**Study on Aggressive Tax Planning**

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

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

**Romania**







**QUESTIONNAIRE**

**Romania**

Abbreviations

ANAF - The Romanian Tax Administration

RFC - The Romanian Fiscal Code enacted in 2004

SFIA - Ruling procedure(In advance Fiscal Individual Solution)

FPC - The Fiscal Procedural Code, enacted in 2004

|  |  |
| --- | --- |
| **Questions** | **Answers** |
| ***Corporate tax rate*** | |
| What is the standard rate of corporate income tax applicable for the fiscal year 2015? | 16%. |
| Some states offer special offshore tax regimes, providing for corporate tax-exemption of certain mobile income types (e.g. royalty) from abroad. Does your MS offer such a tax regime? If yes, please briefly explain, including the conditions to be met. | No |
| ***Dividends received*** | |
| 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 subject to the so-called participation exemption regime are tax exempt. |
| 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 only applies, if the distributing subsidiary is resident in an EU Member State or in a state with which Romania has entered into a double tax treaty. |
| 1. Does this apply regardless of the level of shareholding or voting rights held in the distributing company? | The participation exemption only applies, if the Romanian parent has a holding of at least 10% in the capital of the subsidiary for an uninterrupted period of at least 1 year. |
| 1. Does this also apply if the dividends have been deducted by the distributing company in its taxable income? | Yes. At this moment, Romania does not have a provision to restrict the exemption from withholding tax in case the dividends have been deducted by the distributing company in its taxable income. |
| 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? | As of 1st of January 2016, Romania shall implement the 2014/86/EU Directive and the exemption from taxation will not apply in case the dividends have been deducted from taxable income base by the distributing company. |
| ***Dividends paid*** | |
| Is it possible for a company in your MS to distribute dividends to a foreign company without any withholding tax? | Yes. |
| 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% in the capital of the Romanian company for an uninterrupted period of at least 1 year. For shareholder companies resident in Switzerland the ownership requirement is 25 % for a 2 years period.  Also, in case of third countries, the exemption from withholding tax applies subject to the holding requirements provided by double tax treaties. |
| 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 States or Switzerland and the company is subject to corporate income tax.  In case of double tax treaties, the exemption applies only if the recipient is resident in the other contracting state. |
| 1. Is the withholding tax exemption subject to a beneficial ownership requirement similar to that of the OECD model tax convention? | The RFC does not mention such condition. The majority of the double tax treaties of Romania are in line in this respect with the OECD MC. |
| 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. The ANAF has the power to declare some transactions as artificial under the General anti abuse provision of art. 11 para. (1) and to tax the payments from Romania to abroad at a 50% rate.(See note 2) |
| Is any other tax levied upon a distribution of a dividend by a company in your MS? | No. |
| 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. A buy-back of shares which changes the proportion of the owners in the capital share is deemed to be a dividend, according art 7(1) pct 12 let b. from Romanian Fiscal Code |
| ***Interest income*** | |
| Is interest income from a loan granted by a company in your MS to a foreign group member company taxable? | Yes, according to art. 115 (1)(b) and (c) of Romanian Fiscal Code |
| 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. The creditor is required indirectly to include the deemed interest in its taxable income. Cf. art. 11(2) RFC and the Rules implementing this provision (point 38), the price of a loan between affiliated companies has to reflect the interest agreed between independent persons. Otherwise, the tax authorities are entitled to adjust the price to reflect the arm’s length principle. |
| 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). | Under the anti-abuse provision of art. 11 (1) of the RFC, a loan granted by a Romanian entity can be qualified as equity investment.  However, there are no provision as to the treatment of the dividend resulted from this qualification.  Under the Romanian tax legislation, the dividends received from a foreign company are taxed if certain conditions are not met (minimum holding for a minimum uninterrupted period and the requirement that the distributing company is subject to the corporate tax or a similar tax), cf. art. 20 (a) RFC  If the conditions for exemption are met there is no express provision precluding the granting of the exemption, where in the other state the payments have been qualified as deductible interests. |
| 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? | Implementation of the amendment shall preclude granting of the dividend exemption. |
| ***Interest costs*** | |
| Are inter-group interest payments on a loan granted by a foreign group member company tax deductible to a resident in your MS? | Yes, cf. art. 21 (1) and art. 23 RFC. As a general rule, interest payments made in relation to loans contracted for the purpose of performing taxable activities are deductible for corporate income tax purposes. |
| 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. There is no rule to state that the tax deductibility of the interest depends on the qualification made by the creditor’s state. |
| 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. | There is no provision in this regard. However, the Romanian tax authorities are entitled themselves to consider a transaction to be artificial, i.e. having as purpose the tax evasion, cf. art. 11 (1) RFC and to refuse the deduction. |
| Is the tax deduction of interest cost on inter-group debt subject to any thin capitalisation-rules or other interest deduction limitations-rules? | Yes, cf. art. 23 RFC |
| If yes to 15 |  |
| 1. Please briefly explain the general scope and mechanism of the rules. | Interest related to loans granted by companies other than financial institutions is deductible within the limit of (i) the reference interest rate of the National Bank of Romania for loans denominated in Romanian lei and (ii) a specific annual interest rate for loans denominated in foreign currencies, of 6% since 2010. Interest expenses that exceed these limits are permanently non-deductible.  Further a thin capitalization rule exits. Interest is deductible to the extent that the debt-to-equity ratio does not exceed 3:1. In case the ratio is higher than the 3:1 limit, interest is non-deductible and can be carried forward.  These rules apply, however, only to loans with a reimbursement deadline more of than a year or to loans with deadlines for reimbursement less than a year, but which are extended, so that the actual deadline of reimbursement together with the initial period exceeds one year. |
| 1. In particular, do the rules apply only to interest costs on inter-group debt or more generally to all interest costs? | These rules apply generally to all interest costs on loans between Romanian legal entities. They are not applicable is case of loans from financial institutions. |
| 1. Do the rules take into account the worldwide debt ratio of the group of companies? | Yes. The rule takes into account the worldwide ratio. |
| 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 triple existing test: the interest costs have to be made for the purpose of obtaining taxable income; the limitation of the interest level; the relatively low debt-to-equity ratio, the limitation rules can be considered to be effective. |
| 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. | No. There is no specific provision.  However, FPC in art. 931  states that the adjustments made by the authorities of other state are opposable to the Romanian authorities and that following the adjustment, the Romanian taxpayer can correct its tax statements. This provision applies only where a Double Taxation Treaty is concluded. |
| Would the benefit of such a loan compared to a normal interest-bearing loan on arm’s length conditions be taxable to the debtor company in your MS? If yes, how? | No. |
| Does your MS levy any withholding tax on interest payments? | Yes, but only related to interest payments made to non-resident persons. |
| If yes to 19 |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | 16%, cf. art. 116 (1)(d) Tax Code |
| 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? | For transactions qualified as artificial, a 50% tax rate applies to interests paid to a state with which Romania does not have a binding legal instrument securing an exchange of information between the states (regardless of whether or not the beneficiary is a tax resident in a state with which Romania has a double tax treaty). |
| 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. |
| 1. Is such exemption, reduction or refund subject to other anti-avoidance requirements? If yes, please explain briefly. | No, only the general one mentioned above, art. 11 (1) RFC. |
| ***Allowance for corporate equity*** | |
| 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. |
| 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*** | |
| 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. Romanian Tax law does not offer any preferential tax regime for income from patents and/or other intellectual property rights, the taxation rate being the flat rate of 16%. |
| Can a company in your MS obtain R&D tax credits (typically enhanced tax deduction or tax refund) for costs incurred, e.g. in developing IP rights? | According to the RFC there are 2 types of tax incentives for developing IP rights. On one hand there is a additional tax deduction of 50% of the developing cost of the IP rights granted and on the other hand the IP rights which are activated can be depreciated using the accelerated depreciation method (50% of the depreciation in the first year, the remaining amount over the remaining life time of the asset).  The incentives are granted for own cost generated by the development of IP rights, cost allocation into multinational groups, cost incurred in the own MS or in any other MS, cost incurred for IP rights to be used by the company or to be sold to other beneficiaries. |
| 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. | In order to apply the tax incentive and the accelerated depreciation several formal requirement are imposed.  1. The tax payer has to define a research project, in line with its main activity. The project has to define the objectives to be obtained and the means for reaching the goals of the project.  2. The cost which benefit of the tax incentive are mainly the cost which can be cumulated for determining the value of the assets generated.  3.The project should conduct to marketable results of the R&D. The draft of the new RFC is more flexible in this respect. |
| 1. Can such credits also be obtained for costs that are ultimately reimbursed by a group member company to the company in your MS? | Yes, but only under the condition that the IP rights are transferred to the company which reimburses the costs. |
| 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. The transfer of IP rights between controlled entities has to be done at fair market value. The test if the transferred value is a market value has to be performed at the moment of transfer, any other increases in value of the IP rights are not triggering any additional taxation on Romania. |
| 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? | Yes,  According to the RFC, transactions between controlled companies have to be made at fair market value and in accordance with the TP policy of the group. The TP policy has to be defined in a TP study which has to be made available to the tax authorities on request. If the transaction value does not meet the TP policy defined in the TP file the tax authorities can adjust the value of the transaction.  Anyhow if such an re- assessment is made by the Romanian ANAF, on request of the tax payer the provision of the 90/436/CEE Convention on avoidance of the double taxation are applicable ( Art 93 FPC) |
| 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? | Theoretically yes. See note 1. |
| ***Royalty and other IP costs*** | |
| 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. |
| 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, if the price is at arm’s length price. |
| Does your MS levy any withholding tax on royalty payments? | Yes. |
| If yes to 30, |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | 16%.  For transactions qualified as artificial, a 50% tax rate applies to royalties paid to a state with which Romania does not have a binding legal instrument securing an exchange of information between the states (regardless of whether or not the beneficiary is a tax resident in a state with which Romania has a double tax treaty). The list of such legal instruments comprises the tax treaties concluded by Romania, the EU Directive (2011/16) on administrative cooperation in tax matters, and the bilateral agreements on exchange of information in tax matters concluded by Romania. |
| 1. Are there types of royalty payments which are not subject to withholding tax? | Yes, the royalty payments to associated EU companies, according the EU Interest/Royalty Directive. |
| 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. |
| 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. | There are no special anti avoidance rule on Royalties. The general anti-avoidance rules as defined in Art 11 (1) RFC are applicable, in the context explained in Note no. 2. |
| ***Group taxation*** | |
| 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). | No. In practice, we consider that there is a large number of group transactions at a non arm's length price which leads to the same effect as group taxation, both for domestic and foreign groups. |
| 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. | N/A |
| ***CFC rules*** | |
| Does your MS apply CFC rules to foreign subsidiaries of a parent company in your MS? | No. |
| If yes to 34, please briefly explain the rules and their scope. | N/A |
| 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*** | |
| 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 qualification of a foreign entity is made based on the Domestic Tax Law. |
| 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. | The only available rules to the tax administration are those contained in art 11(1) of the RFC, which have, in practice, a wide scope. See note no. 2 |
| 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. | The available rules are those of art 11(1) RFC. See note no. 2. |
| ***Tax residence of company*** | |
| 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. The Residency is given by the incorporation |
| 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*** | |
| 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. See note 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. The Structures which could apply for such a scheme are PE’s in other MS. Anyhow the appliance of the tax credit / exception is conditioned by the presence of a Tax Residency Certificate of the PE. |
| 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*** | |
| 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. | See Note no. 2. Romania has only few anti- avoidance rules; it has been reported, however that they are being used extensively and given a wide interpretation in practice. |
| ***Other ATP indicators*** | |
| 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. |

Note:

1. According the art. 42 of the FPC there are theoretically implemented both procedures to ensure the legal certainty, meaning the ruling - the advance Individual Fiscal Solution (SFIA) under the form of tax rulings and APAs.

The Romanian tax administration recently communicated that: in the period 2014 and the first 4 months of 2015, only a number of 6 unilateral APA's were issued, and there are another 3 requests for bilateral APA's registered during the period 2014-2015, out of a total of 12 requests, 7 unilateral APAs and 3 bilateral APAs were issued and 2 requests for issuing APAs were rejected due to non compliance with legal provisions.

The number of issued APAs is directly linked to the number of the received requests. The Romanian tax administration cannot influence the number of the requests for issuing APAs. The deadline for issuing them is up to 12 months for unilateral APAs and 18 months for bilateral or multilateral APAs, specifying that the term is suspended while requiring clarifications from the taxpayers.

In respect of the SFIA, their number is not officially communicated, but according our best knowledge their number is extremely low and the duration needed to obtain such a solution is of more than 1 year. As regards the tax rulings, during the period 2014-2015, a total number of 30 tax rulings were issued.

The deadline for issuing them is up to 3 months, specifying that the term is suspended while requiring clarifications from the taxpayers.

Due to these reasons, the draft of the new FPC is considering the written answers received by the taxpayers from the department in charge with the assistance of the taxpayers as mandatory also for the tax auditors.

In this context it is not possible to ascertain the degree with which arm's length principle is respected. The tax administration encourages the voluntary compliance of the taxpayers, APA being one of the instruments of the fiscal legislation in order to create the premises of voluntary compliance.

2. Anti avoidance rules.

The Romanian Fiscal Code contains only 3 explicit anti-avoidance rules as follows:

* a GAAR in art 11(1), permitting to the tax authorities to re-qualify any transaction according its economic content (substance) or to ignore a transaction which do not have an economic purpose.
* a SAAR in art 7(1) point 2 ,permitting the tax authorities to consider any free lancer as deploying a dependent activity, in order to calculate social contributions to its incomes derived from a legal entity.
* SAAR according to which the transactions with non residents identified as being "artificial" are excluded from the regime of the DTT and the derived incomes are taxable with a 50% withholding tax -in art 116(2) c1 .

Their application is expected also in order to require some substance in the recipient of the dividends, etc.