsidiary is subject, in the state of its residence, without being exempt, to a corporate income tax as listed in the EU Parent-Subsidiary Directive (2011/96), or a tax comparable to the Portuguese IRC at a nominal rate which corresponds to at least 60% of the Portuguese IRC (i.e.12,6%); * The distributing subsidiary is not resident in a blacklisted jurisdiction (see Portaria 150/2004 and amendments in Portaria 292/2011). |
| 1. Does this apply regardless of the level of shareholding or voting rights held in the distributing company? | The participation exemption regime only applies, if the Portuguese parent has a holding of at least 5% in the capital of the subsidiary for an uninterrupted period of at least 2 years. |
| 1. Does this also apply if the dividends have been deducted by the distributing company in its taxable income? | The participation exemption does not apply if the dividends are deducted when determining the profits of the distributing company (cf. article 51 para. 10 of the CIRC). |
| 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 has already been implemented in the Portuguese 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. See art. 14 para. 3 and 8 of the CIRC (Corporate Income Tax Code). |
| 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 5% in the capital of the Portuguese company for an uninterrupted period of at least 2 years prior to the date of distribution. |
| 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, an EEA Member state covered by an exchange of information agreement or in a country with which Portugal has signed a double taxation income treaty that includes an exchange of information clause.  Further, it is a requirement that the receiving company is subject, in the state of its residence, without being exempt, to a corporate income tax as listed in the EU Parent-Subsidiary Directive (2011/96), or a tax comparable to the Portuguese IRC at a nominal rate which corresponds to at least 60% of the Portuguese IRC (i.e. 13.8%). |
| 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[[4]](#footnote-5) |
| 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. See art. 94 para 2 of CIRC. |
| *Interest income* | |
| 1. Is interest income from a loan granted by a company in your MS to a foreign group member company taxable? | Yes. See art. 94 para 1, c) of CIRC. |
| 1. If such a loan is granted free of interest (i.e. on non-arm’s length-conditions), would the creditor company resident in your MS have to include any deemed interest income in its taxable income? When responding, please consider Model ATP-Structure no. 4 and assume that FinanceCo B is tax resident in your MS. | Yes. See art. 63 of the CIRC. |
| 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 order to grant tax exemption to dividend income (or equivalent income payments related with corporate’s profits or distribution of reserves), the CIRC states that that income must be subject to tax in the recipient state (see paragraph 6, b) above)[[5]](#footnote-6). |
| 1. If yes to 11, |  |
| 1. Please briefly explain which requirements should be fulfilled. | See paragraph 6, b) above. |
| 1. How will the amendment of Article 4 of the EU Parent/Subsidiary Directive affect your answer? | The amendment will not affect the 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 but subject to the rules on limitation to the deductibility of financing expenses under art. 67 of the CIRC, applicable to both resident and non-resident companies. This tax deductibility rule stipulate that net financing expenses are only deductible up to the higher of the following limits:   * + - € 1,000,000; or   • 30% of earnings before depreciations, net financing expenses and taxes (EBITDA). |
| 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[[6]](#footnote-7). |
| 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 specific anti-avoidance rule to cover this situation. |
| 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. |
| 1. If yes to 15 |  |
| 1. Please briefly explain the general scope and mechanism of the rules. | According to a general limitation rule (art. 67 CIRC) net financing expenses are only deductible up to the higher of the following limits   * EUR 1 million or * 30% of the earnings before depreciation, net financing expenses and taxes (EBITDA).   During a transitional period, the percentage is 50% in 2015 and 40% in 2016.  No distinction is made between bank and intra-group financing transactions and domestic or foreign financing transactions (EU or non-EU).  When the special tax regime of a group of companies applies, the calculation of the deductible limits must be performed individually, for each company of the group[[7]](#footnote-8). |
| 1. In particular, do the rules apply only to interest costs on inter-group debt or more generally to all interest costs? | Generally to all interest costs (see art. 67 CIRC). |
| 1. Do the rules take into account the worldwide debt ratio of the group of companies? | No. Only the position of Portuguese group member companies is taken into account, not that of any foreign group member companies, in accordance with the special tax regime of group taxation (see art. 69 CIRC applicable to purely domestic groups and art. 69-A CIRC applicable to Portuguese member companies of a EU or EEA groups). |
| 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. | Both the limits imposed to interest deductibility under art. 67 CIRC and special conditions that apply to group company taxation under articles 69 and 69-A CIRC are effective tools to counteract ATP.  Moreover, when a EU or EEA group with member group companies resident in Portugal that qualify under the Portuguese group taxation regime, an exchange of information regime must be in place in the EU or EEA group state. |
| 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. | Yes under article 9 (associated enterprises) of the applicable double taxation treaty that includes expressly the corresponding adjustment clause.  Any deemed deduction will be contingent on a corresponding adjustment in the foreign state. |
| 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, as a corresponding adjustment for transfer pricing purposes. |
| 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)? | 25%. See art. 94 para. 4 CIRC. |
| 1. Are there special withholding tax rules for interest paid on a loan from a group member company? | Yes. Under art. 97 para. 1, e) of CIRC no withholding tax applies if the interest is paid to a resident company taxed under the special tax regime of group taxation.. |
| 1. Does this apply regardless of the tax residence of the creditor company, e.g. member state, treaty state, tax haven? | No. However, EU Directives and Double Tax Treaties may establish no WHT (withholding tax) or reduced WHT rates.  The rate is 35% if the interest is paid or made available to the accounts of one or more taxpayers held on behalf of unidentified third parties paid to an entity located in a blacklisted jurisdiction (see articles 94 para. 8 and 87 para. 4 of CIRC). |
| 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 (see- article 14.º, para. 13 to 15 of CIRC). |
| 1. Is such exemption, reduction or refund subject to other anti-avoidance requirements? If yes, please explain briefly. | Yes. Interest payments must be justified or explained under art. 98 para 2, b), number 6 of the CIRC. |
| *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? | Portugal introduced recently a ‘Patent Box’ tax regime under art. 50-A of the CIRC. Accordingly, income derived from the use or exploitation of registered patents, designs and industrial models are 50% tax exempted[[8]](#footnote-9).  To counteract abuse, namely: industrial property rights must result from R&D activities of the company (carried in house or contracted out); industrial property rights income must be allocated to commercial activities; the company exploiting industrial property rights is not set up in a tax haven as defined in the list approved by the Ministry of Finance (see answer to question 3)[[9]](#footnote-10). |
| 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? | Yes. |
| 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. | IP and industrial property rights’ expenses can be totally deducted as tax costs in the respective fiscal year if allocated to development projects of the company under art. 32 of the CIRC. These projects shall aim to enhance scientifically or technically products or services[[10]](#footnote-11). |
| 1. Can such credits also be obtained for costs that are ultimately reimbursed by a group member company to the company in your MS? | No. See art. 70 of the CIRC. |
| 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. | Yes under art. 69-A of the CIRC which applies to a dominant company located in a EU or EEA country and IP rights are transferred by the member group located in Portugal.  The EU or EEA dominant company must comply with the conditions set up to domestic groups (see question 32).  If the above mentioned conditions are not met, and considering Model ATP-Structure nº 5, capital gains are taxed under CIRC in accordance with the arm’s length principle and criteria established by the OECD Transfer Pricing Guidelines.  In line with Portuguese case law, future appreciations of the IP rights are not taken into account unless they can be determined objectively and with certainty at the time of the transfer. |
| 1. If no to 26, i.e. your MS would impose tax on the disposal, | N/A[[11]](#footnote-12) |
| 1. Is the relevant capital gains tax rate lower than the standard rate? | No. However a partial exemption can be applied whenever the proceeds are reinvested (See art 48 of the CIRC). |
| 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? | 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)? | 25 % |
| 1. Are there types of royalty payments which are not subject to withholding tax? | Yes. No withholding tax applies on royalty payments to associated EU companies under the EU Interest and Royalties Directive (see article 14 para. 12 and article 98 CIRC). |
| 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 (see- article 14 para. 13 to 15 and article 98 para. 2 of CIRC). |
| 1. Is the tax exemption/reduction/refund subject to any other anti-avoidance requirements, e.g. based on a test of the substance of the recipient? If yes, please explain briefly. | Yes. Royalties payments must be justified or explained under art. 98, para. 2, b), number 6 of the CIRC. This additional test remains to be tested by the Portuguese tax courts and, so far, no ruling or official interpretation of Portuguese tax authorities has been published on this matter. |
| *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.  A qualifying group consists of a dominant company (the parent) and one or several 75% or more directly or indirectly held subsidiaries, provided that such holding (i) confers on the parent more than 50% of the voting rights and (ii) is maintained by the parent (except in the case of a newly formed subsidiary) for more than 1 year prior to the application of the special regime (see art. 69 CIRC).  A qualifying group of companies can also have a parent company which is resident in the EU or EEA (and bound by an exchange of information mechanism equivalent to that which exists within the European Union), provided the required shareholding in the controlled subsidiaries is held by a Portuguese permanent establishment of the non-resident parent company (see art. 69-A CIRC).  The special group taxation regime means that the profits of the parent company are computed for tax purposes on the basis of the sum of the individualtaxable profits and individualtax losses as determined in the returns of each of the companies belonging to the group (see art. 70 CIRC). |
| 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. See however interest limitations rules explained in questions 13 and 16. |
| *CFC rules* | |
| 1. Does your MS apply CFC rules to foreign subsidiaries of a parent company in your MS? | Yes. See art. 66 CIRC. |
| 1. If yes to 34, please briefly explain the rules and their scope. | Under the CFC regime, profits of or income obtained by non-resident entities that are clearly subject to a more favorable tax regime are imputed to the individual or corporate participators having a, direct or indirect substantial interest therein, and taxed in their hands in proportion to their holdings (article 66 of the [CIRC](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_pt_abb_circ?WT.z_nav=crosslinks)).  For the purposes of the CFC regime, a company is deemed to be clearly subject to a more favorable tax regime, if its residence territory is in a black listed jurisdiction tax haven or in a jurisdiction in which the company is not subject to tax at all or where the tax rate applicable is less than 60% of the tax rate that would be applicable, if the company was resident in Portugal (i.e. 12,6%).  A resident participator is deemed to have a substantial participation in a non-resident company if it owns (directly or indirectly) , even if through a representative, fiduciary or intermediary):   * 25% or more of its capital voting rights or attribution rights over the income or the assets of that non-resident company; or * 10% or more of its capital where more than 50% of its capital is owned (directly or indirectly) by Portuguese resident participators.   The regime is not applicable if the controlled foreign company is resident or established in the EU or EEA and the Portuguese taxpayer proves that the incorporation and functioning of the company are based on valid commercial reasons and that such company carries out an agricultural, commercial, industrial or services activity[[12]](#footnote-13). |
| 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. Foreign income is imputed to the resident individual or corporate entity and taxed in accordace with the CIRC (see dividends and royalties exemption limitation rules in questions 3, 4 and 23) and interest/royalties limitation rules, as explained in questions 13, 16, 20, c) and e) and 31, a) and d), apply. See art. 66 CIRC. |
| *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. | Yes. Portugal accepts the foreign state tax qualification of a foreign legal entity unless fraud or the general anti-avoidance rule comes into operation.  Following Model ATP-Structure nº 3, ‘Hybrid Mismatches’ which can lead to double taxation are addressed under Double Taxation Treaties. However, the problems of a hybrid mismatch leading to no taxation or to ‘double dip’ schemes are not specifically addressed in the Portuguese tax system. |
| 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? | Yes. Under art. 138 CIRC it is possible to obtain a written ruling from the Portuguese tax administration that confirms the most appropriate transfer pricing method applicable to the transaction.  Taxpayers may apply for either bilateral or multilateral APA(s) and, for this purposes, they must present to the tax administration a documented request with a proposal of the most adequate transfer pricing method.  APA(s) are confidential. |
| 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? | No. See art. 63 CIRC.  Theoretically this situation may be defended if in accordance with the arm’s length principle and in case the taxpayer complies with both material and documentation conditions as prescribed in art. 63 para. 6 CIRC). |
| 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? | As far as rulings are concerned the answer is no to question a) and yes to b) but subject to the corresponding adjustment in the other state under the applicable double taxation treaty.[[13]](#footnote-14) |
| *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 General Tax Law (LGT) contains a general anti-avoidance provision. Under this provision (article 38 of the LGT), acts are void if it is proven that they are carried out, by artificial means, with the main objective (or one of the main objectives), of the reduction, elimination or deferral of tax that would otherwise be due. In such a case, the transaction will be subject to normal taxation without the planned tax advantages.  This general anti-avoidance provision is difficult to enforce judicially and Model ATP-Structures no. 1-7 can be targeted under specific anti-avoidance rules as explained in this questionnaire in the context of dividend/interest and royalties limitation rules covering both inbound and outbound payments.  There are 81 jurisdictions which are deemed to be tax havens for the purposes of (i) non-deductibility of payments to non-resident entities located therein, (ii) legislation, (iii) non-application of the exemption in respect of capital gains from the disposal of shares or other corporate rights and securities by non-resident entities located therein, (iv) non-application of certain exemptions from stamp duty, (v) non-application of the tax exemption for interest on treasury bonds derived by non-resident entities located therein and (vi) application of increased rates for the purposes of real estate tax and real estate transfer tax.  Listed tax havens, by region, are (Ordinance 150/2004, as amended):   * In the Americas: Anguilla, Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bermuda, Bolivia, the British Virgin Islands, the Cayman Islands, Costa Rica, Dominica, the Falkland Islands, Grenada, Guyana, Honduras, Jamaica, Montserrat, the Netherlands Antilles, Panama, Puerto Rico, St. Lucia, St. Pierre and Miquelon, St. Vincent and the Grenadines, Trinidad and Tobago, the Turks and Caicos Islands, Uruguay and the US Virgin Islands; * In Europe: Andorra, Gibraltar, the Isle of Man, the Channel Islands, Liechtenstein, Monaco, San Marino and the Svalbard Islands (Spitsbergen and Bjørnøya); * In Africa and the Middle East: Ascension Island, Bahrain, Djibouti, the Gambia, Jordan, Kuwait, Lebanon, Liberia, Mauritius, Oman, Qatar, Qeshm Island, the Seychelles, St. Helena, Swaziland, Tristan da Cunha, the United Arab Emirates and Yemen;   In Asia and the Pacific: American Samoa, Brunei, Christmas Island, the Cocos (Keeling) Islands, the Cook Islands, Fiji, French Polynesia, Guam, Hong Kong, Kiribati, Labuan, Maldives, the Marshall Islands, Nauru, Niue Island, Norfolk Island, the Northern Mariana Islands, other Pacific Islands, the Palau Islands, Pitcairn Island, St. Kitts and Nevis, the Solomon Islands, Tokelau Island, Tonga, Tuvalu, Vanuatu and Western Samoa.[[14]](#footnote-15) |
| *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. | There is no tax practice regarding the application of the alternative residence test of central management and control in Portugal.  The CIRC establishes for residence purposes both the incorporation and central management and control tests but the latter has not yet been applied by tax authorities. |

1. In country validation process the representatives of the MS expressed disagreement with NTE’s answer, stating that that Portugal does not offer any special offshore regime. The representatives further explained their answer stating: “*Portugal does not have special offshore tax regimes. There is only a regime open both to residents and non-residents entities that is classified as a state aid regime: the Madeira free trade zone (Zona Franca da Madeira). This special tax regime was first approved by the European Commission in 1987 and consists of operating aid in the form of some tax advantages, applicable to companies licensed to operate in a special economic zone. Under article 33º para. 4 and 5 a) of the Tax Benefits Statute interest on loans paid by entities located in that free trade zone is exempt from corporation income tax (CIT) provided that such loans have the purpose of financing investments and the normal functioning of the borrowers within the scope of the free trade zone. Royalties income obtain by non-resident entities is also exempted from CIT provided that such income is related to activity developed by entities licensed and within in the Madeira’s free trade*” [↑](#footnote-ref-2)
2. In country validation process the representatives of the MS additionally pointed out that: “*This regime applies to direct or direct and indirect minimum 5% participations in share capital or in voting rights, held for a minimum period of 24 months. The subsidiary should meet the “subject to tax” test, implying a minimum 12.6% nominal corporate income tax rate for subsidiaries in non-EU countries*”. [↑](#footnote-ref-3)
3. In country validation process the representatives of the MS elaborated the answer by NTE stating: “In case of dividends not entitled to exemption, a credit for double taxation on withholding tax applied to the dividends, may be granted, cf. articles 91 and 91-A of the CIRC.” [↑](#footnote-ref-4)
4. In country validation process the representatives of the MS expressed conflicting opinion stating that: “The participation exemption regime may be denied under the application of the general anti-avoidance rule on a case-by-case basis (cf. article 38, para. 2 of the General Tax Law).” [↑](#footnote-ref-5)
5. In country validation process the representatives of the MS elaborated the answer stating: “*Portuguese tax law does not allow income from “hybrid loans” to be treated as dividends, so they cannot benefit of the participation exemption regime.*” [↑](#footnote-ref-6)
6. In country validation process the representatives of the MS elaborated on the answer stating that: “*However, the limitation of tax deductibility applies to the all the expenses connected with the remuneration of debt, deducted from income of the same nature, such as: Interest on bank overdrafts; Interest on short-term and long-term borrowings; Interest from bonds and similar financial products; Amortization of discounts or premiums related to borrowings; Amortization of ancillary costs incurred in connection with the arrangement of borrowings; Financial charges in respect of finance leases; and Exchange differences arising from foreign currency borrowings*” [↑](#footnote-ref-7)
7. In country validation process the representatives of the MS elaborated the answer stating: *“However, the dominant company may opt to apply the limitation mentioned above taking in consideration the following:*

   *• The group’s net financial expenses tax deductibility will be limited to € 1,000,000, independently of the number of the companies within the tax group or, if higher, to the percentage limit based on the earnings before depreciations, net financing expenses and taxes of the total number of companies included in the tax group;• The net financing expenses non-deducted by the companies included in the tax group before it has been created and that have not been deducted can only be considered up to the limits applicable to that companies individually;• The unused limit that had not been used by the companies before the application of the tax group regime can only increase the maximum amount of the financial net expenses of each company, computed individually;• The net financing expenses and the unused limit computed within the tax group can only be used by the tax group. The option should be maintained for a minimum 3 years period, and must be reported to the Tax Authority up to the end of the third month of the tax period in which it is intended to apply the option.*" [↑](#footnote-ref-8)
8. In country validation process the representatives of the MS elaborated the answer stating: “*Qualifying IP are only patents and industrial designs or models subject to registration after January 1, 2014 (trademarks, copyrights of literary, artistic or scientific work, image rights, or any other rights or assets different from patents and industrial models or designs would not be eligible for the tax benefit).*

   *IP acquired from other entity, related or not with the taxable person that claims the benefits, are not qualified. The sale or transfer of qualifying IP do not fall within the regime*” [↑](#footnote-ref-9)
9. In country validation process the representatives of the MS additionally pointed out that: “*To counteract abuse, amongst the requirements to apply the benefit are: (i)Qualifying IP must be developed by the taxable person that claims the benefit (by itself or through contract);(ii)The licensee must effectively use the IP rights assigned in the pursuit of an activity of commercial, industrial or agricultural nature;(iii) If the licensee is a related company, the IP cannot be used to create deductible expenses for the taxpayer or any other company belonging to the same group;(iv) The licensee cannot be an entity with its domicile in a country, territory or region subject to a clearly more favorable regime (blacklisted jurisdiction)*”. [↑](#footnote-ref-10)
10. In country validation process the representatives of the MS elaborated the answer stating: “*Specific tax incentives for R&D activities can be granted in Portugal under the so-called SIFIDE II - Sistema de Incentivos Fiscais em Investigação e Desenvolvimento Empresarial (see Investment Tax Code, articles 33 to 40), which provides enhanced tax deduction for research expenditures (incurred for acquiring new scientific or technological knowledge), development expenditures (concerned with exploitation of research results with a view to get new (or to significantly improve) raw materials, products, services or manufacturing processes) and for current wage expenditures with R&D personnel. This incentives system is managed by an independent authority (National Innovation Agency) and companies should submit their R&D expenditures in the previous year, in order to get the tax deduction provided by SIFIDE II.*” [↑](#footnote-ref-11)
11. In country validation process the representatives of the MS expressed disagreement with NTE’s answer, providing the following explanation: “*No. The capital gains derived from the transfer of the ownership of patents, trademarks and other IP rights is always subject to corporate income tax. The capital gains derived from such transaction should comply with the arm’s length principle (See articles 46 and 63 of the CIRC).*” [↑](#footnote-ref-12)
12. In country validation process the representative of MS elaborated the answer given by NTE adding: “Moreover, this regime does not apply to non-resident entities that simultaneously meet the following conditions:

    - 75% of profits or income is derived from an agricultural or industrial activity or from a commercial or rendering of services activity that are not mainly targeted to the Portuguese market;

    - the main activity of the non-resident entity does not consist of:

    (i) banking or insurance operations;

    (ii) operations related to shareholdings that represent less than 5% of the share capital or of the voting rights, or shareholdings in companies residents in more favourable tax regimes (so considered by the Portuguese legislation) or other securities, intellectual or industrial property, or information concerning industrial, commercial or scientific experience or technical assistance services; or

    (iii) leasing of assets except when related to real estate located in the territory of residence of the non-resident entity. [↑](#footnote-ref-13)
13. In country validation process the representative of MS elaborated the answer given by NTE stating that “*Taxpayers can only apply to the Tax Authority in order to conclude an agreement which set, by advance, the method or methods that can ensure the determination of terms and conditions that would normally be agreed, accepted or practiced between independent entities. The advance price agreement must be request to the General-Director of the Tax Authority and the elements contained in the agreement must specify the particular method or accepted methods, transactions covered, the underlying assumptions, the conditions for revision, revocation and renewal and the duration, which may not exceed three years. All the procedures, information and documentation related to the conclusion of the agreements are regulated with strict adherence to the UE and the OECD guidelines by order of the Minister of Finance (see Ministerial Order [Portaria] no. 620-A/2008, of 16 July).*” [↑](#footnote-ref-14)
14. In country validation process it was additionally pointed out by the representative of MS that *“Court decisions that have been issued in respect to GAAR provision are very few and mainly connected with evidence issues, since the application of the GAAR must follow a procedural rule establish in the Tax Procedure and Proceedings Code which provides that it is for the Tax Authority to prove that the requirements that trigger the consequences set out in the GAAR have been met*” [↑](#footnote-ref-15)