Malta

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General

1. What are recent tax developments in your country which are relevant for M&A deals?

So far there have been no major or significant changes to the tax legislation which are relevant to the M&A deals and which merit any special attention. However, recent and noteworthy changes include more anti-abuse provisions with respect to the transfer of immovable property situated in Malta. For example, mergers involving the indirect transfer of immovable property (situated in Malta) may be deemed to be a transfer of the immovable property itself and taxed accordingly.

2. What is the general approach of your jurisdiction regarding the implementation of OECD BEPS actions (action Plan 6 specifically) and, if applicable, the amendments to the EU Parent-Subsidiary Directive?

To date, no changes were made in the tax legislation as a result of the OECD BEPS actions and the amendments to the EU Parent-Subsidiary Directive (PSD). With regards to the latter, it is worth pointing out that Malta does not impose any withholding taxes (including withholding taxes on dividend income) and therefore the amendments to the PSD will have minimal impact, if any, on dividend distributions by Maltese companies. Also, the applicability of the participation exemption with respect to incoming dividend income (from EU resident companies) hasn't changed and no changes are expected either.

3. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

a. Share deal

The purchase of assets through a share acquisition may be subject to duty on documents (commonly referred to as stamp duty). However, exemptions from duty on documents apply if the company has more than 90% of its business activities outside Malta. If the share transfer is not exempt, then the duty on documents is computed on the market value of the shares. The market value is usually taken to be the net asset value of the shares, adjusted to reflect the market value of any immovable property, any investment in another company and goodwill. Duty on documents is levied at €2 on every €100 of the market value, with the rate being €5 on every €100 if the company has more than 75% of its assets in immovable property situated in Malta.

It is possible for a group company to transfer losses to another group company as long as the two companies are considered to belong to the same group for income tax purposes. Common shareholding must exceed 50%, for companies to be considered to be a group and enable the transfer of trading losses between companies. The surrendering of trading losses must be made within the same tax year. Therefore, any losses carried forward cannot be surrendered. Tax losses carried forward by the target company may be utilised by the acquiring company only if the two companies are merged, unless the Inland Revenue Department considers such merger as being a scheme and thus applies the anti-abuse provisions. Anti-abuse provisions apply when the transfer of losses to a group company arise from profits relating to immovable property situated in Malta.

The future sale of shares may be subject to capital gains tax at the rate of 35%, but an exemption applies if the transfer is made by a non-resident person and the Maltese company (in which the share transfer is being made) does not have any immovable property in Malta.

Share transfers are not subject to value added tax.

b. Asset deal

The purchase of individual tangible assets (except for the purchase and sale of immovable property situated in Malta) does not trigger any tax issues. Duty on documents or other taxes are not payable upon the purchase of assets.

Goodwill is not deductible for income tax purposes and it may not be amortised for tax purposes. Other assets such as industrial buildings (including a hotel and offices) as well as plant and machinery, and used in the production of the income qualify for a tax deduction in form of capital allowances or wear and tear at prescribed rates (using the straight line method).

Purchase of individual assets may be subject to VAT (at the standard rate of 18%) unless the transfer of assets is considered to be a transfer of a going concern, in which case no VAT is applicable.

Buy-side

4. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Companies who opt to re-domicile to Malta or companies resulting from a cross-border merger are entitled (but not obliged) to claim a step-up in the tax base cost of assets situated outside Malta without any adverse Maltese tax consequences.

A share acquisition does not entitle the acquiring company to any tax deductions. Therefore, it is not possible to take advantage of an increase in the step-up value of assets during a simple share transfer. However, revaluations are possible and the increase in the value or cost is not subject to any income tax or capital gains tax.

5. What are the particular rules of depreciation of goodwill in your country?

Goodwill may not be amortised for income tax purposes. It is a non-deductible expense.

6. Are there any limitations to the deductibility of interest on borrowings?

Malta has no debt-to-equity ratios or thin capitalisation rules, and there are no limitations on the deduction of interest provided such interest is incurred in the production of the income. Therefore, for example, interest paid on a loan used to acquire an investment may be deducted from the dividend income received from such investment (unless the dividend income is exempt under the participation exemption provisions). Although there are no specific rules to limit the deductibility of interest on borrowings, general anti-abuse provisions may limit or disregard amounts, transactions or schemes which reduce the amount of tax payable by any person.

As a general rule, no distinction is made between intra-group debt and third-party lenders. However, intra-group debt may be subject to more scrutiny to ensure that such debt is at arm's length.

7. What are usual strategies to push-down the debt on acquisitions?

Since Malta has no thin capitalisation rules or debt-to-equity ratios, it is possible to push-down debt by an assignment, transfer or contribution of any existing loan. The tax legislation clearly provides that any interest payable on capital employed in acquiring the income is allowable for income tax purposes. No duty on documents is payable on the assignment, transfer or contribution of a debt and there are no limitations on debt push-downs.

8. Are losses of the target company(ies) available after an acquisition is made?

Tax losses may be transferred from one company to another (within the same group) provided the transfer of the loss is made during the same year in which it is incurred.

Only trading losses may be surrendered to group companies. Any capital losses as well as unabsorbed capital allowances are carried forward indefinitely and may be deducted against the same type of profits realised in future periods but may not be surrendered to another group company.

Any losses incurred by the target company(ies) before the year of acquisition may not be transferred to other companies after acquisition unless the two companies merge.

It is possible that the purchase and eventual merger of two companies may be viewed by the Inland Revenue Department as a scheme to utilise tax losses by the target company, in which case anti-abuse provisions will apply.

9. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc.)?

Duty on documents (or 'stamp duty') is payable by the buyer upon the transfer of shares at the rate of €2 on every €100 or €5 on every €100 of the market value of the shares. As pointed out above, exemptions from duty on documents apply if the company whose shares are being transferred has more than 90% of its business activities outside Malta. If no exemption applies, the market value of shares is computed on the basis of the company's net asset value, with adjustments for the market value of any other shares held by the company, for increases in the market value of immovable property situated in Malta and for goodwill. Goodwill is calculated as two years' profit based on the performance of the company over the last five years of operation.

Share transfers are not subject to any value added tax.

10. Are there any restrictions on the deductibility of acquisition costs?

Tax legislation provides for a deduction of expenses which are incurred in the production of the income. Acquisition costs are normally considered to be of a capital nature and therefore not allowable as a deduction. However, acquisition costs may be subject to capital allowances in the form of wear and tear or amortised over a number of years depending on the nature of the asset acquired and its use.

11. Can VAT (if applicable) be recovered on acquisition costs?

VAT incurred on the acquisition of an asset is usually recoverable for persons having an economic activity in Malta and if such asset relates to the business activity/ies of the company (unless the input VAT is specifically blocked, e.g. on works of art, antiques, motor vehicles etc.).

Pure holding companies may not claim back any VAT incurred upon the acquisition cost but trading companies may claim back any VAT incurred, if the asset purchased (or the capital good as it is referred to in the VAT Act) is used in the economic activity.

12. Are there any particular issues to consider in the acquisition by foreign companies? *(for example non-resident taxation rules/substance rules and tax efficient exit routes)*

There are no adverse tax implications for foreign parties acquiring shares in a Maltese company. Maltese legislation exempts foreign shareholders from the payment of duty on documents provided the Maltese company has its main interests or business activities outside Malta and the said Maltese company does not own real estate in Malta.

13. Can the group reorganise after the acquisition in a tax neutral environment through mergers or a tax group?

Mergers, demergers, amalgamations and reorganisation within a group of companies are tax neutral if the shareholding position of every shareholder remains unchanged.

The above are exempt from duty on documents as well as capital gains tax.

No income tax and/or duty on documents are due upon the transfer of immovable property or shares or any other asset between two companies which form part of the same group.

14. Is there any particular issue to consider in case of companies of which main assets are real estate?

Exemptions from capital gains tax upon share transfers exclude companies which hold immovable property situated in Malta.

Transfer of an immovable property is subject to property transfer tax at the rate of 8% applicable on the consideration / market value. Other property transfer tax rates apply in exceptional cases and range between 2% and 10%. Such tax is considered to be a final tax and no other taxes are applicable (except for the duty on documents payable by the buyer).

Sell-side

15. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains are brought to charge together with any other income. Capital gains apply upon the transfer of shares (unless the participation exemption applies) and the transfer of immovable property. Capital gains may also apply on some other specific types of assets such as patents, trade-marks, trade names.

The applicable income tax rate depends on whether the gain is realised by an individual or a company. Individuals are taxed at progressive rates, with the highest tax rate being 35%. Companies are taxed at a standard rate of 35% subject to double taxation relief. Also, a Maltese company in receipt of foreign source capital gains (which do not qualify for the participation exemption) may claim a Flat Rate Foreign Tax Credit (FRFTC) of 25% so that the tax payable is reduced from 35% to 18.75%. Upon a distribution of such gains or profits, the shareholder may be entitled to claim a tax refund equivalent to two thirds of the tax paid by the company so that the Combined Overall Malta Effective Tax (COMET) is 6.25%.

Transfers made by a non-resident person in a Maltese company are exempt from tax as long as such company does not hold immovable property situated in Malta.

Malta's participation exemption is quite 'generous' and it applies to dividend income as well as to capital gains arising from the transfer of a participating holding.

If the equity investment made by a Maltese company qualifies as a participating holding, then any capital gains realised upon the disposal or transfer of such investment is exempt from any tax. An investment is considered to be a participating holding if any one of the following conditions is satisfied:

- The Maltese company has at least 10% of the equity shares in another company;
- The Maltese company is an equity shareholder in a company and is entitled to purchase the balance of the equity shares of the company, or it has the right of first refusal to purchase such shares;
- The Maltese company is an equity shareholder in a company and is entitled to either sit on the board or appoint a person on the board of that subsidiary as a director;
- The Maltese company is an equity shareholder which invests a minimum of €1,164,000 (or the equivalent in a foreign currency), and such investment is held for a minimum uninterrupted period of 183 days;
- The Maltese company holds the shares in a company to further its own business, and the holding is not held as trading stock for the purpose of a trade.

The participation exemption is also extended to dividend income received from a participating holding if the body of persons in which the participating holding is held, satisfies any one of the following three conditions:

- It is resident or incorporated in the EU;
- It is subject to foreign tax of a minimum of 15%; or
- It does not derive more than 50% of its income from passive interest and royalties.

Alternatively, the equity investment must satisfy the following two conditions:

- The shares in the non-resident company must not be held as a portfolio investment;
- The non-resident company or its passive interest or royalties have been subject to tax at a rate not less than 5%.

If the dividend income does not qualify for the participation exemption, the Maltese company in receipt of dividend may avail itself of any double taxation relief or unilateral relief. If no proof of foreign tax suffered is available but the company has proof that the dividend income is foreign source, it may avail itself of the Flat Rate Foreign Tax Credit (FRFTC).

16. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Rollover relief is available to companies that transfer an asset used in the business for at least three years and replaced within one year. Therefore, the sale of immovable property may not be brought to charge, but the original cost of the immovable property is reduced by the gain. Such relief defers the tax liability until the asset is disposed of and not replaced.

Anti-abuse provisions apply to minimise tax avoidance when an asset is replaced by another asset of a lower value than the original one.

17. Are there any local substance requirements for holding/finance companies?

Malta does not have any specific legislative requirements with respect to local substance as the basis of taxation for companies incorporated in Malta is on a world-wide basis, thus subject to tax on all its income, irrespective to where such income is generated or remitted.

However, local substance is important and indeed necessary when determining the tax residency of companies incorporated outside Malta. Indeed, a company is considered to be tax resident in Malta if the company is effectively managed and controlled in /from Malta. The tax authorities normally look at the composition of the board of directors, where meetings are held and that the decisions are effectively taken whilst in Malta.

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