Corporate Tax

Fourth Edition

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Malta

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Overview of corporate tax work over last year

The last year has seen continued efforts to consolidate and diversify Malta's financial services industry with a well-regulated but flexible approach continuing to be a successful formula. Malta has continued to enjoy stability built on its reputation as a solid financial services centre, with tax retaining its place as a core element in corporate structuring.

On a global level, corporate taxation and transparency in tax matters have been in the spotlight like never before. In Malta, as in most other jurisdictions, this has resulted in a period of intense work for firms in the arena of corporate tax and corporate structuring, primarily focused on keeping up-to-date with important international initiatives such as the BEPS project and the EU Anti-Tax Avoidance Package, closely followed by the implementation of the reporting necessitated by the implementation of FATCA and the CRS. Bilateral activity in this regard has also continued, with Malta constantly seeking out respectable treaty partners.

Significant deals and themes

Recurring scenarios when advising clients have been the use of Maltese vehicles for the holding of assets outside of Malta both within and outside the EU, and taxation of dividends and capital gains derived from such structures. The use of Maltese companies for the holding of IP has also seen a healthy interest. The application of the Malta participation exemption and full imputation mechanism makes structuring through Malta very attractive in all of these scenarios.

Over the last year or so, particular interest has been seen in the use of Maltese limited partnerships or foundations as holding vehicles due to the flexibility of such entities from a tax perspective, with partnerships having the option to be taxed as companies, whilst foundations, which are by default taxed as companies, having the option to be taxed as trusts. Of particular relevance is the application of the participation exemption regime in those instances where these entities opt to be treated as companies.

There has been continued interest in the setting up of securitisation vehicles in Malta for international securitisation transactions which, with the correct planning, are tax neutral in Malta. The securitisation cell company or protected cell company structure operating as a securitisation vehicle, which is attractive from a tax perspective in that each cell is considered to be a separate entity for tax purposes, has also attracted a fair amount of interest.

Following its deal with the Maltese Government at the end of 2014 for the acquisition of a minority stake in Enemalta plc (the main provider of electricity generation and distribution services in the Maltese islands) and BWSC Delimara plant, representing the

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largest foreign direct investment in Malta with a value of over €300m, Shanghai Electric Power entered into a joint venture with Enemalta for the development of a windfarm in Montenegro.

At the end of last year, Banco Internacional do Funchal, S.A., the majority shareholder in Banif Bank Malta, announced that, in line with conditions dictated by an EU bailout agreement signed in 2013 with Portugal, it had reached an agreement to sell its 78.6% shareholding in Banif Bank Malta to Omada Capita, a UK-based investment management company. The new owner intends to provide between €20m and €25m in fresh capital for expansion.

Key developments affecting corporate tax law and practice

Double tax treaties

Malta continues to seek out collaboration in tax matters, and efforts to increase its double tax treaty network are at the forefront of initiatives by the local tax authorities. The double tax treaties concluded with Mauritius and Moldova, which were signed in 2014, came into force in 2015, bringing the number of Malta's current tax treaties up to over 70. A double tax treaty was also signed with Curacao but is not yet in force.

Domestic – cases and legislation

A new set of Regulations and Pensions Rules were issued under the Retirement Pensions Act effective as from 1st January 2016 to supplement the legal framework for the licensing and regulation of Retirement Schemes (both Occupational and Personal), Retirement Funds and Service Providers related thereto, as well as for the requirement of recognition for persons carrying on back-office administrative services.

On a purely domestic level, we have seen a paradigm shift in the taxation of gains realised on immovable property transfers. Historically, companies and individuals were charged a provisional capital gains tax upon deed of transfer to which provisional tax was applied as a credit against the actual tax due on the gain. Tax was, broadly speaking, levied on the difference between the cost of acquisition and the sale price and calculated at either the corporate income tax rate or the personal tax rate applicable to an individual transferor. With effect from 1st January 2015, a final withholding tax at a flat rate of 8% is levied on the value of the property. Whilst it is understood that most transferors who have realised a gain on disposal are better off with the application of the 8% final withholding tax, the equity of such a system is questionable in the case of loss-making property transfers.

International and EU developments

BEPS

On 5th October 2015, the OECD released its final reports on the BEPS project, and although some elements of the BEPS action plan are still to be delivered during 2016 and 2017, the project is now focusing on implementation of the agreed package. In response to the call of the G20 Leaders, OECD members and G20 countries have developed an inclusive framework allowing interested countries and jurisdictions to work with OECD and G20 members on developing standards on BEPS-related issues and reviewing and monitoring the implementation of the whole BEPS Package.

To join the framework, interested countries and jurisdictions are required to commit to the comprehensive BEPS Package and its consistent implementation, and to pay an annual BEPS Associate fee. However, it is recognised that interested non-G20 developing countries' timing of implementation may differ from that of other jurisdictions, and that

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their circumstances should be appropriately addressed in the framework. It is expected that Malta, which is not an OECD member but has been committed to the BEPS project, is likely to be actively considering joining the framework.

Common Reporting Standards ("CRS")

In late 2015, the OECD and G20 agreed on the Global Standard of Automatic Exchange of Information in a bid to improve tax administrative cooperation. Malta was one of the early adopters of the standard, committing itself to participate in the first wave of reporting set for 2017.

Following the implementation of the CRS requirements at EU level into EU Council Directive 2014/107/EU on administrative cooperation in the field of taxation (the "EU Administrative Cooperation Directive", commonly known as "DAC2"), Malta amended its domestic law on cooperation with other jurisdictions on tax matters to implement CRS into Maltese law with effect from 1st January 2016. Guidelines in relation to the implementation of CRS in Malta were issued by the IRD on December 2015, and the first round of exchange of information between tax authorities in terms of CRS is scheduled to take place in September 2017.

FATCA

With respect to FATCA, which was introduced into Maltese law in 2014, the obligations of professional trustees when reporting trusts to the Maltese tax authorities were modified, to the effect that a professional trustee must allocate a reference number to each trust for which it acts as trustee and report such reference number to the tax authorities. A professional trustee is therefore not obliged to disclose any information on the settlers and disclosed beneficiaries of a trust.

Rulings Directive

At the end of December 2015, the European council adopted a directive aimed at improving transparency on tax rulings given by Member States to companies relating to the manner in which they will be taxed. The directive is one of a raft of initiatives aimed at preventing corporate tax avoidance and requires Member States to exchange information automatically on advance cross-border tax rulings, as well as advance pricing arrangements with the possibility for Member States to request further information where necessary.

The new rules on the automatic exchange of rulings will apply with effect to rulings granted from 1st January 2017. Transitional provisions apply in relation to rulings granted from 1st January 2012. Member States will have the possibility to exclude from information exchange advance tax rulings and pricing arrangements issued to companies which do not mainly conduct financial or investment activities and with an annual net turnover of less than €40m at a group level, if such advance cross-border rulings and advance pricing arrangements were issued, amended or renewed before 1st April 2016.

The European Commission is working on setting up a central database where all exchanged rulings will be kept.

The Malta tax authorities are currently in the process of drafting the necessary amendments in order for the directive to be implemented by the end of the year.

Draft EU Anti-Tax Avoidance Directive

As part of a package to strengthen EU laws for corporate tax avoidance, in January 2016 the EU Commission issued a draft anti-tax avoidance directive. The directive proposes a set of legally binding anti-avoidance measures, which all Member States should implement

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to close off major areas of aggressive tax planning. Not only does the directive appear in certain areas, such as the switch over clause provisions, to exceed BEPS recommendations, but it also includes measures which infringe on the sovereignty of EU Member States.

Domestically, the hope is that that clarity, consistency and a thorough analysis of the provisions and their relative impact are not sacrificed in the blind rush for the directive to be implemented under the Dutch EU Commission Presidency.

Tax climate in Malta

Whilst cognisant of the changes that the international initiatives will bring to the tax landscape as we know it, Malta is confident of its ability to adapt and evolve in the light of such changes emerging as an even more robust and secure jurisdiction in and through which to do business. Malta has a long-standing general anti-avoidance rule integrated into its domestic tax law, already embraces some of the principles at the heart of the BEPS project, and has an extensive double tax treaty network largely based on the OECD model, including exchange of information provisions.

Although the outlook is cautious, business carries on as usual.

Industry sector focus

FinTech

With the international financial sector veering into the FinTech era, Malta as a leading financial European jurisdiction is following suit. Malta has a fast-growing IT sector, capable of offering a range of IT services required by the financial industry. The local financial services regulator strives to stay ahead of the market, ascertaining that the necessary frameworks are put in place with respect to FinTech. There are a number of areas that are already well-regulated. Such regulated FinTech products and services include peer-to-peer lending via an equity-based crowd-funding platform, money transfer solutions such as payment service providers, e-wallets, as well as online financial planning products.

Over the years, Malta has become an e-gaming and payment services hub, whereby the number of such licensed local institutions has seen enormous growth, showing the increasing appetite for such FinTech services in the financial landscape. This, combined with the robust financial sector in Malta, facilitates the growth of the local FinTech-focused industry. We expect to see growth in this industry.

Holding companies

Although Malta does not have a holding company regime *per se*, it does have a participation exemption regime which exempts from taxation any dividends and capital gains derived from qualifying participations. This, coupled with the fact that Malta does not levy withholding tax on outbound interest, royalties or dividend payments, continues to make Malta an attractive holding jurisdiction.

IP

Malta's current exemption in respect of royalties derived from patents will remain in force until 30th June 2016 with grandfathering provisions until 30th June 2021. Following 30th June 2016, it is expected that Malta will adopt some form of modified nexus approach in relation to royalties from patents; however, nothing has as yet been issued by the tax authorities. In the meantime, the full imputation system and tax credit system offers an attractive alternative.

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The year ahead

Malta is awaiting more certainty and direction in relation to the implementation of the BEPS project and the outcome of the proposed anti-tax avoidance directive and package generally at EU level; however, it welcomes co-ordinated measures to ensure global transparency and responsible taxation. Malta's tax system is a transparent one and already supports in part the practices which the OECD aims to achieve through the BEPS project such as the elimination of the use of arbitrage in hybrid situations. Malta is committed to remaining a jurisdiction from which it is attractive to conduct business.

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Kenneth is a tax partner at Chetcuti Cauchi, specialising in corporate taxation and indirect taxation. He advises corporate clients represented by the firm on tax and VAT aspects of operating locally and internationally.
Due to his work for a major hotel group as well as commodities traders, Kenneth brings with him a wealth of industry experience to the firm's hospitality, energy and natural resources industry groups.
Kenneth is a regular lecturer in the fundamental and advanced papers in taxation at the Richard Clarke Academy ACCA training centre and heads the internal tax training at Chetcuti Cauchi. Kenneth sits on the Taxation Committee of the Malta Institute of Accountants and the Taxation Committee of the Institute of Financial Services Practitioners.
Furthermore, Kenneth is the Partner who is responsible for the Asian industry as a whole and consequently one of the firm's major achievements has been accomplished in this area. The firm was proud to assist with one of the largest foreign direct investments in the Maltese islands to date. In addition to this, Kenneth is involved in the firm's Immigration Practice as the main advisor to Asian clients in relation to the Malta Citizenship by Investment, and various Residence Programmes. In fact, he has also been appointed as an accredited agent, licensed by Identity Malta IIP 124.

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With close to 20 years of experience with the Big Four accountancy firms and boutique firms in Malta, Michelle is the Senior Tax Manager within the firm, specialising in tax advice in relation to cross-border transactions and corporate structures and personal tax advice. Ms de Maria primarily advises on domestic tax law as applicable in an international context, on the application of double tax treaties and a variety of cross-border tax issues. Her interest and strong grounding in Corporate Law makes her particularly well-suited to advise about corporate structures. She also advises on tax issues relating to other entities or arrangements such as partnerships, foundations and trusts and the financial services sector. Her clients include large tax firms in other jurisdictions as well as multinational business and HNWIs.

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