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International Tax Structures in the BEPS Era:

An Analysis of Anti-Abuse Measures

IBFD Tax Research Series
Volume 2

International Tax Structures in the BEPS Era: An Analysis of Anti-Abuse Measures

Why this book?
Tax planning structures used by some MNEs have become the bane of policymakers nowadays, at the OECD as well as the EU level, since recent statistics revealed the public budgets were deprived of billions of euro.

Within the context of recent developments in the tax arena, this book examines the anti-abuse measures that already exist in various countries and scrutinizes the effectiveness of these measures in countering aggressive tax structures. This work can be considered complementary to the reports issued or to be issued by the OECD, and to the recent activity at the EU level, as it provides an in-depth analysis of what is already happening in practice in various countries when they encounter abusive tax structures. It also highlights the challenges implicit in the recommended measures in the draft reports issued by the OECD up until 1 May 2015, with some exceptions.

The book provides the reader with an analysis of the most common strategies against tax avoidance; the key concepts in international tax structuring, such as the use of permanent establishments and the exploitation of transfer pricing rules; and the intricacies of anti-abuse measures that counter tax structuring schemes used for financing activities and for selected business models, specifically related to supply chain management, IP migration and exploitation, the digital economy and holding companies.

International Tax Structures in the BEPS Era: An Analysis of Anti-Abuse Measures is essential reading for anyone dealing with tax structuring schemes and anti-abuse provisions in daily practice, including tax practitioners, tax authorities and policymakers.

Title:	International Tax Structures in the BEPS Era
Subtitle:	An Analysis of Anti-Abuse Measures
Editor:	Madalina Cotrut
Expected date of publication:	September 2015
ISBN:	978-90-8722-333-5
Type of publication:	Print book
Number of pages:	330
Terms:	Shipping fees apply. Shipping information is available on our website
Price:	EUR 90 / USD 110 (VAT excl.)

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Anti-Base-Erosion Measures for Intra-Group Debt Financing

René Offermanns and Boyke Baldewsing*

4.1. Introduction: Funding with debt or equity?

When contemplating the issue of funding with debt or equity, tax considerations play a significant role. Sometimes the tax effects of funding with debt or equity can even be decisive. In principle, this is because the remuneration for debt (i.e. interest) is a tax deductible expense, while the remuneration for equity (i.e. dividends) is not tax deductible for corporate income tax purposes.

Generally, base erosion – from the source state perspective – implies that taxable income (taxable base) is decreased (eroded), for instance by tax deductible expenses (e.g. interest payments) and/or by claiming tax treaty benefits which will have the effect of lowering the withholding tax applicable on those expenses. Various forms of base erosion exist, but all have in common that the taxable base in the source country is minimized by deductible payments, while those payments are not taxed or taxed at a low tax rate in the country where the payee is resident.

In view of this advantageous tax effect and the fact that money is a mobile (fluid and fungible) asset, intra-group financing has become a very popular tax planning instrument within MNEs, as it offers the flexibility to set up a group financing company in a favourable tax jurisdiction which will provide loans to other group companies, and also gives rise to a significant reduction of the group's effective tax rate. In some cases, those deductible payments can be seen as excessive. This is one of the reasons why these structures have, in recent years, been subject to close scrutiny by tax authorities and are now the subject of the BEPS Action Plan.[1]

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1. OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD 2013), International Organizations' Documentation IBFD.

This chapter presents the most common intra-group financing tax planning structures, emphasizing the effects of the base erosion phenomenon that these techniques give rise to. In addition, an analysis of the arsenal of measures against base erosion which is at the disposal of tax authorities (also referred to as restrictions)[2] and their effectiveness in practice, particularly with reference to available case law, is offered. The recent work of the OECD and G20 members as regards the BEPS Action Plan is also scrutinized with a focus on recent developments.

4.2. Tax structures for group financing and the applicable anti-base erosion measures

It should be expected that – from a group perspective – attracting debt or equity should not make a difference from a tax perspective. This should be due to the fact that, in the case of debt financing, the interest is deductible at the level of the borrower and taxable at the level of the lender, while in the case of equity financing, dividends are not tax deductible at the level of the company paying the dividend, and possibly not taxable, for instance by virtue of a participation exemption, for the recipient of the dividends. Thus, from a group perspective, both forms of financing should work out to be tax neutral.

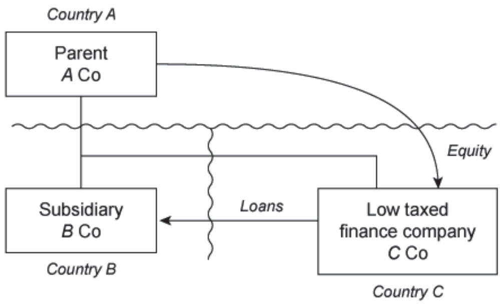
However, there are many structures implemented whereby the interest is deductible at the level of the borrower (which is located in a country with a high corporate income tax rate), while that interest is low taxed or not taxed at the level of the lender. At the same time, there is no interest withholding tax leakage in the country where the borrower is located.

Given these tax effects, MNEs have been seen to mostly use intra-group loans instead of equity in order to make available to the affiliated borrowers the necessary funds for performing their activities.

From the tax planning schemes used by MNEs, three basic examples of group financing techniques will be presented, with special attention on the anti-base erosion measures available to the tax authorities in their efforts to counter those techniques and their effectiveness in practice.

2. The term “restriction” is used in a broad sense; it encompasses, for instance, notional interest deduction regimes (*see* section 4.2.3.2.) and CFC rules (*see* section 4.2.3.3.) which, strictly speaking, do not restrict interest deductibility, but rather discourage excessive intra-group debt financing from a tax perspective.

4.2.1. Tax structures using a low-taxed group financing company



A classic example is that of parent company, *A* Co, resident in Country *A*, that holds shares in a subsidiary, *B* Co, resident in Country *B* and also in subsidiary *C* Co, a finance company resident in Country *C*. Countries *A* and *B* have a high corporate income tax rate of 25%, while Country *C* has a corporate income tax rate of 5%. If *A* Co finances *B* Co directly, the interest on the loan will be tax neutral, as the interest is deductible and also taxable because the corporate income tax rate is the same (i.e. 25%). However, in this structure, *A* Co does not lend directly to *B* Co. Rather, *A* Co capitalizes a company (*C* Co) resident in a low-tax country. *C* Co subsequently uses its equity to finance *B* Co[3]. The interest on the loan is a tax deductible expense for *B* Co in Country *B*, which has a corporate income tax rate of 25%, and taxed at the level of *C* Co at a low corporate income tax rate of 5%. This structure results in a decrease of the effective tax rate of 20 percentage points (i.e. from 25% to 5%).

4.2.1.1. Thin capitalization rules as an anti-base erosion measure

Thin capitalization is the informal term used in tax practice to indicate that an entity is thinly capitalized with equity while at the same time the entity is funded with a substantial amount of debt. Because interest on debt is tax deductible as business expense, thin capitalization rules can be used to combat structures where a substantial amount of debt is allocated to one or more group companies so as to minimize its taxable base.

3. The same principle applies to the financing of affiliated entities in other (high-tax) countries.

With regard to restrictions on the deductibility of interest, a number of systems can be distinguished,[4] namely the stand-alone approach, the worldwide ratio approach, the debt-to-equity safe harbour approach, the interest-to-profit approach and the hybrid approach. However, an enacted system may contain a combination of elements of two or more of these systems:[5]

– *Stand-alone approach.*
  Under the stand-alone approach, it is investigated how much money a subsidiary could borrow and at what interest rate, assuming that it would borrow from a third party as a separate (stand-alone) entity instead of as a group member. If the debt is higher than the debt calculated under the stand-alone approach, the interest on the excess debt is not tax deductible. At the same time, any interest in excess of the arm's length interest is not tax deductible.

– *Worldwide ratio approach.*
  Under a worldwide ratio approach, the total amount of an MNE's debt towards third parties compared to the MNE's equity (the group's debt-to-equity ratio) is taken into account. This worldwide ratio is subsequently compared with the debt-to-equity ratios of the group members. Under such approach, interest is tax deductible only to the extent that the debt-to-equity ratio does not exceed the group ratio. Sometimes the tax deductible interest is based on an allocation of the total amount of interest paid by the group to external lenders or an average interest rate derived from the group's average third-party interest rate, irrespective of the actual intra-group interest amounts.

– *Debt-to-equity safe harbour approach.*
  This approach is based on a fixed debt-to-equity ratio, for instance 3:1. This means that if a company has equity of 100, the maximum amount of debt should be 300. The interest due on the amount of debt in excess of 300 would not be tax deductible, while interest due on the amount of debt up to and including 300 is tax deductible. This system is applicable

4. For an overview, *see* S. Webber, *Thin Capitalization and Interest Deduction Rules: A Worldwide Survey*, Tax Notes Intl. (29 Nov. 2010), at 683; C. Burnett, *Intra-Group Debt at the Crossroads: Stand-Alone versus Worldwide Approach*, 6 World Tax J.1 (2014), Journals IBFD.
5. France applies a system which combines all methods. *See* FR arts. 39.I.3 & 212 General Tax Code (*Code Général des Impôts*).

in many countries, such as Argentina,[6] Belgium,[7] Czech Republic[8] and Romania.[9]

– *Interest-to-profit approach*
  Instead of a debt-to-equity ratio, some countries use an interest-to-profit ratio for the determination of the permitted interest deduction. This system is also known as an interest limitation, interest barrier or earnings stripping rule. For example the interest expense is tax deductible only to the extent that it does not exceed a prescribed percentage of earnings before interest, taxes, depreciation and amortization (EBITDA). There are also countries that apply this system, such as Germany,[10] which provides that the interest expense in excess of 30% of EBITDA is not tax deductible.

– *Hybrid approach.*
  Many countries apply a hybrid approach under which a debt-to-equity ratio or an interest-to-profit ratio is combined with an arm's length interest rate. If the debt-to-equity ratio is regarded as too severe, companies have the possibility to show that – even if they exceed the prescribed debt-to-equity ratio – the interest paid is still at arm's length and should therefore be deductible. Another example of a hybrid approach is to allow companies to show that the debt-to-equity ratio of the group is higher than the debt-to-equity ratio specified in the thin capitalization rule, so that they could apply that higher group ratio instead of the (lower) fixed ratio under the law. Australia[11] is one country that applies a hybrid system.

Nevertheless, it could be seen from the practices of different states that thin capitalization rules are not always a very good tool to combat debt financing. For instance, the case law of various countries reveals that issues have arisen regarding the compatibility of thin capitalization rules with EU law, with tax treaties or with the particular country's constitution.

6. A.E. Messineo, *Argentina – Corporate Taxation* sec. 10, Country Analyses IBFD (accessed 29 Apr. 2015).
7. G. Cruysmans, *Belgium – Corporate Taxation sec.*10, Country Analyses IBFD (accessed 29 Apr. 2015).
8. T. Mkrtchyan, *Czech Republic – Corporate Taxation* sec. 10, Country Analyses IBFD (accessed 29 Apr. 2015).
9. A.E. Miron et al., *Romania – Corporate Taxation* sec. 10, Country Analyses IBFD (accessed 29 Apr. 2015).
10. DE: art. 8b Corporate Income Tax Act.
11. T. Toryanik, *Australia – Corporate Taxation* sec. 10, Country Analyses IBFD (accessed 29 Apr. 2015).

For example, the UK system has given rise to many disputes regarding arm's length interest. Therefore, the possibility to obtain increased certainty by means of an advance thin capitalization agreement (ATCA) with the tax authorities (HMRC) has been introduced.

In Germany, the tax authorities have scrutinized excessive debt financing since 1987.[12] The rules have undergone many changes, and were even declared to be incompatible with the freedom of establishment in the ECJ decision in *Lankhorst-Hohorst*;[13] they were also declared to be unconstitutional[14,15] and even incompatible with tax treaties.[16,17] Currently, Germany has switched to an interest-to-profit ratio with one of the escape clauses bearing features of the worldwide ratio approach.[18]

Spain was also influenced by the experience of Germany. Spanish thin capitalization rules were also found to be incompatible with the non-discrimination provision[19] of tax treaties,[20] and in 2012 Spain introduced an interest barrier similar to the German regime.[21]

There are also countries, for example the Czech Republic, where excessive interest has been reclassified as a dividend.[22,23] However, it was concluded that the domestic thin capitalization rules are, generally, not applicable under Czech tax treaties. There are also countries, such as the Netherlands[24]

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12. DE: BMF, 16 Mar. 1987, BStBl. I 1987, 373.
13. DE: ECJ, 12 Dec. 2002, Case C-324/00, *Lankhorst-Hohorst*, ECJ Case Law IBFD.
14. E.g. DE: BFH, 13 Mar. 2013, BStBl. II 2012, 612 and BStBl. II I B 111/11, 186.
15. DE: BFH, 18 Dec. 2013, Case I B 85/13.
16. DE: BFH, 8 Sept. 2010, Case I R 6/09; DE: BFH, 16 Jan. 2014, Case I R 30/12. The same view was recently taken by Financial Court of Münster on 29 April 2013 (9 V 2400/12 K).
17. *See* art. 25 Switzerland-Germany Income and Capital Tax Treaty (1971); art. 24 United States-Germany Income and Capital Tax Treaty (1989).
18. The German regime applies to domestic and cross-border intra-group loans, loans guaranteed by the group and third-party loans, including back-to-back financing. Disallowed interest expense may be carried forward. The scope of the German interest barrier rules is very broad and results in a significant increase in the tax burden on leveraged investments.
19. *See* e.g. article 24 Spain-Switzerland Income and Capital Tax Treaty (1966).
20. ES:TS (*Tribunal Supremo*), 17 Mar. 2011, Appeal 5871/2006; ES: TS, 2 Nov. 2011, Appeal 3196/2007; ES:TS, 7 Dec. 2011, Decision 451/2008.
21. G.M. Luchena Mozo, *Thin Capitalization: An Unanswered Question Following Recent Spanish Amendments*, 52 Eur. Taxn. 8 (2012), Journals IBFD.
22. CZ: NSS (*Nejvyšší správní soud*), 10 February 2005, Case 2Afs 108/2004-106.
23. United States-Czech Republic Income Tax Treaty (1993) and Netherlands-Czechoslovakia Income and Capital Tax Treaty (1974), as amended by the 1996 Protocol in respect of the Czech Republic.
24. NL: HR, 1 Sept. 2012, Case 10/05268, *X BV v. Belastingdienst*; NL: HR, 29 Nov. 2013, Case 12/05498, *X BV. v. Belastingdienst*. The case concerned the Germany-Netherlands

and Russia,[25] where courts have held that thin capitalization rules are compatible with tax treaties.

Thin capitalization rules have been subject to criticism. They are often considered to be too rigid, as they also apply to purely domestic situations where base erosion is not a serious issue, or even to borrowings from unrelated parties. Furthermore, fixed debt-to-equity ratios are used without clear substantiation that breaching those ratios would imply unacceptable base erosion. Thin capitalization rules also have a negative effect on financing transactions which are bona fide transactions. However, a report published by the IMF[26] concluded that the number of countries which has introduced thin capitalization rules has substantially increased, which indicates that thin capitalization rules are considered a successful means of combating excessive debt financing by many countries. Other institutions[27] have scrutinized the impact of thin capitalization rules on investments, determining that such rules influence investment in a negative way.

As thin capitalization rules can reduce the amount of (intra-group) debt financing, while at the same time negatively influencing the amount of investment, thin capitalization rules should be preferably used in combination with other measures to combat excessive debt financing, as described below.

4.2.1.2. General anti-abuse rules

Many states have used general anti-abuse rules (GAARs)[28] to combat base erosion caused by aggressive intra-group financing, but those efforts were not always successful. On the basis of legal practice and/or available case law in some states, the effectiveness of the application of GAARs in relation to combating excessive debt financing is considered below.

Income and Capital Tax Treaty (1956), the France-Netherlands Income and Capital Tax Treaty (1973) and the Portugal-Netherlands Income and Capital Tax Treaty (1999).

25. RU: FAC 2 September 2014, Case A41-21630/2013. This decision is in line with an earlier decision of the Federal Supreme Arbitration Court. RU: Federal Supreme Arbitration Court, 15 Nov. 2011, Case 8654/11, *Northern Kuzbass Coal Mining Company*.

26. J. Blouin et al., *Thin Capitalization Rules and Multinational Firm Capital Structure*, IMF Working Paper 14/12 (24 Jan. 2014).

27. M. Rufl & D. Schindler, *Debt Shifting and Thin-Capitalization Rules, German Experience and Alternative Approaches*, research paper of 13 Dec. 2012, Report published by a cooperation of the Norwegian Center for Taxation (NoCeT) and the German Institute for Economic Studies (CESifo).

28. *See also* chapter 1.

In certain countries (for example Canada),[29] judges use a three-step approach to apply a GAAR. First, it is ascertained a tax benefit was realized as a result of the transaction or series of transactions at issue. Next, it is determined whether the transaction or series of transactions meets the requirement of having been arranged primarily to realize a tax benefit (i.e. an avoidance scheme).[30] The final consideration looks to whether the transaction or series of transactions should be deemed to be an abuse of a relied upon provision.[31]

Other countries, such as France, use the "abnormal act of management concept" with regard to debt financing that is not in the interest of a company. This concept applies only outside the scope of specific rules (e.g. thin capitalization rules). However, the French Supreme Administrative Court (*Conseil d'État*) in *SA Andritz* concluded that the use of debt financing instead of equity is allowed as long as the financing meets the requirements under the thin capitalization legislation.[32]

The United Kingdom and United States are countries where GAARs were developed in case law or doctrine. In the United Kingdom, GAARs were introduced in 2014, while in the United States, the economic substance doctrine[33] was codified in 2010. Economic substance exists if (i) the taxpayer's economic position is changed in a meaningful way and (ii) in addition to tax motives, the taxpayer has a substantial purpose for entering into a transaction.

As GAARs are provisions that combat abusive behaviour in general and, therefore, are not always effective, the practice of different states indicates that GAARs should be used in combination with other measures in order to be more effective.

4.2.1.3. Restrictions in the case of notional interest deduction regimes

In order to mitigate the different tax treatment of debt (interest is deductible) and equity (dividends are not deductible), some countries have introduced notional interest deduction regimes which calculate the allowable deduction by multiplying a pre-set interest rate with the amount of (qualifying)

29. Based on section 245(1) and 245(2) of the ITA.
30. Based on section 245(3) of the ITA.
31. Based on section 245(4) of the ITA.
32. FR: CE, 30 Dec. 2003, Case 23894, *SA Andritz*.
33. US: art. 7701(o) IRC.

equity of the taxpayer. The effect of a notional interest deduction regime should amount to less (excessive) debt financing and more equity financing. A notional interest deduction regime results in a lower effective tax rate, which can be illustrated by the following example.

Suppose a company has a balance sheet with 1 million of receivables on group companies, bearing an interest rate of 4%, and 1 million of share capital. Thus, the company has used its entire share capital for group financing. This means that the profit before tax is 40,000 (4% of 1 million). Assuming that the corporate income tax rate is 25% and the applied notional interest deduction rate is 3%, the effect on the effective tax rate is as follows:

Profit and loss account	Without notional interest deduction	With notional interest deduction
Profit before tax	40,000	40,000
Notional interest deduction 3%	N/A	-30,000
Taxable profit	40,000	10,000
CIT rate 25%	10,000	2,500
ETR	25%	6.25%

Belgium and Italy are well-known countries with laws that provide for notional interest deduction regimes.

Belgium was one of the first countries to introduce a notional interest deduction regime.[34] Originally, the pre-set deemed interest rate was 6.5%, which was equal to the interest rate on a 10-year government bond. Due to the fact that the notional interest deduction regime was a big success, and therefore too costly for the government, the rate has been reduced in phases. Currently, it is 1.63% (2.13% for small and medium-sized entities). Qualifying equity is defined as the total of share capital, share premium, revaluation gains, reserves (including retained earnings) and capital investment subsidies. In order to avoid accumulation of tax benefits, certain items are excluded from the equity base, for instance income and gains falling under the Belgian participation exemption and exempt profits attributed to a foreign PE of an entity resident in Belgium.[35]

34. The notional interest deduction regime is included in articles 205bis to 205novies of the Income Tax Code.

35. The inclusion of equity of a foreign PE is based on the ECJ decision in *Argenta Spaarbank* (C-350/11) in which the exclusion of equity of a foreign PE was held incompatible with the freedom of establishment. BE: ECJ, 4 July 2013, Case C-350/11, *Argenta Spaarbank NV*, ECJ Case Law IBFD.

Under the Italian notional interest deduction regime, introduced in 2011, Italian resident companies and Italian PEs of non-resident companies may deduct from their net tax base[36] a notional interest on "new" equity, i.e. the amount of increase in equity after 31 December 2010. This means that the amount of equity as per 31 December 2010 is carved out from the equity base for purposes of calculating of the notional interest deduction.[37] In Italy, the notional interest rate is set annually by the Ministry of Finance, and is based on the average return on Italian public debt securities and a risk factor. For the period 2011-2013, the percentage was set at 3%. In 2014, the rate was increased to 4%; it was increased to 4.5% in 2015 and will further increase to 4.75% in 2016.

The amount of the notional deduction in excess of the net tax base may be carried forward to relieve future taxable income with no time limitation.[38] The Italian notional interest deduction rules provide for specific upward and downward adjustments to the equity base.[39]

4.2.1.4. CFC rules

The effectiveness of intra-group financing structures, like the one depicted in section 4.2.1., can be mitigated by CFC legislation[40] applicable in the country of the parent company (for instance the United States and the United Kingdom). The effect of CFC rules is that the income accrued at the level of a low-tax finance company must be included as taxable income at the level of the parent company.

However, CFC rules are not always effective because they can be circumvented by applying check-the-box[41] rules in the United States or by invoking an exception such as for group financing activities in the United Kingdom.

36. The net tax base is taxable income after deduction of loss carry-forwards.
37. While the Italian notional interest deduction rules only take into account the equity increase after 31 December 2010, Belgium also includes equity existing at the time of the introduction of its notional interest deduction regime.
38. This aspect is more favourable than the Belgian regime, because the seven-year carry-forward possibility existing in Belgium has been abolished.
39. In Circular Letter 12 of 23 May 2014, the Italian tax administration provided important clarifications concerning the application of the notional interest deduction regime.
40. For details, *see* chapter 1.
41. In general check-the-box rules offer the taxpayer the option to treat an entity as transparent or as opaque for tax purposes.

Furthermore, within the EU, the CFC rules are effective only with regard to wholly artificial arrangements as stipulated by the ECJ in the *Cadbury Schweppes* case.[42]

4.2.1.5. Restrictions applicable to payments to tax haven entities

As will be described hereunder, several countries have introduced so-called anti-tax haven rules which aim to restrict debt financing through tax havens. These rules, in essence, deny the deduction of interest paid to a group financing company established in a tax haven. A number of countries (also) levy a withholding tax on certain interest payments. Some countries publish lists of countries which are deemed to be tax havens for these purposes, in order for the measures to be more effective.

Under Belgian law, interest, royalty or service fee payments that are directly or indirectly paid to a resident of a tax haven are not deductible, unless the taxpayer proves that the payments are at arm's length and based on sound business motives.[43] In addition, a 2007 circular provides that non-deductible interest, royalty and service fee payments to tax haven residents are subject to withholding tax.[44] In 2010, a reporting obligation for payments to tax haven residents was introduced. As a result, payments of more than EUR 100,000 to a tax haven resident must always be reported in the tax return, even if they are at arm's length and based on sound business reasons. If the reporting obligation is not met, the payments are not tax deductible. A tax haven is considered to be a country which (i) does not provide for exchange of information in line with OECD standards or (ii) has a nominal corporate income tax rate of less than 10%.[45]

A second example is seen in Brazil, which in 2009 introduced a rule that interest payments to related companies established in a tax haven[46] are deductible only if the debt-to-equity ratio does not exceed 2:1 and the

42. UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes v. Commissioners of Inland Revenue*, ECJ Case Law IBFD.
43. BE: art. 54 Income Tax Code.
44. BE: Circular Ci. RH 421/555.503 (3 Oct. 2007).
45. The list of tax havens currently includes the following countries and territories: Abu Dhabi, Ajman, Andorra, Anguilla, Bahamas, Bahrain, Bermuda, British Virgin Islands, Cayman Islands, Cyprus, Dubai, Fujairah, Guernsey, Isle of Man, Jersey, Jethou, Luxembourg, Maldives, Micronesia, Moldova, Monaco, Montenegro, Nauru, Palau, Ras al-Khaimah, St Barthélemy, Seychelles, Sharjah, Turks and Caicos Islands, Umm al-Quwain, Vanuatu and Wallis and Futuna.
46. Countries with a corporate income tax rate of less than 20%.

amount of debt does not exceed more than 30% of the Brazilian entity's net equity.

In 2014, the Colombian National Tax Authority published various clarifying rulings on the deductibility of payments to residents of tax havens.[47] Such payments are not deductible unless they were subject to income tax withholding.[48] Furthermore, Colombian taxpayers carrying out transactions resulting in payments to residents of tax haven countries[49] must document and provide proof of the functions performed, assets used, risks assumed and the costs and expenses incurred in the tax haven country for the activities generating those payments.[50] Finally, the taxpayer must show that the transaction is at arm's length and transparent.[51]

Since 2014, France has applied a new test to the existing rules which apply to interest deductions for financing from a lender that is directly or indirectly related to a French borrower. Under the new rule, interest is deductible only if the French borrower proves that the lender is subject to corporate income tax plus surcharges on the gross interest income. Furthermore, this tax must be equal to 25% or more of the corporate income tax that would be due under French tax rules.[52] If the lender is established outside France, the tax rate effectively applicable to the gross interest income of the foreign lender – including specific rebates, deductions and exemptions applicable to the interest income – is compared with the French rate that would have been applicable had the lender been a French tax resident. The test thus focuses on specific local rules that may reduce or limit the amount of taxable interest.

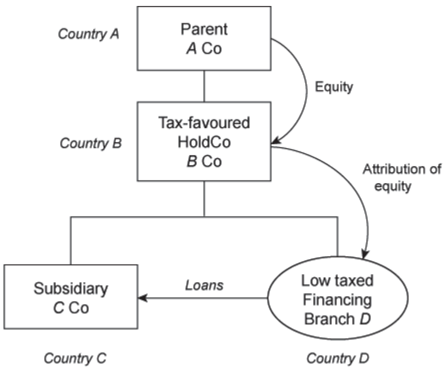
The law in El Salvador also provides that payments to residents of tax havens are subject to an increased withholding tax of 30% on the gross

47. CO: NTA, 26 May 2014, Ruling 31855; CO: NTA, 4 Nov. 2014, Ruling 1355.
48. CO: art. 124(2) Tax Code (*Impuesto Sobre la renta)*.
49. The following countries and territories are regarded as tax haven: Angola, Antigua and Barbuda, Bahamas, Bahrain, Brunei Darussalam, Cape Verde, Dominica, Cook Islands, Grenada, Guyana, Hong Kong, Jordan, Kuwait, Labuan, Lebanon, Liberia, Macau, Maldives, Mauritius, Marshall Islands, Nauru, Oman, Pitcairn Islands (including Henderson, Ducie and Oeno), Qatar, Qeshm, St Helena, Ascension and Tristan da Cunha, St Pierre and Miquelon, St Vincent and the Grenadines, Samoa, Seychelles, St Kits and Nevis, St Lucia, Solomon Islands, Svalbard, Trinidad and Tobago, Vanuatu and Yemen.
50. CO: art. 124(2) Tax Code. However, based on Ruling 1256 of 10 October 2014, the payments are deductible if they correspond to financial transactions registered before the Central Bank.
51. CO: art. 260(7) Tax Code.
52. This means that a tax rate ranging from 8.33% to 9.5% is required.

payments.[53] Under similar rules, the withholding tax rate in such cases is 25% in Tunisia[54] and 17% in Nicaragua.

Under Greek domestic law, expenses and payments made directly or indirectly to entities established in tax havens[55] are not deductible unless the taxpayer proves that the expenses were made for real and customary transactions, and not for tax evasion.

4.2.2. Tax structures using a finance company with a financing branch



53. The list of tax havens includes the following low-tax countries or territories: Albania, Cyprus, Delaware (US), Hong Kong, Kuwait, Labuan (Malaysia) , Liechtenstein, Lebanon, Macau, Micronesia, Ostrava (Czech Republic), Paraguay, Singapore, Switzerland and Uruguay. In addition, it includes the following no-tax countries or territories: Andorra, Anguilla, Azores, Bahamas, Bahrain, Bermuda, British Virgin Islands, Campione d'Italia, Cayman Islands, Cook Islands, Dominica, Grenada, Isle of Man, Liberia, Maldives, Marshal Islands, Monaco, Nevada (US), Norfolk Islands, Qeshm, Samoa, Seychelles, St Helen and Tristan da Cunha, St Kitts and Nevis, St Vincent and the Grenadines, St Lucia, Turks & Caicos Islands, United Arab Emirates, Vanuatu and Wyoming (US). Finally, it includes Montserrat, Nauru and Niue, which are regarded as tax havens by the OECD.

54. The list of tax havens includes Anguilla, Antigua and Barbuda, Aruba, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Curacao, Cook Islands, Costa Rica, Delaware (US), Djibouti, Dominica, Gibraltar, Grenada, Guernsey, Jersey, Liberia, Marshal Islands, Montserrat, Nauru, Niue, St Martin, St Maarten, Panama, Philippines, Samoa, St Kitts and Nevis, St Vincent and the Grenadines, St Lucia, Turks and Caicos Islands, Uruguay and Vanuatu.

55. In Greece the following countries are regarded as tax havens: Andorra, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Brunei, Cayman Islands, Cook Islands, Costa Rica, Dominica, Gibraltar, Grenada, Guatemala, Guernsey, Hong Kong, Isle of Man, Jersey, Lebanon, Liberia, Liechtenstein, Macedonia, Malaysia, Marshall Islands, Mauritius, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue, Panama, Philippines, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Samoa, Seychelles, Singapore, Turks and Caicos, US Virgin Islands, Uruguay and Vanuatu.

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