ANTI-AVOIDANCE LEGISLATION AND TAX PLANNING

Dr. Balázs Békés
Andrea Manzitti
24 November 2017
• Tax planning would be easy if we would have mathematical approach

• Find low effective tax rate structures, jurisdictions

• Implement it

• There are anti-avoidance measures against (aggressive) tax planning
On international level

- EU Code of Conduct
- EU Directives – e.g. the Anti Tax Avoidance Directive (2016)
- OECD BEPS actions
- OECD grey and black lists

In double tax treaties

- Residency test
- Beneficial owner test

Based on domestic rules

- Substance over form
- Exercising the laws within their meaning and intent
- Anti-hybrid rules
- TP rules
Public concern and political pressure

- The financial crisis
  - Belt tightening, including tax hikes
  - Some groups seemingly paying little tax
- Political pressure
  - Stems from public concern
  - International tax rules seen as outdated
  - Need to update and modernize the rules

Policy

- “No or low taxation is not *per se* a cause of concern but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it” – BEPS Action Plan
- Source versus residence taxation
Anti Tax Avoidance Directive (ATAD)

- Contains five legally-binding anti-abuse measures, which all Member States should apply against common forms of aggressive tax planning.
- Member States should apply these measures as from 1 January 2019.
- It creates a minimum level of protection against corporate tax avoidance throughout the EU, while ensuring a fairer and more stable environment for businesses.
- The anti-avoidance measures in the ATAD other than the rule on hybrid mismatches, are:
  - Controlled foreign company (CFC) rule: to deter profit shifting to a low/no tax country.
  - Switchover rule: to prevent double non-taxation of certain income.
  - Exit taxation: to prevent companies from avoiding tax when re-locating assets.
  - Interest limitation: to discourage artificial debt arrangements designed to minimize taxes.
  - General anti-abuse rule: to counteract aggressive tax planning when other rules don’t apply.
Anti avoidance rule in Italy

- Abuse of Law is defined (2015) as:
  - One or more transactions lacking economic substance which, despite being formally compliant with the tax rules, achieve essentially undue tax advantages
  - Transactions lack economic substance when they imply facts, actions and agreements, related or not to each other, that are unable to generate significant business consequences other than tax advantages
  - Tax advantages are undue where they consist of benefits that conflict with the purpose of the relevant tax provisions or the principles of the tax system
Lawful tax planning occurs when:

- The taxpayer achieves a tax benefit which is not "undue", i.e., it does not conflict with the rationale of the tax rules and/or the tax system;
- The taxpayer achieves an undue tax benefit but its behaviour is justified by a valid business purpose;
- The GAAR explicitly states that taxpayers are free to choose among different optional tax regimes provided by the law or between alternative transactions with a different tax burden.

It applies to all types of taxes, thus impacting individual tax planning:

- The Revenue Agency is bound to respond to the ruling requests aimed at verifying if a transaction constitutes abuse. Failure to respond within a specified timeframe amounts to acceptance that the transaction does not constitute abuse.
- The tax office has the burden of proofing that the tax benefit is undue, the taxpayers that the transaction is supported by a solid business purpose.
- Tax avoidance does not expose taxpayers to criminal penalties.
Anti avoidance rules in Hungary

• Substance over form
  • tax consequences of the transactions should be determined in line with their true economic substance

• Exercising the laws within their meaning and intent
  • Not fulfilled if the purpose of the transaction is to evade tax laws

• Anti-hybrid rules
  • Hungary does not exempt the taxation of an income, if based on the applicable provisions of the given double tax treaty, such income is not considered as taxable income in either contracting state

• TP rules
  • Downward TP adjustment (deduction) is only available in case the other party is
    • Not a CFC,
    • subject to corporate tax in its jurisdiction,
    • Provides declaration on the amount of the adjustment
    • Provides declaration that it includes the adjustment amount in its tax base in line with the arm’s length principle
### Anti-Avoidance Legislation and Tax Planning

#### Country Questionnaire

1. Does your country provide rules against the (ab)use of tax havens or non-cooperative jurisdictions applicable to (a) resident individuals or (b) foreign companies controlled by resident companies?

2. Does your country provide a General Anti Avoidance Rule? If so, is it applicable to individuals? Have there been cases involving the application of the GAAR to estate planning?

3. Do the rules of your country allow taxpayers to seek advance rulings to clear a transaction from anti-avoidance challenges?

<table>
<thead>
<tr>
<th>Country</th>
<th>Question 1</th>
<th>Question 2</th>
<th>Question 3</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Malta</strong></td>
<td>Exemption from tax of interest, discounts or royalties accruing to non-residents applies only if the beneficial owner is not a resident of Malta and is not owned and controlled by persons resident in Malta. Certain anti-abuse requirement for participation exemption as well (EU test, effective tax rate test, passive income test, etc.).</td>
<td>Yes, where any scheme, which reduces the amount of tax payable by any person, is artificial or fictitious or is in fact not given effect to, the CIR shall disregard the scheme and the person concerned shall be assessable accordingly. Applies to individuals as well.</td>
<td>Yes, local tax authorities might issue advance revenue rulings confirming certain prescribed matters including, inter alia: that the domestic general anti-abuse provisions would not apply in respect of a transaction to be implemented for bona fide commercial reasons.</td>
</tr>
<tr>
<td><strong>Russia</strong></td>
<td>Since 2015 Russia has enacted CFC rules (so called 'de-offshorization law') relevant for individuals and legal entities which are the tax residents of Russia.</td>
<td>Yes, this concept has been incorporated into Tax Code recently (article 54.1 of Tax Code) and enacted since August 2017.</td>
<td>Since 2016, the Russian tax payers can apply for tax ruling ('motivated opinion'), this new instrument is currently unavailable for most of the small and medium taxpayers in Russia.</td>
</tr>
<tr>
<td><strong>Slovenia</strong></td>
<td>Slovenia does have specific rules precluding certain benefits when an entity in a jurisdiction where the nominal average tax rate is less than 12.5% is involved (provided, additionally, that the country in question is not an EU jurisdiction and is published on the official list of such jurisdictions</td>
<td>Yes, &quot;substance-over-form&quot; principle: - where the legal and economic aspects of a transaction differ (in terms of taxation), the economic aspect shall prevail; - if a transaction is performed purely for tax benefits/advantages and has no (other) economic substance, the transaction is disregarded for tax purposes (and the underlying transaction prevails).</td>
<td>Advance rulings (called “zavezuoča informacija” / &quot;binding ruling&quot;) can be obtained from the tax authorities in certain cases. In the field of transfer pricing, Advance Pricing Agreements can be concluded.</td>
</tr>
</tbody>
</table>
ANTI-AVOIDANCE LEGISLATION AND TAX PLANNING
COUNTRY QUESTIONNAIRE

1. Does your country provide rules against the (ab)use of tax havens or non-cooperative jurisdictions applicable to (a) resident individuals or (b) foreign companies controlled by resident companies?

2. Does your country provide a General Anti Avoidance Rule? If so, is it applicable to individuals? Have there been cases involving the application of the GAAR to estate planning?

3. Do the rules of your country allow taxpayers to seek advance rulings to clear a transaction from anti-avoidance challenges?

<table>
<thead>
<tr>
<th>Country</th>
<th>Question 1</th>
<th>Question 2</th>
<th>Question 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hungary</td>
<td>No CFC legislation in case of private individuals, but higher tax rate in case of income received from low tax jurisdiction. CFC rules apply to legal entities only, in line with ATAD.</td>
<td>Yes: Substance over form, exercising the laws within their meaning and intent, anti-hybrid rules and TP rules</td>
<td>Yes, binding rulings and advance pricing arrangements are available.</td>
</tr>
<tr>
<td>Austria</td>
<td>Yes, for example, rules against low taxed, passive subsidiaries of Austrian corporations: dividends received are not tax exempt under the international participation exemption, but taxable with credit.</td>
<td>Yes, Austria has a GAAR, and it also applies to individuals and estate planning.</td>
<td>Yes, formal binding advance rulings are available for certain areas.</td>
</tr>
<tr>
<td>Italy</td>
<td>Italy has CFC rules applicable to all non Italian companies controlled by Italian resident taxpayers (including individuals and family members).</td>
<td>The Italian GAAR applies equally to individuals and corporations, whether resident or non-resident. Few known cases of application to individual taxation</td>
<td>Yes. The Revenue Agency is bound to respond the ruling requests aimed at verifying if a transaction constitutes abuse. Failure to respond within a specified timeframe amounts – by operation of the law - to acceptance that the transaction does not constitute abuse.</td>
</tr>
</tbody>
</table>
1. Does your country provide rules against the (ab)use of tax havens or non-cooperative jurisdictions applicable to (a) resident individuals or (b) foreign companies controlled by resident companies?

2. Does your country provide a General Anti Avoidance Rule? If so, is it applicable to individuals? Have there been cases involving the application of the GAAR to estate planning?

3. Do the rules of your country allow taxpayers to seek advance rulings to clear a transaction from anti-avoidance challenges?

<table>
<thead>
<tr>
<th>Country</th>
<th>Question 1</th>
<th>Question 2</th>
<th>Question 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>Germany enacted already in the early 70ties CFC-rules which have, in most aspects the same scope as the envisaged CFC-rules under the ATAD I directive. They apply both to German tax-resident individuals and corporations.</td>
<td>Yes. The GAAR was, for instance, invoked by the German tax authorities in cases where owners of business property sought to transfer the business in a privileged manner by way of anticipated succession and to that effect separated certain assets from the business property in advance to such transfer.</td>
<td>The German tax authorities are generally reluctant to rule in advance that a certain fact pattern does constitute an abuse of law.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Resident individuals who own 5 % or more of a non-resident company whose assets consists for 70 % or more of portfolio investments have to report an annual deemed income of 5.39% that is subject to a 30 % flat income tax rate (not applicable in case of at least 10% ETR). In addition, the Dutch participation exemption rules include various anti-avoidance rules that exclude (in)direct participations in low-taxed entities that are predominantly involved with portfolio investments and intra-group licensing and financing.</td>
<td>There is an extra-statutory 'abuse of law' doctrine that applies also to individual taxation. Under this doctrine, tax planning structures that seek a result that would be against the purpose and intent of the law and that are predominantly tax driven may be ignored. No known application of this doctrine to estate planning.</td>
<td>The Dutch ATR (Advance Tax Ruling) system often also (in)directly addresses the presence/absence of business reasons/tax avoidance motives, so in this way, it can offer protection against anti-avoidance challenges.</td>
</tr>
</tbody>
</table>
**ANTI-AVOIDANCE LEGISLATION AND TAX PLANNING**

**COUNTRY QUESTIONNAIRE**

1. Does your country provide rules against the (ab)use of tax havens or non-cooperative jurisdictions applicable to (a) resident individuals or (b) foreign companies controlled by resident companies?

2. Does your country provide a General Anti Avoidance Rule? If so, is it applicable to individuals? Have there been cases involving the application of the GAAR to estate planning?

3. Do the rules of your country allow taxpayers to seek advance rulings to clear a transaction from anti-avoidance challenges?

<table>
<thead>
<tr>
<th>Country</th>
<th>Question 1</th>
<th>Question 2</th>
<th>Question 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>The UK has CFC rules. In addition, there is quite a wide-reaching rule where an individual transfers assets abroad. There are also rules taxing individuals on capital gains made by non-UK companies which are “close” and rules that apply to investments in offshore funds. None of these are specifically focused on tax havens.</td>
<td>The UK GAAR applies equally to individuals and corporations, whether resident or non-resident. No known cases of application to individual taxation.</td>
<td>Generally no.</td>
</tr>
<tr>
<td>Portugal</td>
<td>Portugal has quite far-reaching CFC rules, applicable also to individuals owning significant shareholding in foreign companies that are subject to a more favorable tax regime. In addition, there are restrictive rules on payments made to entities located in a Tax Haven.</td>
<td>GAAR also applicable to individuals. In most cases the courts have analysed one case, that is the conversion of the Portuguese company type to benefit from the Real Estate Transfer Tax applicable to the transfer of shares of real estate companies constituted as sociedade anónima (as said exemption only applies to this type of companies). According to most decisions of the courts, it has been understood that the GAAR is not applicable to that conversion.</td>
<td>Through the Portuguese advance tax rulings mechanism, it is possible to the Portuguese tax authorities (in)directly address the presence/absence of business reasons/tax avoidance motives, so it can offer some protection against anti-avoidance challenges. In any case, please note that the Portuguese tax rulings may be revoked by the Portuguese tax authorities (without retroactive effect) one year after their issuance.</td>
</tr>
<tr>
<td>Country</td>
<td>Question 1</td>
<td>Question 2</td>
<td>Question 3</td>
</tr>
<tr>
<td>---------</td>
<td>---------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>France</td>
<td>French CFC rules generally apply to more-than-50% controlled foreign companies or permanent establishments of a French company when the tax paid locally is less than 50% of the amount of French tax that would have been. When the foreign entity is a company, the profits taxable in France under the CFC regime are considered as deemed distribution. A safe harbor applies for EU subsidiaries, subject to the condition that the structure is not artificial and aiming at avoiding French tax (based on Cadburry Schweppes). A similar anti-abuse rule applies to French tax resident individuals.</td>
<td>Yes, the French tax authorities may challenge arrangements which (a) are artificial/fictitious; or (b) seek to benefit from a literal application of legal provisions or decisions in contradiction with the purpose set forth by the author of such provisions or decisions and motivated by the sole purpose of avoiding or mitigating the tax burden of the taxpayer. The abuse of law doctrine has been applied also to individuals (interposition of structures, grants disguised as sales, sales disguised as contributions, etc.)</td>
<td>Ahead of a given operation/transaction, French taxpayers may file an advance tax ruling request with the French tax authorities focusing on whether or not such operation/transaction qualify as an abuse of law. In such case the French tax authorities shall be provided with any relevant information. Absent any reply by the French tax authorities within a 6-month period (or if a favourable reply is sent to the taxpayer within such 6-month period), the “abuse of law” proceedings cannot be implemented towards the taxpayer having filed the advance ruling.</td>
</tr>
<tr>
<td>Spain</td>
<td>Spanish tax laws contains several restriction for individuals (a) moving to (b) receiving income from a or (c) controlling an entity located in, a tax haven jurisdiction. Spanish CFC rules apply if a non-resident entity is directly or indirectly controlled by a Spanish resident individual is taxed at a rate lower than 18.75%. Nevertheless no Spanish CFC rules apply if (i) the relevant foreign entity has been formed for valid economic reasons; (ii) has enough human and material resources; and (iii) performs an economic activity.</td>
<td>Yes, among others, the Spanish tax authorities have concluded, in the context of a tax ruling request, that a transfer of real estate owned by a tax resident individual to a company owned not only thereby but also by close relatives in which the individual that contributed the real estate asset to the company expressly renounced to the allocation of new shares issued by the company in consideration for the contribution could be re-characterized under GAAR as a donation which should have been subject to Spanish Gift Tax on the hands of the close relatives co-owning the company.</td>
<td>Taxpayers have the possibility of filing binding and non-binding rulings before the Spanish tax authorities in connection with a specific transaction. In this regard, the Spanish tax authorities are obliged to provide an answer on the taxation linked to said specific transaction. However, the Spanish tax authorities may in practice be reluctant to give their view, in the form of a ruling, with respect to the non-application of the GAAR, and would do so only if the fact pattern is very clear.</td>
</tr>
</tbody>
</table>