Skatteverket – International Tax Planning
Agenda

• Introduction

• General remarks on International Tax Planning

• Analysis of International Tax Planning Models and Indicators

• International IP Tax Planning and the BEPS Perspective
Introduction

• CORIT Advisory
  – Ambition of being top quality boutique firm.
  – Emphasis on high-end, international and complex tax matters.
  – Fully credible and independent alternative to traditional service providers.
  – Tax advisory based on:
    • Academic ties
    • Business and framework understanding
    • True advisory approach (Not a cross disciplinary sales agenda)
    • Strict focus on quality and technical competences
    • International perspective

• Providing services to leading public and private organisations
• Our involvement in the topic
International Tax Planning

• What is international tax planning?
  - "International tax planning is a multifaced discipline and may be defined as the lawful structuring (through the legally acceptable use of domestic tax law and tax treaties) of cross-border investments or activities with the objective of optimizing the overall tax burden and maximizing net income."

• Includes optimization of effective tax rate (ETR) and mitigation of risks and uncertainty.

• What is aggressive international tax planning?
  - "Taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability."
International Tax Planning

- Nothing wrong in carrying out tax planning
  - Avoid double taxation
  - Direct opportunities in existing tax legislation (e.g. deprivations)
  - Succession on business transactions
  - Effective Tax Rate in competition

- This presentation excludes tax evasion and illegal tax avoidance (this is not ATP)
International Tax Planning

• Which techniques are generally used internationally?
  - Guarding against different position form authority side:
    • Tax clauses in agreements, binding rulings, APAs etc.
  - General overview:
    • Corporate structures, holding companies etc.
    • Avoidance of withholding taxes
    • Double tax relief
    • Tax effective supply tax chain management
    • Placement of production, sales and services
    • Migration and relocation of companies, including head quarters
    • Transfer pricing
    • Financing structures and financing terms
    • Mobile income
    • Treaty shopping
    • Hybrid entities
    • Hybrid financial instruments
    • Loss utilization, including tax consolidation
    • Double dips
    • Leasing
    • IP tax planning
The Models - ATP Structures

• Model ATP structures serve as a means of identifying a set of ATP indicators against which the risk exposure of tax systems can be tested.

• OECD Models:
  – A hybrid financing structure
  – A one-tiered IP and cost contribution arrangement
  – A two-tiered IP structure with a cost contribution-arrangement

• Four additional ATP structures:
  1. An offshore loan structure
  2. A hybrid entity ATP structure
  3. An interest free loan
  4. A patent box ATP structure
The Models - ATP Structures

1 Offshore loan 2 Hybrid financing 3 Hybrid entity 4 Interest free loan

IP models

5 Patent box 6 Two-tiered IP 7 IP and CCA

- Model ATP-structures were selected from OECD BEPS reports, other tax literature and the authors’ professional knowledge.
Model 1 – Offshore Loan

- (1) Equity
- (2) Loan
- (3) Loan
- (4) Purchase price amount
- (5) Group taxation
- (6) Interest
- (7) Interest
<table>
<thead>
<tr>
<th>MS A</th>
<th>MS B</th>
<th>MS C</th>
<th>State D</th>
</tr>
</thead>
<tbody>
<tr>
<td>No taxation of dividends received.</td>
<td>Tax deduction for interest costs.</td>
<td>Tax deduction for interest costs.</td>
<td>No withholding tax on dividends paid.</td>
</tr>
<tr>
<td></td>
<td>treatment in the creditor's state.</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>No thin cap/interest limitation-rules.</td>
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</tr>
<tr>
<td></td>
<td>No withholding tax on interest payments.</td>
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</tr>
<tr>
<td></td>
<td>Unilateral ruling on interest spread.</td>
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</tr>
<tr>
<td></td>
<td>No general or specific anti-avoidance</td>
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<tr>
<td></td>
<td>rules to counter the structure.</td>
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<td></td>
</tr>
</tbody>
</table>
Model 2 – Hybrid Financing

- **MNE Group**
  - **Equity EUR 400m**
  - **Dividend (no deduction/no inclusion)**

- **B Holdco**
  - **Hybrid loan EUR 400m**
  - **Interest/Dividend (deduction/no inclusion)**

- **C Holdco**
  - **Purchase price amount EUR 1,000m**
  - **Loan EUR 600m**

- **Target Co**
  - **Group taxation**

- **External bank**
  - **Interest (deduction/inclusion)**

Additional notes:
- **MS A**
  - **Hybrid Financing**

- **MS C**
  - **State B (non-MS)**

- **Seller**

- **External bank**

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## Model 2 – Indicators

<table>
<thead>
<tr>
<th>State A</th>
<th>State B</th>
<th>State C</th>
</tr>
</thead>
<tbody>
<tr>
<td>• No taxation of dividends received.</td>
<td>• No withholding tax on dividends paid.</td>
<td>• Tax deduction for interest costs.</td>
</tr>
<tr>
<td>• No CFC Rules.</td>
<td>• Income from certain hybrid instruments can be treated as tax free dividend or similar.</td>
<td>• Tax deduction does not depend on the tax treatment in the creditor's state.</td>
</tr>
<tr>
<td></td>
<td>• No taxation of dividends received regardless of deduction by the distributing company (hybrid loan).</td>
<td>• No interest limitation-rules.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• No withholding tax on interest payments.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• No effective beneficial owner-test for reduction of withholding tax.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Group taxation with acquisition holding company allowed.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• No general or specific anti-avoidance rules to counter the model ATP structures.</td>
</tr>
</tbody>
</table>
Model 3 – Hybrid Entity

State A (MS or non-MS)

MNE Group

MS B

C Hybrid

TargetCo

(1) Loan

(3) Interest

(2) Purchase price

Seller

(4) B Hybrid seen as opaque. C Hybrid included in group taxation

(5) C Hybrid seen as transparent
# Model 3 – Indicators

<table>
<thead>
<tr>
<th>State A</th>
<th>State B</th>
</tr>
</thead>
<tbody>
<tr>
<td>• No rule to counter a qualification mismatch of entities.</td>
<td>• Tax deduction for interest costs.</td>
</tr>
<tr>
<td>• No general or specific anti-avoidance rules to counter the model ATP structures.</td>
<td>• Tax deduction does not depend on the tax treatment in the creditor's state.</td>
</tr>
<tr>
<td></td>
<td>• No interest limitation-rules.</td>
</tr>
<tr>
<td></td>
<td>• No withholding tax on interest payments.</td>
</tr>
<tr>
<td></td>
<td>• Group taxation with acquisition holding company allowed.</td>
</tr>
<tr>
<td></td>
<td>• Tax qualification of foreign partnership does not follow that of the foreign state.</td>
</tr>
<tr>
<td></td>
<td>• No rule to counter a qualification mismatch of entities.</td>
</tr>
<tr>
<td></td>
<td>• No general or specific anti-avoidance rules to counter the model ATP structures.</td>
</tr>
</tbody>
</table>
Model 4 – Interest-free Loan

MNE Group

FinanceCo B

FinanceCo D

OpCo

MS A

(1) Equity

MS B

MS D

(2) Loan

(5) Dividend

(4) Interest

(3) Loan
## Model 4 – Indicators

<table>
<thead>
<tr>
<th>State A</th>
<th>State B</th>
<th>State C</th>
<th>State D</th>
</tr>
</thead>
<tbody>
<tr>
<td>• No taxation of dividends received.</td>
<td>• No deemed income from interest-free loan (non-arm's length-transactions).</td>
<td>• No withholding tax on dividends paid.</td>
<td>• No withholding tax on dividends paid.</td>
</tr>
<tr>
<td>• No CFC-rules.</td>
<td>• No taxation of benefit from interest-free debt.</td>
<td>• Tax deduction for interest costs.</td>
<td>• Tax deduction for interest costs.</td>
</tr>
<tr>
<td>• No general or specific anti-avoidance rules to counter the model ATP structures.</td>
<td>• Interest deduction allowed for deemed interest costs on interest-free debt.</td>
<td>• No interest limitation-rules.</td>
<td>• No interest limitation-rules.</td>
</tr>
<tr>
<td></td>
<td>• No withholding tax on interest payments.</td>
<td>• No withholding tax on interest payments.</td>
<td>• No withholding tax on interest payments.</td>
</tr>
<tr>
<td></td>
<td>• No general or specific anti-avoidance rules to counter the model ATP structures.</td>
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<td>• No effective beneficial owner-test for reduction of withholding tax.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• No general or specific anti-avoidance rules to counter the model ATP structures.</td>
</tr>
</tbody>
</table>
International IP Tax Planning

- **What is IP**
  - The notion of intangibles
  - The notion of royalties

- **IP Tax Planning in its simplest form**
  - Timing:
    - In the start up phase
    - Development of IP
    - Migration of existing IP rights
  - Long term assets v. direct costing
  - Tax and other incentives
  - A tax-friendly structure (model)
    - Low taxation of income (Patent boxes)
    - CFC and other parent-issues?
Model ATP-structures were selected from OECD BEPS reports, other tax literature and the authors’ professional knowledge.
Model 5 – Patent Box Structure

1. Transfer of IP
2. License
3. Dividend

Payment of royalty
## Model 5 – Indicators

<table>
<thead>
<tr>
<th>State A</th>
<th>State B</th>
<th>State C</th>
</tr>
</thead>
</table>
| • No taxation of dividends received.  
• No or low taxation of capital gain (fair market value) upon disposal of IP.  
• No CFC-Rules. | • No withholding tax on dividends paid.  
• Patent box or other preferential tax treatment of income from IP. | • Tax deduction for royalty costs.  
• No withholding tax on royalty payments.  
• No effective beneficial owner-test for reduction of withholding tax.  
• No general or specific anti-avoidance rules to counter the model ATP structures. |
Model 6 – Two-Tiered Structure

- **MS A**
  - MNE Group
  - **(1)** Transfer of IP
  - Incorporated in MS B but tax resident in State E
  - **(5)** Dividend

- **MS B**
  - Company B1
  - **(2)** License and royalty payment

- **MS C**
  - OpCo
  - **(4)** Sub-license and royalty payment

- **MS D**
  - Company D
  - **(3)** Sub-license and royalty payment
  - **(2)** License and royalty payment
# Model 6 – Indicators

<table>
<thead>
<tr>
<th>State A</th>
<th>State B</th>
<th>State C</th>
<th>State D</th>
<th>State E</th>
</tr>
</thead>
<tbody>
<tr>
<td>• No taxation of dividends received.</td>
<td>• No withholding tax on dividends paid.</td>
<td>• Tax deduction for royalty costs.</td>
<td>• Tax deduction for royalty costs.</td>
<td>• No taxation of dividends received.</td>
</tr>
<tr>
<td>• No or low taxation of capital gain (fair market value) upon disposal of IP.</td>
<td>• Tax deduction for royalty costs.</td>
<td>• No withholding tax on royalty payments.</td>
<td>• No withholding tax on royalty payments.</td>
<td></td>
</tr>
<tr>
<td>• No CFC-Rules.</td>
<td>• No withholding tax on royalty payments.</td>
<td>• No effective beneficial owner-test for reduction of withholding tax.</td>
<td>• No effective beneficial owner-test for reduction of withholding tax.</td>
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<tr>
<td></td>
<td>• Locally incorporated company not tax resident if management/control is situated in another state.</td>
<td>• Excess profits are tax exempt (ruling can be obtained).</td>
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<td></td>
</tr>
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<td></td>
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<td>• No taxation of dividends received.</td>
<td>• No withholding tax on dividends paid.</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>• No or low taxation of capital gain (fair market value) upon disposal of IP.</td>
<td>• Patent box or other preferential tax treatment of income from IP.</td>
<td>• No withholding tax on royalty payments.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• R&amp;D tax incentive obtainable also for costs that are reimbursed.</td>
<td>• Absence of corporate income taxation or very low corporate tax rate.</td>
<td>• No general or specific anti-avoidance rules to counter the model ATP structures.</td>
<td></td>
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</tr>
</tbody>
</table>
EU Anti Tax Avoidance Package

• On 28 January 2016 the European Commission presented its Anti Tax Avoidance Package
• Includes a proposal for directive on BEPS, which includes the following provisions:
  - Interest deduction
  - Exit tax
  - GAAR
  - Switch over clause
  - CFC rules
  - Hybrid mismatches

• Impact?
BEPS Perspective

• BEPS action 8 on intangibles
  - Align transfer pricing outcomes and value creation
  - "Vulnerable to manipulation"

• Four issues are analyzed
  1. Identifying intangibles
  2. Ownership of intangibles
  3. Transfer of intangibles
  4. Arm’s length test of intangibles
BEPS Perspective

Re 1) Identifying intangibles

• Broad, independent definition of intangibles under art. 9:
  1. Not a physical or financial asset,
  2. Capable of being owned or controlled,
  3. Used in commercial activities, and
  4. Use or transfer would be compensated in a transaction between independent parties.

• No legal basis in art. 9 to qualify income – income qualification follows domestic law – arm’s length principle only supplements material tax law.

• IP does not include market conditions, group synergies, assembled workforce and location savings etc.
Re 2) Ownership of intangibles

- Two separate issues: 1) ownership of intangibles and 2) joint development of intangibles

- Identification of group members that are entitled to returns from the exploitation of intangibles:
  - A) legal owner test and B) arm’s length principle.

- A) Legal owner test:
  - OECD now acknowledges that the legal owner is the owner of intangibles according to art. 9.
  - Thus, in principle all returns derived from the exploitation of the intangibles may initially accrue to the legal owner.
Re 2) Ownership of intangibles (continued)

• **B) Arm’s length test:**
  - Group members must be compensated for functions performed, assets used and risk assumed on an arm’s length basis.
  - More focus on significant people functions than on risk and capital.
    - Regular functions
    - Important functions (significant functions)
  - To receive total return on intangibles the legal owner must:
    - Perform and control all functions, including important functions,
    - Provide all assets, including funding, and
    - Bear and control all risks

• **Legal owner → economic owner → significant people functions**
  - AOA developed for art. 7 will in fact be introduced in art. 9.
Re 3) Transfer and use of intangibles

• Transfer
  – The labels applied to transactions do not control the TP analysis.
  – Written contractual terms vs. actual conduct of the parties.
  – Transfer of combination of intangibles may be subject to a combined TP analysis.
    • Some intangibles are so intertwined that it is not possible to transfer one intangible without transferring the other.
    • E.g. trademarks under a license agreement and goodwill.
  – Transactions including the use of intangibles in combination with performance of services may be subject to a combined TP analysis.
Re 3) Transfer and use of intangibles (continued)

• Use:
  – All intangibles used by group members must be identified for the purpose of:
    1. Comparability analysis,
    2. Choice of best method \textit{and}
    3. Choice of tested party.
Re 4) Arm’s length test

- Intangibles vs. other resources
- **Residual income** should not automatically be allocated to the legal owner
- **Other factors** have to be considered e.g.: i) risks, ii) market characteristics, iii) location, iv) business strategies and v) group synergies.

- The profit split method
  - The preferred OECD method
- TNMM
  - Not a preferred method