

**International bar Association Annual Conference 2022**

**Recent Developments in International Taxation**

**Malta**

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## Publication of Transfer Pricing Rules

Malta is one of the last jurisdictions in the EU to introduce formal transfer pricing rules. Following Malta's commitment to introduce such rules as part of its post-pandemic Recovery and Resilience Plan (approved by the EU Commission and ECOFIN), the Maltese legislator introduced enabling legislation by way of Article 51A of Malta's Income Tax Act in 2021. These were shortly followed by a set of Transfer Pricing Rules (the 'Rules') on 18 November 2022, via Legal Notice 284 of 2022 and will come into effect from financial year 2024.

The Rules introduce deeming and computational provisions requiring in-scope companies to include the arm's length value of any amount incurred, due, accrued or derived thereby with respect to cross-border arrangements between associated enterprises in ascertaining total taxable income. It is expected that these Rules shall be shortly supplemented by guidelines issued by the Commissioner for Tax and Customs (the "Commissioner") detailing the methodologies to be used to determine the arm's length amount.

A cross-border arrangement is defined as an arrangement with an associated enterprise where at least:

- One party to the arrangement is not resident in Malta, and at least one party is a company resident in Malta; or
- One party to the arrangement maintains a permanent establishment ('PE') outside Malta to which the arrangement is effectively connected, and at least one party is a company resident in Malta; or
- One party to the arrangement is not resident in Malta and at least one other party (not resident in Malta) is a company maintaining a PE in Malta to which the arrangement is effectively connected, or otherwise derived income or gains arising in Malta.

In all cases the arrangement in question must be relevant in ascertaining the total income of the respective company.

Associated enterprises are defined as bodies of persons where:

- One of the bodies of persons controls the other body of persons whether as a result of the fact that it holds, directly or indirectly, a participation of more than 75% in the voting rights, or the ordinary capital, of the other body of persons or by virtue of any powers conferred by the articles of association or other document regulating the other body of persons; or

- The same person or persons control two or more bodies of persons whether as a result of the fact that it holds, directly or indirectly, a participation of more than 75% in the voting rights, or the ordinary capital, of the two or more bodies of persons or by virtue of any powers conferred by the articles of association or other document regulating the two or more bodies of persons

The threshold in both cases above is lowered to 50% where such bodies of persons are constituent entities of a MNE group as defined by the Cooperation with Other Jurisdictions on Tax Matters Regulations.

The “arm’s length amount” in relation to an arrangement is the amount that independent parties would have agreed to in relation to the arrangement had they entered into that arrangement in comparable circumstances. The methodologies for establishing the arm’s length amount are to be determined by the aforementioned guidelines to be issued by the Commissioner.

### **Malta Business Registry Removes Public Access to Beneficial Ownership Information following CJEU Judgement**

As of the 25 November 2022, the Malta Business Registry has limited access to its register of beneficial owners to competent authorities and Subject Persons (the latter as defined in terms of applicable AML legislation). Subject Persons are required to register with the Business Registry’s online portal in order to be granted access to the register of beneficial owners. The decision follows the CJEU judgement of the 22 November 2022 which, the MBR states, has the effect of invalidating the relevant provisions of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (as amended).

In its judgement, the Court held that the provision of the anti-money laundering directive whereby Member States must ensure that the information on the beneficial ownership of corporate and legal entities incorporated within their territory is accessible in all cases to any member of the general public, is invalid. Said access was deemed by the Court to constitute a serious interference with the fundamental rights to respect for private life and to the protection of personal data, enshrined in Article 7 and 8 of the EU Charter of Fundamental Rights.

### **Transposition of DAC 7 into domestic legislation**

On 20 January 2023, Malta transposed Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation, introducing a new reporting framework for Platform Operators (referred to as “DAC 7”). The amendments were transposed by means of Legal Notice 8 of 2023, amending Malta’s Cooperation with Other Jurisdictions on Tax Matters (Amendment) Regulations, 2023.

As a result of the amendments, the scope of the Regulations has been extended to reporting platform operators, whereby a “Platform” is defined as any software, including a website or a part thereof and applications, including mobile applications, accessible by users and allowing sellers to be connected to other users for the purpose of carrying out a Relevant Activity, directly or indirectly, to such users. It also includes any arrangement for the collection and payment of consideration in respect of Relevant Activity. This excludes however activities of (solely) payment processing, user advertisements and the redirection of users to a Platform. In-scope Relevant Activities are defined as the rental of immovable property (whether residential, commercial, or any other immovable property), personal services, the sale of goods, and the rental of any mode of transport.

With regard to reporting requirements, reporting Malta platform operators must report information on sellers to the Commissioner by the 31<sup>st</sup> of January following calendar year in which said seller is identified as being a reportable seller in terms of the Regulations. Reporting Malta platform operators will be required to collect and report on sellers’ name and surname, primary address, TIN, Member State issuing the TIN, place of birth (in the absence of a TIN), VAT identification number (where available) and the date of birth.

The Commissioner has also released specific guidelines on the application and interpretation of the DAC 7 requirements as transposed into the Regulations. Furthermore, the Guidelines provide that reporting Malta platform operators must register with the Commissioner within 2 weeks of their commencement as a platform operator, however existing platform operators and excluded platform operators) have been given until 31<sup>st</sup> August 2023 to submit their registration, and any changes to said registration must be submitted by 31<sup>st</sup> December 2023. Otherwise, platform operators commencing activities after the 31<sup>st</sup> August 2023 must register by the 31<sup>st</sup> December 2023, though the guidance reiterates that such operators are bound by the 2-week deadline to register.

## **Amendments to the Group Deductions (Income Tax) Rules**

Malta Group Deductions Rules were introduced in January of 2022, and enable the surrender of capital allowances between group companies for year of assessment 2022, where at least one of those companies was a beneficiary of the “COVID-19 Fiscal Assistance – Postponement of Payment of Certain Taxes” tax deferral scheme. The Rules allowed for the surrender of allowable deductions between one group company and another, up to a maximum of €1million per group, with the total amounts surrendered being equal to the amounts claimed, and capped at the claimant company’s total income for year of assessment 2022.

The Rules were amended by virtue of Legal notice 40 of 2023, and effectively extend the applicability to year of assessment 2023 (therefore concerning income received in basis year 2022). By virtue of the amendment, the Rules now specify that the €1million limit per group applies per year of assessment. A further amendment was made in order to clarify that deductions that may be made by a claimant company in the year of assessment 2022 and in the year of assessment 2023 shall not exceed the claimant company’s income for the years of assessment 2022 and 2023 respectively.

### **Revenue Guidance on Requirements for Reduced Tax Rate Applicable to income from Employment Outside Malta**

In February 2023, the Commissioner released a guidance note on the calculation of the 30-day limit on time spent in Malta for individuals benefitting from a reduced rate of tax on remuneration for employment duties carried out outside Malta in terms of sub-article 56(17) of Malta’s Income Tax Act. Said sub-article establishes a 15% tax rate on applicable income derived by any individual, being:

- (a) emoluments payable under a contract of employment requiring the performance of work or of duties mainly outside Malta (excluding service on vessels, aircraft, and road vehicles chartered or leased by a Maltese company, and government service), and
- (b) received in respect of work or duties carried outside Malta, or
- (c) in respect of any period spent in Malta in connection with such work or duties, or
- (d) on leave during the carrying out of such work or duties.

One of the conditions for the reduced tax rate to apply is that during the relevant year, the employee must not be present in Malta for a period or periods that in aggregate exceed 30 days (disregarding presence during vacation or sick leave). The Commissioner has clarified

that the following scenarios will be regarded as presence during vacation leave, and thus also disregarded:

- an employee working abroad on shift basis and staying in Malta between shifts;
- an employee working abroad on a time-on / time-off basis and staying in Malta during time-of periods; and
- an employee working regularly abroad and staying in Malta during weekends and public holidays.

### **Amendments to DAC6 Revenue Guidelines regarding the waiver of reporting obligations by legal professionals**

On the 9<sup>th</sup> March 2023, the Maltese Revenue has issued a guidance note on the waiver of DAC6 notification obligations for lawyers subject to legal professional privilege, in response to CJEU Case C-694/20. In its judgement, the Court laid down a limitation on the requirement of a legal professional exempt from reporting due to legal professional privilege, to notify without delay any other intermediary who is not their client of that intermediary's reporting obligations.

The Revenue has now clarified that the provisions of Malta's Cooperation with Other Jurisdictions on Tax Matters Regulations concerning the said notification obligations are to be interpreted such that they do not apply in the case of advocates, notaries, and legal procurators except where the notification is to be made to the client of the said professionals. The "client" in this case may be either the relevant taxpayer or another intermediary.

Clarification has also been provided as to the requirement of intermediaries who have waived reporting obligations to provide an annual update to the Commissioner consisting of a list of cross-border arrangements where said obligation has been waived. The Revenue has clarified that legal professionals affected by the Judgement and Revenue Guidance are not required to include the identification details of the relevant taxpayer or other intermediary on whom the reporting obligation has been waived and the arrangement and disclosure ID numbers.

### **Amendment to Income Tax Act provisions on the tax treatment of mergers, divisions and restructuring of companies**

An amendment has been introduced to the enabling provisions for the establishing of rules regulating the tax treatment of companies undergoing a restructuring under Article 27A of the Income Tax Act. The transfers that qualify now include "a transfer between a company and a

person who is related to it in such a manner as may be prescribed.” In light of the foregoing, the Revenue has confirmed that such transfers will have to meet the conditions specified in new rules that are expected to be published in order to implement these measures, and which shall be applicable from the date of publication of aforesaid rules.

### **Amendment to Income Tax Management Act provisions on the time limit imposed on the Commissioner to pay out tax refunds**

Malta is well known for its unique shareholder tax refund system whereby shareholders of Maltese companies may claim a 6/7<sup>ths</sup>, 5/7<sup>ths</sup>, 2/3<sup>rds</sup> or 100% refund of the income tax paid by the company in Malta, following the distribution of a dividend thereto by said company. Once approved, such refunds constitute a debt by the Commissioner for Revenue to the taxpayer and must be paid out with the timeframe established by law. In terms of Article 48(8) of the Income Tax Management Act, the time limit for the payment of the shareholder tax refunds by the Commissioner is the fourteenth day following the day on which the refund becomes due.

The legislator has introduced a proviso to Article 48(8) catering for the possibility of an extension of the time period within which the Commissioner may pay the tax refunds to the shareholder to an additional period of twelve months if the Commissioner is required to carry out further due diligence verifications. Whilst not stated specifically within the proviso, the update notes issued by the Commissioner state that such extension is to be applied when there is a need for in-depth due diligence due to suspicions of illicit activities.