

Malta's tax system - setting the record straight

May 2017



Recently Malta has been attacked through a series of articles which appeared in the local and international press, referring to what have been termed as the Malta Files. Such files refer to data obtained both from publicly available information, as well as leaked documents. The data is being utilised to incorrectly portray Malta as an offshore jurisdiction or a tax haven due to its imputation tax system. In this paper we rebut allegations, several of which are based on incorrect statements and assumptions.

The following is a synopsis of the arguments made by the press and which are easily rebutted by the facts relating to the Maltese tax system and the environment in which it operates.

1. The articles give the impression that Malta's imputation tax system, generally resulting in a 5% tax after the tax refund is paid, is a major discovery. It is worth remembering that the Maltese tax system was discussed in detail and agreed to (in March and November 2006) with both the European Commission (as well as with DG Competition from a State Aid perspective) and with the Member States within the Code of Conduct Group which reviews tax measures to enable a determination as to whether they are harmful in terms of the Code of Conduct for Business taxation. In its report to ECOFIN of November 2006, the Code of Conduct Group (consisting of representatives from the Finance Ministries and tax authorities of the Member States) expounded on the Maltese tax system, which had been agreed upon by the same Group, and also provided numerical examples to assist in the analysis. From the outset, Malta was and has always been transparent about its tax system: Malta's aim was always to have an attractive tax system, one that relied on statutory law and legal certainty and not one which relies on the discretion of the tax authorities, through tailor-made deals with taxpayers.

2. Malta has always honoured EU and international principles and its obligations with regard to direct taxation, a summary of which is set out below:

a. As an EU Member State Malta has full authority and autonomy to structure its tax system as it deems fit as long as it does not fall foul of certain conditions, namely the following:

i. That tax law does not infringe the EU's Four Freedoms and the principle of non-discrimination. Malta has no tax rules which infringe these EU principles, so much so that the Commission has not brought any cases against Malta in this regard.

ii. That all EU tax directives (which are unanimously approved by all Member States in ECOFIN) are implemented and complied with. Malta has fully implemented all EU tax directives.

iii. That tax law does not infringe the EU state aid rules. DG Competition confirmed that with the Maltese tax system does not infringe EU Competition law as explained in paragraph 1 above.

iv. That tax law is in line with the criteria set out in the Code of Conduct for Business Taxation agreed to by ECOFIN. The Code of Conduct Group and ECOFIN determined that the Maltese tax system is not harmful.

b. Malta is a BEPS associate country and is fully co-operative in the international initiative against tax evasion. Malta fully applies EU law and all OECD initiatives on combatting tax evasion including the directives on mutual assistance between tax authorities; automatic exchange of information; as well as the exchange of tax rulings and advance pricing arrangements in the transfer pricing field. Malta is also an early adopter of the Common Reporting Standard and Country-by-Country reporting obligations.

c. Malta approved (together with other Member States in ECOFIN) the Anti-Tax Avoidance Directive, (ATAD) 1 in June 2016 and, during its Presidency, moved fast to acquire all Member State's approval to ATAD 2 in February 2017.

3. The current debate on tax is also about the morality of setting up in a low-tax EU jurisdiction. The Court of Justice of the European Union (CoJEU) addressed this question in the Cadbury Schweppes decision, in which the CoJEU held that anti-avoidance provisions (in the specific case CFC provisions) cannot hinder the EU Fundamental Freedom of establishment, and that the profits of a subsidiary in another Member State with a lower rate of taxation can

only be taxed in the country of residence of the parent company if the subsidiary is wholly artificial, that is, where it does not have adequate substance in the jurisdiction of the subsidiary. In this regard it should be noted that a number of Member States, in particular the larger ones, do have effective CFC legislation enabling that Member State to tax the undistributed profits of subsidiaries with inadequate substance, and that all Member States will be obliged to have CFC legislation as from 1 January 2019.

4. Furthermore, it should be noted that while only EU and EEA member states are bound by CoJEU decisions, other countries may apply CFC legislation outside the aforementioned parameters. Generally, CFC provisions would not apply where the subsidiary carries on genuine business activities and/or is not artificial and has substance, but conditions will vary between countries. In addition, the OECD BEPS (Base Erosion and Profit Shifting) initiative brings additional and renewed focus across the globe on artificial entities without the necessary substance in the country of incorporation/residence to support the activities carried out by such entities.

5. Finally the issue of transparency which has been vaunted so much in the articles requires addressing. In this respect it is worth noting that:

a. Malta's public registry is open for scrutiny by anyone and indeed it is very likely that the spreadsheet listing Maltese companies (referred to in the media) was

compiled using data directly obtained from the Registry of Companies.

b. Malta does not have offshore companies – offshore legislation was repealed in 1994.

c. All companies have to publish audited financial statements and certain information quoted in the articles came from publicly available information taken from these audited financial statements.

d. Our tax system is fully transparent, based on statutory rules and not on administrative discretion.

e. Under Phase II of the OECD's Peer Reviews Malta has been classified as Largely Compliant (similar to the UK, Germany, Netherlands and Italy) in matters of transparency and exchange of tax information.

The above constitute the most salient facts negating the sensationalistic articles which have appeared in the press recently.

We at KPMG in Malta have fully adopted KPMG's Global Tax Principles as we advise and assist our clients with respect to their tax affairs (follow this link to view these principles: <https://responsibletax.kpmg.com/global-tax-principles>).

Should you wish to discuss these matters further please do not hesitate to contact us on tax@kpmg.com.mt or your usual contact person at KPMG.



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