**Study on Aggressive Tax Planning**

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

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

**Filled in for Spain**





**QUESTIONNAIRE**

**Spain**

## Abbreviations

**CITL = Corporate Income Tax Law (Law 27/2014)**

**NRITL= Non Resident Income Tax Law (Royal Decree Law 5/2004)**

**PITL= Personal Income Tax Law (Law 35/2006)**

**GTL = General Tax Law (Law 58/2003)**

|  |  |
| --- | --- |
| Questions | Answers |
| *Corporate tax rate* | |
| 1. What is the standard rate of corporate income tax applicable for the fiscal year 2015? | 28% (As of 2016, 25 per 100) |
| 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. Some special tax regimes apply in some territories but they are linked to activities carried out in those there:   * Canary Islands: tax rate of 4 per 100 for ZEC entities. A ZEC entity can only carry out certain listed activities, including licensing of IP or some services, and, in order to benefit from the reduced rates, has to meet certain conditions in terms of investment and employment (cf Law 19/2014, as modified by Royal Decree Law 15/2014); * Special incentives also apply in Ceuta and Melilla: art. 33 CITL.   The Spanish Holding Company (“ETVE”) regime does not entail any special treatment for dividends, capital gains or profits obtained through a foreign PE by a Spanish company but has some peculiarities regarding distribution of profits to shareholders or capital gains obtained by non-resident shareholders, provided they are linked to income and capital gains exempt for the Spanish Holding (no taxation in Spain of dividends / capital gains if obtained by non-resident shareholders that are not resident in a tax haven, as defined in the Spanish legislation) (art. 108 CITL).  There is also a patent-box and R&D tax credits whose main features are explained below. |
| *Dividends received* | |
| 1. Is it possible for a company in your MS to receive dividends from a foreign company free of tax (or at a greatly reduced rate of tax, e.g. 95% tax-exemption)? | Yes. Dividends subject to the so-called affiliation privilege / participation exemption regime are tax exempt (Spain also applies direct and indirect credits for the case of dividends that cannot benefit from the exemption method, the comments below are referred to the exemption method; the exemption method also applies to capital gains obtained from the alienation of participations which permit the Spanish parent company to obtain exempt dividends provided some conditions are met).  Cf. art. 21 CITL |
| 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? | No. The affiliation privilege will not apply in the case of subsidiaries resident in a tax haven (as defined in Spanish law, see below answer 45), with the exception of those tax havens within the EU (Gibraltar), provided the taxpayer proves the entity has been set up for valid economic reasons and carries out an economic activity (art. 21.9 CITL).  The participation exemption will not apply either if the foreign subsidiary is subject to a nominal tax rate of less than 10 per 100 or the foreign tax is not comparable to the Spanish corporate tax. This condition is deemed to be met in the case of countries with which Spain has a tax treaty in force, if the tax treaty is applicable to the subsidiary and it has an exchange of information clause (cf. art. 21.1.b) CITL). |
| 1. Does this apply regardless of the level of shareholding or voting rights held in the distributing company? | No. The affiliation privilege regime only applies if the parent company has a direct or indirect participation of at least 5% in the capital or shareholder funds of the distributing company for an uninterrupted period of at least 1 year (this requirement can be met before or after the distribution of the profit). It also applies if the acquisition value of the participation is more than euro 20 million.  Some limitations apply for dividends distributed by first tier subsidiaries coming from participations in second or lower tier subsidiaries.  (cf. art. 21.1.a) CITL) |
| 1. Does this also apply if the dividends have been deducted by the distributing company in its taxable income? | No, if the foreign subsidiary can apply a deduction when dividends are distributed, the exemption method does not apply (cf. art. 21.1 CITL). Interests from participative loans between entities of the same group of companies are regarded as dividends unless the payments are deductible in the State of paying company. |
| 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? | Art. 21 of the new CITL applicable from January 1st, 2015 has already implemented the change to art. 4 of the Parent-Subsidiary Directive. |
| *Dividends paid* | |
| 1. Is it possible for a company in your MS to distribute dividends to a foreign company without any withholding tax? | Dividends distributed by Spanish Holding Companies (so called “ETVEs”) to non-residents in Spain (individuals or companies) are not subject to tax provided they are linked to benefits / capital gains obtained by the Spanish holding company to which the participation exemption or the foreign PE exemption applied (art. 108 CITL). A similar regime also applies to dividends received by non-resident partners of venture capital entities (art. 50 CITL).  Dividends covered by the Spanish implementation of the Parent-Subsidiary Directive are exempt from withholding tax, cf. Art. 14.1(h) of the LIRNR. Dividends paid to companies resident in Switzerland or States of the EEE are also exempt under similar conditions as those established in the Parent-Subsidiary Directive. In the case of EEE countries effective exchange of information with Spain is required.  Some benefits also apply to Canary Islands ZEC entities (exemption, with some requirements, for payments of dividends to non-residents, or gains obtained from the alienation of shares, except if they are resident in a country or territory that does not exchange information with Spain).  Dividends and other participations in profits derived by the following entities resident in another EU or EEA Member State are also exempt if certain conditions are met (i.e. exchange of information with Spain in the case of EEA countries):   * Pension funds equivalent to those within the ambit of Royal Decree-law 1/2002 of 29 November 2002; and * Undertakings for Collective Investment in Transferable Securities (UCITS) within the ambit of Directive 2009/65/CE of 13 July. |
| 1. If yes to 5, |  |
| 1. Does this apply regardless of the amount or percentage of shares, which the foreign company holds? | In the case of Spanish Holding companies (“ETVE”), the only condition refers to (1) formal application of this regime (option for it) (2) the Spanish holding distributing income that is exempt according to the domestic participation exemption (dividends or capital gains or income from foreign PEs); (3) the person receiving the dividends is not resident in a tax haven.    The participation exemption (implementation of the Parent-Subsidiary Directive) only applies if the foreign parent company holds at least a 5% direct participation in the capital of the distributing Spanish subsidiary or the participation has an acquisition value of, at least, euro 20 million. The 1-year holding period also applies in these cases (before or after the distribution of the dividend). The same threshold applies to ZECs in the Canary Islands.  In the case of pension funds or UCITS, no threshold applies. |
| 1. Does this apply regardless of the tax residence of the foreign company, e.g. member state, treaty state, tax haven? | As mentioned, in the Spanish Holding Company regime (“ETVE”), if dividends are paid to a resident in a tax haven, the withholding tax will be applicable. The same applies to partners of venture capital entities (art. 50 CITL).  The participation exemption implementing the Parent Subsidiary Directive only applies if the foreign shareholder company has one of the corporate forms listed in the Annex to the Parent-Subsidiary Directive, and is subject to normal corporate tax in its country of residence. The participation exemption does not apply where:   * The parent is resident in any of the listed tax havens (within the European Union this applies only to Gibraltar, within the EEE, to Liechtenstein); or * The majority of voting rights of the parent company are held, directly or indirectly, by a resident outside the European Union or the EEE (provided there is effective exchange of information with such a country); except when the incorporation of the company and its operation are motivated by sound economic purposes and substantive business reasons.   Almost the same clause is applicable to ZEC entities in the Canary Islands with the difference that the exemption in this case applies to payments to parent companies located in any country with which there is effective exchange of information.  In the case of foreign pension funds and UCITs, the exemption will not apply in the case of those resident in a country of the EEE if there is no exchange of information with the country of residence (in practice this only affects Liechtenstein). |
| 1. Is the withholding tax exemption subject to a beneficial ownership requirement similar to that of the OECD model tax convention? | Not in law, but yes when the exemptions are interpreted. When there is 0 rate in double tax conventions, the dividend article usually includes the beneficial ownership requirement. |
| 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. | See under 6b) above. The Spanish GAAR could also apply. |
| 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. | Those transactions are characterized as capital gains under Spanish law. In general, like dividends, capital gains derived by nonresidents without permanent establishment in Spain are subject to tax in Spain at a rate of 20 per 100 in 2015 and 19 per 100 in 2016 (there is no withholding, however, in most of the cases) (cf. art. 25.1.f) NRITL).  Capital gains obtained by non-resident companies without permanent establishment in Spain which, in turn, are residents within the EU are exempt if the requirements of the domestic participation exemption are met (5 per 100 participation or acquisition value of the participation of, at least, euro 20 million, one year holding period, and the asset owned by the company cannot consist mainly, directly or indirectly, in properties situated in Spain[[1]](#footnote-2)) (art. 14.1.c) NRITL). In the ZEC regime, this exemption is extended to non-residents that are not residents of countries with no effective exchange of information with Spain.  Capital gains obtained by shareholders of Spanish holding companies (“ETVE”), unless they are residents of a tax haven, are not subject to tax in Spain provided that they correspond with exempt income obtained by the ETVE or with participations that give the Spanish holding the right to apply the participation exemption regime if the reserves of the ETVE or the participations are in companies that are not residents of Spain. If the capital gain is attributable to foreign PEs the Spanish holding may have abroad, the capital gain is not taxable in Spain either (art. 108.2 CITL).  Alienation of shares in venture capital entities by non-residents is not subject to tax in Spain unless obtained by a resident of a tax haven or the purchaser is resident of a tax haven (art. 50.4. and 5 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. | Yes. |
| 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). | If the payment is regarded as ‘dividend or distribution of profits’ according to Spanish tax law, it will only be exempt if it is not deductible for the payer. See answer 4.c. above. |
| 1. If yes to 11, |  |
| 1. Please briefly explain which requirements should be fulfilled. | N/A |
| 1. How will the amendment of Article 4 of the EU Parent/Subsidiary Directive affect your answer? | N/A |
| *Interest costs* | |
| 1. Are inter-group interest payments on a loan granted by a foreign group member company tax deductible to a resident in your MS? | Yes, with the limits explained below (cf. art. 15 and 16 CITL). |
| 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. | Expenses corresponding to transactions carried out with associated companies that, as a consequence of a different characterization of the income when received by the payee, are not taxed or taxed at a nominal rate lower than 10 per 100 are not deductible (cif. Art. 15.j) CITL). This rule also applies to interest. |
| 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. | See answer to question 14.a). If that rule does not apply, the mismatch is possible. |
| 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. | 1) Interest related to debts generated within a corporate group in order to acquire participations in the capital or equity of any kind of entities from other group entities, or to make capital or equity contributions to other group entities is not deductible. The restriction does not apply, however, if the taxpayer can provide evidence of the existence of valid economic reasons for the underlying transactions (cf. art. 15.h) CITL).  2) The rule on hybrid payments, which encompasses interest as well as other deductible payments, has been explained in the answer to 14.a).  3) Further (net) interest expenses may only be deducted up to 30% of EBITDA (income from shares that benefit from the participation exemption is included within the base to which the 30 per 100 limit applies except if the rule in art. 15.h CITL explained above is triggered).  A safe-harbour rule applies: net borrowing costs up to EUR 1 million per tax period are deductible in any case (proportionally to the duration of the taxable year if the taxable period is less than a year.) Any net borrowing costs that were not deductible due to the 30% ceiling may be carried forward without a time limit (before January 1s, 2015, the limit was 18 years).  From January 1st 2015, an additional limit has been introduced for leveraged vehicle acquisitions (debt push-down) that form a consolidated group or involve a merger from 20 June 2014. This limit will restrict the deductibility of interest on loans obtained to purchase shares in a company to 30% of the acquiring company’s operating profit. This limit will not apply in the taxable year the shares are acquired if the acquisition is funded with debt not exceeding 70% of the acquisition price. In addition, the limit will not apply in subsequent taxable years, if the debt decreases proportionally in each of the eight years following the acquisition date, to 30% of the acquisition price.  The limit does not apply to: (1) credit and insurance companies as well as securitization vehicles; (2) in the last year when the company is dissolved and liquidated, unless this is the consequence of a business restructuring.  Cf. art. 16, 67, 83 CITL  4) Transfer pricing rules (cf. Art. 18 CITL) will apply to keep the interest rates at arm’s-length. New transfer pricing rules permit the Spanish tax administration to re-characterize the transaction. |
| 1. In particular, do the rules apply only to interest costs on inter-group debt or more generally to all interest costs? | We refer to the answer to question 16.a): the rule in (1) applies to groups, the rule in (2) applies to associated companies, the rule in (3) applies to any type of interest paid to associated companies, companies of a group or third parties, and (4) the transfer pricing rules apply to associated parties as defined in art. 18 CITL. |
| 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. | 1. Structure 1: The interest barrier (point 3 in answer 16.a) will act as a general limit and rule 1 in answer 16.a will only apply if the seller would be within the same company group of companies. Effectiveness of the interest barrier will depend, basically, on how the transaction is structured and the operating profit of target (the limit that refers to the operating profit of C Holdco can be avoided if the limits set out in the norm are respected). 2. Structure 2: The only differences with respect to Structure 1 are that (1) the hybrid loan will trigger the limit of art. 15.j CITL if payments received by B holdco are, as a consequence of different characterization of the payment in State B, exempt or taxed at a nominal rate of less than 10 per 100, if this rule does not apply, the business purpose of the transaction will have to be proved by the taxpayer if the seller is within the same group of companies (art. 15.h CITL, rule 1 in answer 16.a); and (2) payments for guarantees provided by the group will be deductible provided they are made at arm’s-length. 3. Structure 3: The interest barrier (3 in answer 16.a) will act as a general limit and rule 1 in answer 16.a) will require the taxpayer to provide evidence of business purpose of the transaction if the seller is within the same company group. If business purpose is shown, effectiveness of the interest barrier will depend on how the transaction is structured and the operating profit of target. The anti-hybrid rule in art. 15.j) CITL (see above answer 14.a) will not apply in our view, since the difference is attributable to different views about the entity and not to different characterizations of the payments. 4. Structure 4: Only the general interest barrier would apply in this case, and, therefore, the effectiveness of the limit will depend on the operative benefit of Opco.   In all the cases, transfer pricing legislation would apply to (1) the interest rate and (2) would permit the tax administration to re-characterize the transaction and bring it in line with arm’s-length conditions.  Whereas it is true that the new legislation limits interest deductions, the limits can be bypassed or it is dubious whether the general interest barrier will be effective since profitability levels of some companies or sectors may easily permit to absorb interest deductions. It is also likely that tax planning will move to other deductible concepts (i.e. services, royalties) with are not affected by the new rules. |
| 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, transfer pricing rules will apply (art. 18 CITL). The deemed deduction will not be contingent on a corresponding adjustment in the foreign State (if there is an adjustment, a MAP and, if applicable, arbitration procedure should be initiated). This basically means that if FinanceCo D is a tax resident of Spain, incoming interest will be off-set with deemed interest paid to FinanceCo B. |
| 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, transfer pricing rules would again apply (art. 18 CITL) and incoming or net interest would be taxed at normal corporate tax rate. |
| 1. Does your MS levy any withholding tax on interest payments? | Yes. However, if the interest is not attributed to a domestic PE, some very relevant exemptions in domestic law apply:   1. To interest paid to EU residents (art. 14.1.c) NRITL), except if they are residents of a tax haven (art. 14.2 NRITL). 2. To interest from Spanish public debt (art. 14.1.d) NRITL. 3. To interest from securities issued in Spain (art. 14.1.e) NRITL). 4. To interest of non-resident accounts, with certain conditions (art. 14.1.f) NRITL)   Specific tax treaty exemptions will also be relevant |
| 1. If yes to 19 |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | 20 per 100 for 2015, and 19% from 2016 (cf. art. 25.1.f) NRITL). |
| 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? | The only difference refers to domestic exemptions. See above answer to question 19. |
| 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? | The domestic provisions in force do not refer to beneficial ownership in the case of interest, although it is quite likely that if the person receiving the interest is not the beneficial owner, it will be interpreted by the tax administration that the specific exemption will not apply (either by applying the domestic GAARs or simply by interpreting that the income is attributable to the true owner). |
| 1. Is such exemption, reduction or refund subject to other anti-avoidance requirements? If yes, please explain briefly. | The domestic GAAR (art. 15 GTL) or anti-sham / simulation provision (art. 16 GTL) can also be 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, but it offers a reduction for ‘capitalization reserves’ (art. 25 CITL) of 10 per 100 of the increase in shareholders' equity (own funds) in any tax year provided that the increase is held during the following 5 years without distributing it to shareholders and there is a separate reserve in the balance sheet (certain conditions and limits are also applicable). Some reductions are also offered in the Canary Islands but in this case the special reserve is linked to investments not to notional interests. |
| 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? | Yes, a so-called ‘patent box’ (art. 23 CITL): income (gross income less expenses linked with the asset) derived from transfers (including rights to use and sales) of patents, designs, formulas or secret processes, or for information concerning industrial, commercial or scientific experience will be included within the corporate tax base with a reduction of 60 per 100 provided (1) the company transferring the right has created the asset in, at least, 25 per 100 of its cost; (2) the payer of the royalty uses the IP in an economic activity and the use of the IP does not result in supply of goods or provision of services that generates deductible expenses for the Spanish transferring entity if it is an associated company with the payer; (3) the payer must not be a resident of a country or territory listed as a territory of no taxation or tax haven, unless it is within the EU and the taxpayer proves that there are valid business motives and carries out economic activities; (4) if the same contract includes provision of services, the part corresponding to services must be split from the part corresponding to IP covered by the patent box; (5) the Spanish entity must have accounting records that show the income and expenses corresponding to the IP that is being transferred; (6) the patent box will not apply to alienation of the IP between companies of the same group.  The patent box will not apply to income / capital gains derived from trademarks, copyrights of literary, artistic or scientific work, including cinematograph films, personal rights such as image rights, software or industrial, commercial or scientific equipment (or any other asset different from those explained above).  Tax rulings and APAs are admitted with regard to (1) characterization of the transaction and property or right as one giving right to the patent box; or (2) valuation of gross income, expenses or capital gains. |
| 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. | The regulation of R&D credits (art. 35 and 39 CITL) is complex and very detailed, but some basic features are the following:   * The concept of R&D, which also covers technologic innovation activities, is very broad. Basically, R&D covers from the preliminary to the last stages of activity (first design, prototype, pilot projects etc.) or even commercialization and marketing of some products (elaboration of catalogues of new products). * The tax base of the credit is linked to the R&D expenses and investments in some assets, as defined in CITL. * The amount of the credit will vary depending on the level of expense and type of asset in which the investment materializes. * Tax rebates can be obtained for excess credits in certain conditions. |
| 1. Can such credits also be obtained for costs that are ultimately reimbursed by a group member company to the company in your MS? | The owner of the final product is generally the only one entitled to apply the tax credits. If costs are reimbursed, this basically means that the paying company will be the holder of rights upon the final product and will be the one entitled to apply the credits. However, the Spanish Directorate General for Taxation has admitted that a Spanish resident company can apply a credit for all R+D costs even if other non-resident companies of the same group would reimburse the costs plus an arm’s-length margin and are the owners of the final product provided that the Spanish resident company has materially conducted the research (e.g. Resolution DGT 7 June 2013, V1892-2013, or of 27 May 2010, V1145/2010).  On the other hand, outsourcing of research is permitted and the expense is included within the tax base of the credit. However, they will only be included within the tax base of the credit when such amounts are paid for the performance of these activities in Spain, or in a UE or EEE Member State, at the request of the taxpayer. |
| 1. Can a company in your MS transfer ownership of a patent, trademark or other IP right to a foreign group member company without incurring capital gains tax? When responding, please consider Model ATP-Structure no. 5 and assume that MNE Group is tax resident in your MS. Please also assume that the IP has no significant fair market value at the time it is transferred but it becomes highly valuable shortly (1-2 years) after. | No (provided that the market value of the IP is higher than its cost for the taxpayer). Since transfer pricing legislation (cf. art. 18 CITL) will be applicable to the transfer, it should be checked whether the original transfer was valued correctly or whether the increase after 1-2 years can be attributed to value added by the foreign company. |
| 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 (note that the patent box, cf. n. 23 above, does not apply if the transfer takes place between companies of the same group) |
| 1. Does taxation arise as a result of an anti-abuse provision or similar? | It could be the case if there is a simulation that the higher value after 1-2 years is attributed to company B that received the IP right, whereas the value was created in Spain by MNE Group. |
| 1. Would any R&D tax credits obtained in the past be reversed upon a disposal? | No, if disposal refers to the IP created as a result of the R+D, yes if disposal refers to assets acquired to be used in the R+D activities that permitted the taxpayer to apply the credit (the asset is to be kept for 5 or 3 years, depending on its nature, or less if their useful life is less than that time) |
| 1. Can a ruling confirming the value of the IP be obtained? | Yes (cf. art. 18 and 23 CITL) |
| *Royalty and other IP costs* | |
| 1. Is royalty paid by a company in your MS to a group member company in another MS or for utilization of IP tax deductible? | Yes. Royalties are deductible if paid on an arm’s-length basis and the general requirements for deduction of expenses in the Spanish corporate tax law are met. |
| 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. If there is a different characterization, the anti-hybrid rule referred to above for the case of interest may apply (cf. art. 15.j). But this is unlikely for the case of royalties. |
| 1. Are there types of royalty payments which cannot be deducted? | Some restrictions may apply if the royalties are paid to persons resident in tax havens (cf. art. 15.g) CITL). These royalties will not be deductible unless the taxpayer proves that the deduction corresponds to a transaction that has been effectively carried out. |
| 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)? | 24 % is the general tax rate.  20 % (19 % after January 1st, 2016) for taxpayers that are resident of the EU or EEE countries, provided in this latter case there is an exchange of information agreement.  Cf. art. 25.1.a) NRITL |
| 1. Are there types of royalty payments which are not subject to withholding tax? | Royalty payments by Spanish companies are exempt from withholding tax, provided that the recipient is an associated company and the payment is covered by the Interest and Royalties Directive (Directive 2003/49/CEE which is included in Article 14.1.m) NRITL). Payments made to Swiss associated companies are also exempt from withholding tax if conditions similar to those of the Directive are met, but this exemption is included within the Spain-Switzerland Double Tax Treaty. Other tax treaties also provide for exemption of royalties at source for all (e.g. Hungary, United Arab Emirates, Malta) or some categories of royalties (usually so called cultural royalties). |
| 1. In connection with an exemption, reduction or refund of withholding tax under a tax treaty or the EU Interest/Royalty Directive, is it common tax practice to apply a beneficial ownership requirement similar to that of the OECD model tax convention? | Yes. The Spanish implementing legislation of the EU Interest and Royalty Directive does not refer expressly to beneficial ownership but describes its meaning. Spanish tax treaties usually include a reference to beneficial owner in the royalty article, and even where that reference does not exist (e.g. tax treaty between Spain and the Netherlands) it can be interpreted that the beneficial ownership requirement also applies in that context |
| 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. | When implementing the EU interest and royalty Directive, Spain has introduced an anti-abuse clause: the exemption will not be applicable if the majority of voting rights of the company receiving the royalties is, directly or indirectly, held by persons who are not residents of the EU, except when the company has been set up for valid economic motives and substantive business reasons.  Apart from that clause, the domestic GAAR (art. 15 GTL) or anti-simulation provision (art. 16 GTL) can apply. Some tax treaties also have specific anti-abuse clauses (either LOBs or PPT). |
| *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. The controlling company can be a resident company, a non-resident company with legal personality and subject to a corporate tax similar to the Spanish one or a qualifying permanent establishment (in the last two cases provided that the non-resident entity is not resident in a tax haven) which owns, directly or indirectly, more than 75% of the dependent company or companies and a majority of voting rights on the first day of the tax year and for the remainder of the taxable period (except if the dependent entity is dissolved). If the dependent company is a listed company, the qualifying shareholding is 70%.  The subsidiaries must be resident companies, subject to (and not exempt from) corporate income tax and taxed at the same tax rate as the controlling company. Spanish PEs of foreign companies or Spanish subsidiaries controlled through a foreign subsidiary can be included within the consolidation group if certain requirements are met.  There are some peculiarities with regard to credit institutions.  If tax consolidation is granted, profits and losses within the group are eliminated. Therefore, only the consolidated net income is subject to corporate income tax.  Cf. art. 55-75 CITL |
| 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. | Not really, what is restricted is the deduction of interest. See above answer 16.a), point 3, where this rule is explained (cf. art. 67.b) CITL). |
| *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. | Under controlled foreign company legislation, income from investment in non-EU resident entities located abroad may be attributed to its resident participator (either individuals or companies) and therefore taxed in Spain. The following conditions have to be met for the CFC regime to apply:   * The resident taxpayer holds, alone or together with associated persons, 50% or more of the capital, funds, voting rights, or profits of the foreign company. This will apply to directly and indirectly controlled entities. * The tax paid by the foreign company with regard to the type of income included within the CFC regime is lower than 75 per 100 of the tax that would have been paid in Spain.   For the CFC regime to apply the type of income obtained by the foreign entity is also relevant. This regime will be triggered if:   1. The foreign company does not have the human and material resources to carry out its activity (except that the activity is carried out with resources provided by other entities of the group that are not resident in Spain or it is shown that there are valid business reasons to set up that company or it is a holding company as defined in the legislation). This means that active (and not only passive) income can fall within the CFC regime. 2. If 1 is not applicable, the taxpayer will only include within the tax base the following types of (positive) income:  * Income from immovable property (unless affected to an economic activity) * Income from participation in the equity of any type of entity or interest (as defined in Spanish law). Important exceptions apply in this regard, for instance, for interest if the companies belong to a group or for dividends for holdings as defined in the Spanish legislation. * Income from insurance and capitalization transactions that have the Spanish taxpayer as beneficiary. * Income from IP, technical assistance, movable property, image rights, letting or subletting of business or mines unless affected to a business activity. * Capital gains from the alienation of any of the assets mentioned in the previous paragraphs. * Derivatives, except those used to cover risks in the context of business transactions. * Credit, financial, insurance activities or, in general, provision of services to Spanish resident entities that are associated companies of the foreign CFC (this does not apply if more than 50 per 100 of the income of the CFC comes from transactions with non-associated companies).   In principle, the CFC legislation does not apply to entities resident within the EU. But the regime is also applicable to entities resident in a EU jurisdiction if the taxpayer does not prove that the incorporation of the company is based on economic reasons, and that the company carries on business activities. The CFC regime does not apply either to EU collective investment institutions covered by Directive 2009/65/CE unless they are resident of a tax haven.  Income is attributed to the resident company at the pro rata share in the results of the [CFC](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_es_abb_cfc?WT.z_nav=crosslinks). A de minimis rule applies if the sum of attributable income is less than 15 per 100 of the total income obtained by the foreign entity (with the exception of the case of services provided to Spanish associated companies).  Where the [CFC](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_es_abb_cfc?WT.z_nav=crosslinks) is resident in a tax haven, a more strict regime applies, as there is a rebuttable presumption that:   * the corporate tax actually paid on any kind of income by the CFC is less than 75 per 100 of the Spanish Corporate Tax; * all income accruing to the CFC is included within the CFC regime; and * the annual minimum income derived by the CFC is equal to 15% of the acquisition cost of the participation in the entity.   Cf. art. 100 CITL (there is a twin regime in the PITL) |
| 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? | * MNE group can easily benefit from the exceptions of the CFC regime in Structures 1,2 and 4-6. The consequence is that all of them would escape attribution to the Spanish MNE (if well structured). |
| *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. | Spain uses its own criteria. Foreign entities are treated as transparent whenever their legal nature is the same or analogous to a Spanish entity that is treated as transparent (cif. Art. 87.1 PTL and art. 37.1 NRITL). This has created problems because it is not clear whether the interpreter has to take into account the legal or tax features of the foreign entity or both. The Spanish Directorate General for Taxation seems to take into account all the features (company and tax law) of the foreign entity when comparing it with Spanish entities (see, for instance, Ruling of the Spanish Directorate General of Taxation of 11 January 2011, V-0012-11, or of 1 June 2005, V-0196-05).[[2]](#footnote-3)  As a consequence, mismatches can occur like in Structure 3. |
| 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. | In cases where hybrid mismatches occur, as a consequence of a different tax qualification of a legal entity, the non-deducibility of expenses provided for in Article 15.j of CTIL applies. This non-deductibility is explained in answer 14.a) to this questionnaire.[[3]](#footnote-4) |
| 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. |
| *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, if the company is incorporated in Spain, it will be regarded as a tax resident of Spain (unless a tie-breaker rule of a tax treaty applies) |
| 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? | Spain offers both rulings and APAs[[4]](#footnote-5), but they should be aligned with the principles of domestic legislation and tax treaties, arm’s-length among them. |
| 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? | These types of structures, rather than with transfer pricing legislation, have been attacked with an expansive interpretation of the PE concept in well-known judgments of our Supreme Court such as Roche, Borax etc. At the risk of oversimplifying, basically, our tax administration and courts have concluded that there is a PE of the foreign principal where there is a ‘complex operative settlement in Spain’ in which relevant functions have been split among entities of the same group (either resident or non-resident in Spain), but still a business cycle is completed in Spain.  For cases not falling within the scope of that controversial position, transfer pricing legislation, as well as the Spanish GAAR, would permit the tax administration to attack these structures. |
| 1. Can a company in your MS obtain a ruling or APA that a) provides for tax exemption of profits considered to exceed an arm’s length-income or considered to have been left to the company by its shareholders (capital contribution), or b) provides for the deduction of deemed expenses that would have been due under arm-‘s length conditions? | No. |
| *GAAR/SAAR* | |
| 1. Please consider Model ATP-Structures no. 1-7. Are you aware of any general or specific anti-avoidance rules or practice in your MS which could impede or counter the ATP objective of any of the structures? If yes, please describe briefly the scope of the rules/practice and how they could be applied to each of the structures. | Spain has a GAAR (Article 15 GTL) that has been used by the Spanish tax administration to fight against structures where it was identified that interest were deducted in Spain (in factual situations equal or similar to those considered in Structures 1-4)[[5]](#footnote-6).  Special restrictions also apply to companies resident in a tax haven, as defined by the Spanish legislation (see above). For instance,  expenses on services related to transactions carried on, directly or indirectly, with persons or entities resident in a tax haven, or services paid through persons or entities resident in a tax haven are not deductible for Spanish tax purposes, unless the Spanish resident company can prove that the expense is related to a transaction carried on by valid economic reasons, cf. Art. 15.1(g) of the LIS.  The concept of tax haven is defined in the Additional Provision 1 of Law 36/2006 which sends to the countries or territories listed in a Royal Decree. For the time being, the list of Royal Decree 1080/1991 of 5 July 1991, effective from 25 July 1991, is still valid:  - Bahrein.  - Brunei  - Gibraltar.  - Anguilla.  - Antigua and Barbuda.  - Bermuda.  - Cayman Island.  - Cook Island.  - Republic of Dominica.  - Grenada.  - Fiji.  - Guernsey and Jersey (Islas del Canal).  - Falkland Islands.  - Isle of Man  - Mariana Islands.  - Mauritius.  - Montserrat.  - Nauru.  - Solomon Islands.  - San Vincent and the Grenadines.  - St Lucia.  - Turks and Caicos Islands.  - Vanuatu.  - The British Virgin Islands.  - The US Virgin Islands.  - Jordan  - Lebanon.  - Liberia.  - Liechtenstein.  - Macau.  - Monaco.  - Oman.  - The Seychelles.  However, that list can be updated and for that purpose the following criteria will be taken into account:   * Whether there is a tax treaty or TIEA with that country or territory or if it is a signatory of an international agreement on exchange of information or the OECD / Council of Europe Convention on mutual assistance (as amended by the 2010 Protocol). * If there is no effective exchange of information with a country or territory. * The peer-review results of the Global Tax Forum on Exchange of Information.   For the time being there has not been an update of the list above. |
| *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. |

1. The last aspect of requirements for the domestic participation exemption regarding “the asset owned by the company cannot consist mainly, directly or indirectly, in properties situated in Spain” raised a conflicting issue between the views of the representative on the MS and NTE. The final questionnaire text includes the addition made by Spanish fiscal attaché. However, the addition was disregarded by the NTE, noting that the Spanish legislation provides that capital gains derived by non-residents who are in turn residents of the EU from movable assets located in Spain are exempt from tax in Spain. The exemption will not apply in three different circumstances: (a) the asset owned by the company consists mainly in real estate located in Spain; (b) for individuals, if in the 12 months period before the transfer of shares, the taxpayer participated, directly or indirectly in the entity in more than 25 per 100 of its capital (or wealth); (c) for the case of non-resident entities, if the transfer of shares does not meet the requirements to benefit from art. 21 CITL. Since a transfer of shares in a real estate rich company can also benefit from the participation exemption in art. 21 CITL, the interpretation on NTE is that transfers of shares of land or real estate rich companies will not be exempt when they do not meet the requirements to benefit from the domestic participation exemption. But if they meet those requirements there is no reason to refuse the exemption. It was further noted by the NTE that the interpretation the Spanish administration proposes is not in line with the wording or the law or even with EU law since that interpretation may create discriminations contrary to the EU fundamental freedoms (establishment and capital). [↑](#footnote-ref-2)
2. In country validation process it was stated by the MS representative that the answer represents subjective comment of NTE. However such position was disregarded by NTE, arguing the provided answer objectively describes the situation. [↑](#footnote-ref-3)
3. The validation process of questionnaires resulted in conflict between the answers from the NTE and the representatives of the MS regarding questions 38 and 39. Thus, the final version of the Questionnaire provides the answers for questions 38 and 39 in accordance with the interpretation of the MS representative. It should be noted, however, that the NTE disagreed with the interpretation provided by the Spanish representatives because, he argued art. 15.j) CITL does not apply to hybrid entities and it only applies to hybrid payments. [↑](#footnote-ref-4)
4. In country validation process MS representative preferred to substitute term “rulings” with “Advance Price Agreements”. NTE disregarded this comment, stating that this would mean limiting the answer solely to the practices of APAs, while the original question has broader scope. [↑](#footnote-ref-5)
5. The answer to the question was approved by the MS representative to the extent, given in the final questionnaire. However according to the NTE the following explanation must be further included in the answer: “It can even be said that the decisions by the Administration and the reasoning of our Supreme Court are (unduly and likely in breach of EU law) transferring to our legal order the BEPS concept of aggressive tax planning without really having it in art. 15 GTL (or any other legal provision). Instead of focusing on the artificiality of the behavior, as art. 15 GTL requires, it seems that absence of business reasons for the transactions and / or low or no taxation in the other State of interest deducted in Spain (instead of the artificiality element that is central to the GAAR) were crucial to characterize some loans and transactions as abusive (cf., for instance, Judgments of the Supreme Court of 9 February 2015, n. 188/2014 or 3971/2013; other similar examples can be found in the Judgments of the Supreme Court of 23 March 2015, 682/2014 or 4075/2013).” [↑](#footnote-ref-6)