MALTA

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INTERNATIONAL DEVELOPMENTS

1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

Changes to Malta's tax legislation are not frequent and there have been no changes to the income tax legislation which are relevant to the M&A deals and private equity except for the introduction of a Notional Interest Deduction (NID) which is very attractive to companies financed through equity and other contributions since they may claim an allowable deduction to reduce their chargeable income or taxable profits by up to 90%.

Other changes to Malta's tax legislation are often the result of 'Budget Measures' or EU Directives.

2. WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVES?

Malta is not a member of the OECD and, although it endorses some of the BEPS actions, has not amended its tax legislation or renegotiated any of its tax treaties as a direct result of the BEPS action plan. However, since Malta is a Member of the European Union, it has amended the tax legislation to implement the amendments relating to various tax and tax related Directives such as the anti-abuse provisions of the EU Parent Subsidiary Directive, the Country-by-Country Reporting (CbCR), the exchange of information on tax rulings and other tax transparency measures such as the Register of Beneficial Owners (RBO).

As from 2019, Malta will also have to implement the Anti-Tax Avoidance Directive (ATAD) and therefore some of the BEPS Actions will find their way into Malta's tax legislation.

So far Malta has very limited anti-tax avoidance measures and the legislation does not contain any CFC rules or provisions, no exit taxes, no debt to equity ratios or thin cap rules, no withholding taxes and no specific transfer pricing measures. With ATAD I and ATAD II, this may well change.

GENERAL

3. WHAT ARE THE MAIN DIFFERENCES BETWEEN AN ACQUISITION OF SHARES AND AN ASSET DEAL IN YOUR COUNTRY?

A) Share deal

The purchase of assets through a share acquisition may be subject to duty on documents (referred to as stamp duty). However, exemptions from duty on documents apply if the company has more than 90% of its business interests or activities outside Malta. If the share transfer is not exempt, then duty on documents is computed on the market value of the shares. The market value is usually taken to be the Net Asset Value (NAV) 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.

Tax advantages:

It is possible for a group company to transfer losses to another group company if 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 a group and enable the transfer of trading losses. The surrendering of trading losses must be made within the same tax year. Therefore, any losses brought forward or 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 in which case the anti-abuse provisions apply. Anti-abuse provisions apply when the transfer of losses to a group company arise from profits relating to immovable property situated in Malta.

In certain cross border transactions such as a redomiciliation of a foreign company into a domestic company (transfer of legal seat), a cross-border merger and the change in a company's tax residence by moving the effective management and control, it is possible to have a step-up in the value of assets held by the company. The step-up is not subject to any tax in Malta but may qualify for depreciation or amortization.

Tax disadvantages:

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.

B) Asset deal

The purchase of individual tangible assets (except for the purchase 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.

Tax advantages:

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.

Intangible assets such as intellectual property and scientific research may also be depreciated / amortised for income tax purposes over their useful economic life.

Tax disadvantages:

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

Goodwill is not deductible or allowable for income tax purposes and it may not be amortised for income tax purposes.

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 that opt to re-domicile to Malta or companies resulting from a cross-border merger are entitled to claim a step-up in the tax base of both tangible and intangible foreign assets without any adverse tax consequences in Malta.

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. A revaluation of local assets does not affect the tax base on which depreciation or amortization may be claimed.

5. WHAT ARE THE PARTICULAR RULES OF AMORTISATION OF GOODWILL AND SIMILAR INTANGIBLE ASSETS IN YOUR COUNTRY?

Goodwill may not be amortised for income tax purposes. It is a non-deductible expense. Other intangible assets such as intellectual property, trademarks, trade names, research and development may all qualify for amortization over their economic useful life. In some cases, the cost or tax base may be inflated by a percentage, example, 20%.

6. WHAT ARE THE LIMITATIONS ON THE DEDUCTIBILITY OF INTEREST EXPENSE? ARE THERE SPECIAL INTEREST LIMITATIONS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

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. 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 rule, no distinction is made between intra-group debt and third-party financing. However, intra-group receivables may be subject to more scrutiny by the tax authorities to ensure that such debt is at arm's length and no interest income is 'lost'.

Interest free borrowings as well as equity and reserves may all qualify for a Notional Interest Deduction (NID) which is currently set at 7.03% and may be claimed as a deduction to arrive at the chargeable income. The NID is limited to 90% of the chargeable income such that the company will pay tax on the 10%. Any unutilised NID may be carried forward and deducted in subsequent years. The amount of NID claimed by the company is brought to charge in the hands of resident shareholders. Non-resident shareholders are not subject to interest income unless they have a PE in Malta or are tax resident in Malta. The NID may also be claimed in conjunction with double taxation relief such as the Flat Rate Foreign Tax Credit (FRFTC).

7. WHAT ARE COMMON STRATEGIES TO PUSH-DOWN 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. Tax legislation provides that any interest payable on capital employed in acquiring the income is allowable for income tax purposes as long as the interest charged is at arm's length. 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 THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

Given that the interest rates are rather low and the NID on the invested risk capital including interest free loans is set at 7.03%, there is a tax incentive to finance Maltese companies through equity.

9. ARE LOSSES OF A TARGET COMPANY AVAILABLE AFTER AN ACQUISITION IS MADE? ARE THERE ANY RESTRICTIONS ON THE USE OF SUCH LOSSES?

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 arises.

Only trading losses may be surrendered to group companies. Any capital loss 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 and the merger is not seen by the tax authorities as being tax driven in which case the losses are not allowable.

10. ARE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?

Not really. Malta does not have any specific legislation or rules with respect to thin capitalisation or transfer pricing which may limit certain deductions. However, it is pertinent to point out that Maltese tax legislation contains a general anti-abuse provision as well as some specific anti-abuse provisions that may limit tax deductions or disregard a transaction or a series of transactions.

11. 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. The latter only applies in case of companies having immovable property situated in Malta. As already pointed out, exemptions from duty on documents apply if the company whose shares are being transferred has more than 90% of its business interests or activities outside Malta. If no exemption applies, the market value of shares is computed on the basis of the company's NAV, 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.

12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX DEDUCTIBILITY OF ACQUISITION COSTS?

Tax legislation provides that expenses which are incurred in the production of the income are allowable as a deduction. 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.

13. 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 or motor vehicles).

Holding companies as well as companies engaged in VAT exempt activities 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.

14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION OF A DOMESTIC COMPANY BY A FOREIGN COMPANY?

There are no adverse tax implications for foreign entities acquiring shares in a Maltese company. On the contrary, this may offer tax advantages such as the NID referred to earlier on and the possibility to claim tax credits and tax refunds upon a distribution of profits by the Maltese company to the foreign company. These tax credits and tax refunds may also apply to accumulated profits / retained earnings.

Also, 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.

15. CAN THE GROUP REORGANISE AFTER THE ACQUISITION IN A TAX NEUTRAL MANNER THROUGH MERGERS OR A TAX GROUPING?

Mergers, demergers, amalgamations and reorganisations within a group of companies are tax neutral if the shareholding position of all shareholders remains unchanged.

The above are also exempt from duty on documents and 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. Roll-over relief is also available.

16. ARE THERE ANY PARTICULAR ISSUES TO CONSIDER IN THE CASE OF A TARGET COMPANY THAT HAS SIGNIFICANT REAL ESTATE ASSETS?

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

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

17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?

In the 2016 Budget, the Minister of Finance announced that fiscal unity will be introduced however to date, this budget measure was never introduced.

However, current legislation provides for the transfer of tax losses within a group of companies and the tax deferral upon transfer of assets within a group of companies. Anti-abuse provisions apply in both circumstances.

18. DOES YOUR COUNTRY HAVE ANY SPECIAL TAX STATUS SUCH AS A PATENT BOX FOR COMPANIES THAT HOLD INTANGIBLE ASSETS?

No specific legislation has been introduced for companies holding intangible assets and no special tax status applies. However, companies holding intangible assets, may, depending on the type of intangible asset, amortise the cost over a number of years and claim the amortised part as a deduction against income. In certain cases, such as research and development, the company may inflate the actual cost incurred and the amortization is calculated in the inflated amount.

19. DOES YOUR COUNTRY IMPOSE ADVERSE TAX CONSEQUENCES IF OWNERSHIP OF INTANGIBLES IS TRANSFERRED OUT OF THE COUNTRY?

Malta does not impose any exit taxes and there are no adverse tax consequences if the ownership of intangible assets is transferred out of Malta irrespective of whether the transfer is within a group or not.

SELL-SIDE

20. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY? WHAT, IF ANY, GAINS ARISING IN AN M&A CONTEXT ARE ELIGIBLE FOR SPECIAL TREATMENT?

Capital gains realised by a corporate taxpayer are in principle deemed profit and are therefore taxable at the nCapital 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, trademarks and 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% (unless individual has a special tax status under a specific programme). 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%. The COMET of 6.25% may be reduced even further if the company also claims the NID.

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 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 qualifies as 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; or
- 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; or
- 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; or
- 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; or
- 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; or
- 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 FRFTC. The NID may also apply.

21. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES OR ASSETS ARE REINVESTED?

Rollover relief is available to companies that transfer an asset used in the business for a period of at least three years and replaced within one year. As a result, any profit realised upon the sale of the asset, including immovable property, will not be brought to charge, but the original cost of the asset or the immovable property, is reduced by the realised gain subject to the rollover relief. Therefore, such relief defers the tax liability until the asset is disposed of and not replaced.

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

22. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING COMPANIES?

Malta does not have any specific legislative requirements with respect to local substance since the basis of taxation for companies incorporated in Malta is on a world-wide basis, and therefore 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 residence of companies incorporated outside Malta. Indeed, a foreign company is considered to be tax resident in Malta only 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.

23. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?

Mergers are generally considered to be tax neutral and therefore there are no tax advantages (or disadvantages) in mergers. No VAT or duty on documents is imposed on the merger of two entities and thus no taxation is due.

MANAGEMENT INCENTIVES

24. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES IN CONNECTION WITH SELLING OR BUYING A COMPANY?

Any remuneration to employees, including management, is subject to tax irrespective of the form of payment granted. Any non-cash remuneration is treated as a fringe benefit in Malta and subject to tax in Malta. This applies to individuals whose income is subject to tax in Malta by virtue of their residence and/or domicile.

The exercise of a share option is treated as a fringe benefit under Maltese legislation and taxed at a flat rate of 15%. The taxable event is triggered when the employee exercises the option and acquires shares in the company or whenever an employee receives shares under a share award scheme. The value of the benefit is the excess, if any, of the market value of the shares at the time when the shares are transferred over the price paid for those shares by the employee. Taxation is charged at the flat rate of 15% on the value of the benefit. The fringe benefit is treated as income that is separate and distinct from the employee's other income. The benefit is treated as income derived at the time when the employee acquires the shares and as arising in the country where the employer is performing his duties at that time.

The employee may subsequently transfer the shares at a profit. For the purpose of determining the taxable profit upon the disposal of shares, the cost of the shares is not the price actually paid by the employee but the market value (if higher) established for the purpose of determining the fringe benefit.

Tax incentives may apply for highly qualified persons. The objective of the Highly Qualified Persons Rules is the creation of a scheme to attract highly qualified persons to occupy "eligible office" with companies licensed and/or recognized by the Malta Financial Services Authority (MFSA), companies licensed by the Malta Gaming Authority (MGA) and undertakings holding an Air Operators' Certificate or an Aerodrome Licence issued by the Authority for Transport in Malta.

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