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Taxation of Cross-Border Mergers and Acquisitions

Malta

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Malta

Introduction

Malta is seeking to strengthen its status as a jurisdiction of choice for both the financial services and high-tech manufacturing sectors, which, together with tourism, form the bedrock of the Maltese economy. The Maltese legislature has thus undertaken a number of initiatives to simplify the legal and tax framework for cross-border mergers and acquisitions (M&A) involving Maltese entities. To this end, Malta has fully implemented the European Union (EU) Merger Directive, which provides possibilities for tax-neutral company reorganizations in addition to those that were already available under Maltese domestic law.

In recent years, Malta has emerged as a jurisdiction of choice for multinationals seeking a cost-effective, tax-efficient jurisdiction within the EU. This is due to a number of factors, including Malta's:

- legal, regulatory and fiscal framework
- use of English as the business language
- qualified workforce including legal, tax and financial services professionals
- relatively low operating costs.

Under Maltese law, M&A can be achieved in various ways, such as purchase of assets, purchase of shares, purchase of going concern or exchange of shares. Further, the Maltese Companies Act provides that two or more companies may be amalgamated through a merger by acquisition or a merger by formation of a new company.

This chapter provides a general overview of tax and other issues relating to cross-border M&A in Malta and clarifies the frameworks within which the different operations may take place. In particular, the following aspects are addressed:

- implications of acquiring either the target's shares or its assets
- choice of acquisition vehicle
- funding of the acquisition.

Recent developments

Domestic M&A activity has remained stable, driven mainly by the consolidation of smaller firms into larger economic entities to reduce fragmentation and by strategic acquisitions by the larger corporates to generate synergies. This activity has also seen foreign corporations either acquiring the majority stakes in previously wholly domestically owned businesses or taking stakes in joint ventures with domestic investors.

Internationally, there has been significant interest from foreign companies seeking to set up a European business base in Malta by either establishing a Maltese company that would then acquire another European company or group or by a cross-border merger. Indeed, Malta has experienced an increasing level of international M&A activity through either:

- establishment in Malta of foreign-owned holding companies used as vehicles for the acquisition of businesses in other jurisdictions
- acquisition of a Maltese holding company that itself owns business interests in one or more other jurisdictions.

Asset purchase or share purchase

Asset and share purchases have different tax consequences for the seller and purchaser. In a share deal involving a company that does not own non-business Maltese real estate, a seller who is not resident in Malta has no exposure to tax on capital gains. On the other hand, an asset deal involving a Maltese business owned by a company resident and domiciled in Malta normally exposes the company to tax on capital gains from the transfer of the business and the recapture of previously claimed tax depreciation. An asset deal generally presents advantages for the purchaser as the tax depreciation is calculated on the amounts at which assets are acquired, avoiding the need to undertake extensive due diligence regarding the assets, liabilities and obligations inherent in acquiring a company.

Purchase of assets

Implications for the seller

A transfer of a business or business assets normally is subject to capital gains tax at the rate of 35 percent. However, the effective tax suffered in Malta may be reduced to 5 percent under Malta's full imputation and tax refund system on profit distributions. Where the seller is a company resident in Malta (by virtue of central management and control) but not domiciled (incorporated) in Malta and the transfer comprises capital assets (business/shares and other assets) not situated in Malta, no exposure to Maltese tax arises – such a resident non-domiciled company is only taxable on its Maltese source income/capital gains and on foreign-source income that is actually received in Malta.

The Income Tax Act (ITA) provides for an exemption from such tax where assets are transferred between companies that are deemed to be a 'group of companies' for ITA purposes. A group of company is defined to include companies that are controlled and beneficially owned directly or indirectly more than 50 percent by the same shareholders. This is further qualified in the case of intragroup transfers of immovable property situated in Malta or securities in a property company (essentially defined as a company that owns immovable property in Malta, directly or indirectly, through its shareholdings in other bodies of persons). In this case, the ultimate beneficial shareholders of the transferor and the transferee companies must be substantially the same, with only a 20 percent variance in each individual's shareholding in the two companies ('immovable property group exemption'). Where the applicable conditions are met, no loss or gain is deemed to have arisen from the transfer. The cost base of the assets does not increase for tax purposes, but the tax on the capital gain is deferred until a subsequent transfer outside the group.

As Malta has fully implemented the EU Merger Directive (90/434/EEC), qualifying cross-border mergers that do not meet the conditions for these exemptions could be achieved tax-neutrally under the Directive.

Value added tax

Goods and services that fall within the scope of Maltese valued added tax (VAT) are chargeable at the rate of 18 percent. However, the transfer by a person of assets of its economic activity is neither a supply of goods nor a supply of services and therefore falls outside the scope of Maltese VAT, provided all of the following conditions are met:

- The assets are transferred to a person duly registered under Article 10 of the VAT Act to whom the transferor transfers their economic activity or part of that economic activity that is capable of separate operation as a going concern.
- The assets transferred are to be used by the transferee in carrying on the same kind of activity, whether or not as part of an existing economic activity, as that carried on by the transferor.
- The transfer is recorded in the records of the transferor indicating the registration number of the transferee.

Where the transferee is not registered under article 10, the above provision may still apply provided it is proved to the Commissioner for VAT that the transferor did not qualify for a credit of the input tax attributable to the acquisition and the accumulation of the assets being transferred.

Implications for the purchaser

Purchase price

In principle, the purchase of assets may increase the cost base for the buyer while a gain from the sale is taxable for the seller. However, Maltese tax law only imposes a tax on transfers of certain prescribed capital assets. For tax purposes, it is necessary to apportion the total consideration among the assets acquired. Where the purchase agreement specifically stipulates the purchase price for each asset acquired, the allocation generally is accepted for tax purposes. Although Malta does not have any transfer pricing legislation, the amounts stipulated in the purchase agreement should approximate fair value. An acquisition of assets must be accounted for in accordance with International Financial Reporting Standards (IFRS) 3, which requires the purchase price to be allocated to the identifiable assets acquired on the basis of their fair value. Where the purchase agreement does not specifically allocate the purchase price to the various assets acquired, the IFRS accounting values are generally recognized for tax purposes.

Goodwill

Goodwill is the amount by which the total purchase price exceeds the value of identifiable tangible and intangible assets. Goodwill is not deductible for tax purposes.

Tax depreciation

Tangible assets, plant and machinery (including computers and software), and industrial buildings and structures can be depreciated for tax purposes. Tax depreciation for plant and machinery is calculated on the straight-line method over the minimum number of years. Tax depreciation for industrial buildings or structures (excluding land) comprise an initial allowance of 10 percent plus a straight rate not exceeding 2 percent per year. Where the acquiring and selling company are related (50 percent shareholding or both owned and controlled 50 percent by same shareholder), the wear and tear deductions for the acquiring company are computed on the lesser of:

- the written-down value of the asset for the seller
- the purchaser's acquisition cost.

On disposal of a depreciable asset, further tax depreciation or recapture of tax depreciation previously claimed may result, depending on whether the disposal proceeds are less or more than the tax base cost.

Step-up in base cost on cross-border merger

On a cross-border merger, a Maltese surviving company may elect an acquisition cost of fair market value at the time of acquisition in cases where the assets were previously situated outside Malta and owned by a merging company that was not domiciled and/or resident in Malta before the merger. This stepped-up value is the tax base value for all tax purposes in Malta, including tax depreciation/amortization and eventual sale. The election must be made in the year following the year in which the merger occurs.

Tax attributes

Where a transfer of assets takes place pursuant to a merger/division under the terms of the Companies Act, the acquiring company succeeds to all the assets, rights, liabilities and obligations of the companies being acquired, including any domestic unutilized tax depreciation and tax losses. In all other acquisitions and share exchange transactions, unutilized tax depreciation and tax losses cannot be transferred between different legal entities.

Value added tax

If VAT has been charged by the seller, the purchaser may or may not be able to recover the VAT, depending on the nature of the purchaser's business.

Duty on documents and transfers

Where the merger involves the transfer of immovable property or shares in companies having 75 percent or more of the value of fixed assets being Maltese immovable property, a duty of 5 percent is normally payable unless the immovable property group exemption applies. Further, where the merger involves the transfer of shares, a duty of 2 percent may be payable unless one of the numerous exemptions apply. The duty is payable on the higher of the consideration or market value. In practice and in accordance with the Civil Code, the duty is normally paid by the purchaser. However, the relevant law provides that the seller and the purchaser are jointly and severally liable for the payment of the duty.

Main advantages for purchaser

An advantage of an asset purchase over a share purchase is that the tax cost base of depreciable assets may increase and new intangible assets (e.g. intellectual property rights internally generated by the target) may be created on which the acquiring company may claim tax deductions. Where a purchase of assets is financed by debt, the interest expense is incurred by and deductible for the operating company, thus ensuring that it is immediately utilized against operating profits.

Purchase of shares

Implications for the seller

Generally, a seller is subject to tax on the chargeable gain on the transfer of shares at the rate of 35 percent unless:

- the group exemption or immovable property group exemption applies
- the transfer is an exchange of shares with no change in ultimate beneficial shareholders or their respective holdings
- the seller is not resident in Malta and is not owned or controlled by individuals ordinarily resident and domiciled in Malta, and the target company does not own, directly or indirectly, non-business Maltese immovable property
- the participation exemption applies; generally, this applied to holdings of 10 percent or more in resident and non-resident companies that do not own, directly or indirectly, non-business Maltese immovable property
- the seller is not domiciled in Malta and the shares disposed of are in a company not resident or domiciled in Malta.

Implications for the purchaser

On a share deal, the tax base cost of the assets of the target company remain unchanged. The purchaser can apply a step-up the base cost to market value if the tax residence of the target company is transferred to Malta or if the target company is re-domiciled to Malta.

Payment for indemnities and warranties

Subject to the contents of the sale-purchase agreement, an amount received or payment pursuant to warranty provisions is normally regarded as capital in nature and constitutes an adjustment to the agreed purchase price.

Unutilized tax depreciation and tax losses

Unutilized tax depreciation and tax losses are generally inherited by the acquiring company. However, where the shares in a company are acquired solely or mainly for the purpose of acquiring a tax advantage, utilized tax depreciation and tax losses may be lost.

Crystallization of tax charges – de-grouping provisions

Where the target company acquires an asset from a group company in terms of an immovable property group exemption within 6 years of the acquisition of the target and the acquisition causes the target to cease being part of the original group, the previously exempt gain crystallizes in the hands of the target company. Provision for this liability should be taken into account in establishing the transfer price. Alternatively, the liability may be transferred to a company of the seller by joint election, subject to certain conditions.

Pre-sale dividend

Given Malta's imputation and tax refund system, in the vast majority of cases, it is normally beneficial for the seller to realize part of its value in the target by paying dividends or simply declaring them, which creates a liability for the target. The payment normally results in no further tax.

The seller may also be entitled to claim tax refunds (normally, 6/7 of the 35 percent Malta tax charge) from the Maltese tax authorities and the sales proceeds may be correspondingly reduced.

Duty on documents and transfers

Unless the immovable property group exemption applies, duty at the rate of 5 percent is due where Maltese immovable property accounts for 75 percent or more of the fixed asset value of the target company or group. In other cases, a duty of 2 percent is due on the transfer of shares; however, the law provides for a number of exemptions that typically exempt most international M&A activity from this 2 percent duty.

Choice of acquisition vehicle

Several potential acquisition vehicles are available for achieving a merger or acquisition. The tax implications ultimately influence the choice of vehicle. There is no capital duty on introducing capital into a Maltese company or branch or a Maltese-registered *societa Europea*.

Local holding company

A Maltese holding company is taxed as an ordinary company at the standard corporate tax rate of 35 percent. However, under Malta's imputation tax system, no tax is suffered on dividends received from resident companies. Moreover, on the receipt of dividends from other resident companies, the holding company may claim tax refunds, which generally reduce the Maltese tax to between 0 and 6.25 percent. These tax refunds may also arise as a consequence of debt financing since the interest expense is deductible against dividends received, thus releasing all or part of the underlying tax on the dividends as a tax refund.

Where certain conditions are met (i.e. 10 percent holding), a participation exemption should apply to any income derived from non-resident companies and to gains arising from the disposal of shares in resident and non-resident companies.

Where Malta is chosen as the domicile of an acquisition vehicle that will acquire non-resident companies, it is beneficial to use a company not domiciled/incorporated in Malta but resident in Malta by virtue of the exercise of central management and control (effective management) in Malta. Such a company is only subject to Maltese tax on Maltese source income and gains and on foreign income actually received in Malta; the company is not taxed on foreign source capital gains even if received in Malta. Such a company may thus benefit from Malta's network of tax treaties.

Malta does not levy any withholding taxes (WHT) on dividends, interest and royalties.

Foreign parent company

The use of a foreign parent company as the acquisition vehicle does not create any advantages or disadvantages from a Maltese tax perspective. The foreign parent is entitled to any dividends, interest or royalties without any Maltese withholding tax. The parent is also entitled to tax refunds paid by operating distributing companies in same way as a Maltese holding company, thus reducing the Maltese tax liability to between 0 and 6.25 percent. However, the receipt of dividends and tax refunds by the foreign parent may expose it to tax on the dividend and/or tax refund in its country of residence.

Non-resident intermediate holding company

See this chapter's information on foreign parent companies.

Local branch

Where the acquisition of the target's business is undertaken by a branch of a foreign company, as the foreign company is a person not resident or domiciled in Malta, it is subject to tax only on Malta source income and capital gains. Malta source income includes profits derived from any trade/business that is carried out from Malta. Any foreign-source income and gains derived would not be taxed in Malta even if the

proceeds are received in Malta. Non-trading income, such as dividends received from companies not resident in Malta, is regarded as foreign income accruing to a person not domiciled and not resident in Malta, so it is outside the scope of Maltese taxation. Such non-trading income is not normally attributable to the trading activity of the Maltese branch.

The profits (determined in the normal way) of the Maltese branch are taxed at 35 percent in the same way as a company resident in Malta is taxed. On a distribution of such profits by the foreign company of which the Maltese branch forms part, the shareholders of the foreign company are entitled to claim the applicable tax refunds from the Maltese tax authorities, which reduces the tax burden to between 0 and 6.25 percent. Further, Malta does not impose any withholding tax on branch profits.

Joint venture

Joint ventures do not have a specific legal form under Maltese law and can be conducted through partnerships, limited liability companies or contractually. Where a legal form is not established or a partnership (other than a limited partnership with share capital, which is regarded as a company for tax purposes) is established, the partners are generally assessed on their share of the profit of the joint venture. However, the use of partnerships in Malta as the medium to carry out an activity may not always be beneficial since the tax refunds that reduce the Maltese tax burden to between 0 and 6.25 percent may not always be available.

Choice of acquisition funding

It is possible to fund the acquisition with debt, equity or hybrid debt, such as profit participating loans, which are regarded as pure debt for Maltese tax purposes. The advantage of debt over equity is the potential tax-deductibility of interest expense when compared to non-deductible dividends.

Debt

As mentioned, the advantage of funding the acquisition with debt is that the ITA provides a tax deduction where interest is payable on capital employed in acquiring income. In addition, Malta does not levy any withholding tax on interest and does not have any thin capitalization rules. By contrast, dividends are not deductible for tax purposes in Malta.

Deductibility of interest

Maltese tax law provides for the deductibility of interest incurred on money borrowed, provided that the interest is payable on capital employed in acquiring income.

This deduction rule has the following implications for the purchaser:

- In an asset purchase deal partly or wholly financed by debt, the acquisition vehicle acquires the business or business assets and becomes the operating entity, in which case the interest expense is deductible against income derived from the business or business assets.
- In a share purchase deal partly or wholly financed by debt, the acquisition vehicle acquires shares in a Maltese operating company or companies. Whichever acquisition vehicle is used, the relative interest expense is not deductible against the profits of the Maltese operating companies but is tax-deductible against dividends received by the acquisition vehicle from the operating companies. As a result of this deduction, the Maltese underlying tax attaching to the dividends received is wholly (where the interest expense is equal to or exceeds the dividend received) or partially refunded. Any interest expense in excess of dividends received does not constitute a tax and is lost. For these reasons, it is normally beneficial to merge the acquisition vehicle with the operating company or companies so the operating companies can deduct the interest expense. Note also that, as a result of the tax refund system, the Maltese tax suffered on distributed profits after the deduction of interest expense would range between 0 and 6.25 percent.

Malta does not have any thin capitalization rules, so there is no limit on the amount of debt financing. Further, Malta does not have transfer pricing rules, although a general anti-avoidance provision may apply in limited circumstances.

Withholding tax on debt and methods to reduce or eliminate it

Under Maltese tax legislation, interest paid to a non-resident is not subject to tax (by withholding or otherwise), provided that the debt claim in respect of which the interest is paid is not effectively connected with a permanent establishment of the non-resident in Malta.

Checklist for debt funding

- Malta has no thin capitalization or transfer pricing rules.
- Interest on debt is tax-deductible against income derived from the capital borrowed.

Equity

A purchaser may use equity to fund its acquisition with no limitation. This includes the ability for the acquiring entity to issue shares to the seller in full or partial satisfaction of the consideration. Further shares may be issued post-acquisition.

Malta does not levy any stamp duty or other type of capital tax on the issue of shares. Malta does not levy any withholding taxes on the payment of dividends to non-residents. Dividends are not deductible for tax purposes.

Shares may be issued at their nominal value or at a premium, which company law treats as statutory share capital. Subject to certain conditions, the acquisition of a target in consideration for the issue of shares may be exempt from the requirement to account for the inherent share premium in a share premium account.

Tax–free reorganizations

As mentioned earlier in this chapter, various exemptions exist at Maltese law that enable various reorganizations to be achieved in a tax-neutral manner.

Hybrids

A profit-participating loan or a loan with any other mixture of the characteristics of both debt and equity could be used to finance the acquisition of a Maltese entity. From a Maltese viewpoint, such arrangements are treated as loans, so the interest is deductible in Malta.

Discounted securities

The discount or premium payable on the issue of securities is normally treated as a tax-deductible interest cost of finance akin to interest. The amount of the interest is computed using the amortized cost method in compliance with International Accounting Standards (IAS) 39, using the effective interest rate method.

Deferred settlement

Where acquisitions involve elements of deferred consideration (i.e. the amount of consideration depends on the business' post-acquisition performance), such unknown future consideration is regarded as part of the sale price and, if taxable, it is normally only taxable on receipt. Where the sale price relates to shares disposed of, the deferred settlement may be eligible for the participation exemption in the same way as the remainder of the consideration.

Other considerations

Concerns of the seller

In structuring any transaction, the buyer and seller have competing demands, especially where a Maltese situs business is the subject of the sale. The purchaser normally prefers an asset purchase deal. The seller normally prefers a share purchase deal in light of the various exemptions/ mitigations available, which include:

- non-residents exemption
- resident non-domiciled exemption
- participation exemption
- pre-sale dividend.

Usually, other tax-efficient structuring is also possible, depending on the circumstances.

Company law and accounting

The Companies Act 1995 regulates the formation, liquidation, amalgamation, division and conversion of companies. In terms of the Companies Act:

- An amalgamation or merger is the process whereby a company (the acquiring company) acquires all the assets, liabilities, rights and obligations of another company (the company being acquired) in consideration for the issue by the acquiring company of shares to the shareholders of the company being acquired plus a cash payment not exceeding 10 percent of the nominal value of the shares issued. The acquiring company may either be an existing company or a new company incorporated as part of the merger process. The company or companies so acquired then cease to exist by operation of law without having to be wound up.

- A division of a company is achieved by a company (the company being divided) delivering its assets, liabilities, rights and obligations to one or more companies (the recipient companies, which can be existing or incorporated on achieving the division) in exchange for the issue of shares by the recipient companies to the shareholders of the company being divided, which ceases to exist by operation of law plus a cash payment of 10 percent of the nominal value of the shares issued.
- A company may also be converted into a partnership, which may be a general partnership, a limited partnership or a limited partnership the capital of which is divided into shares.
- Any foreign company may be re-domiciled (continued) into Malta as a company incorporated in Malta and any Maltese company may be re-domiciled out of Malta to a foreign jurisdiction that has legislation allowing the continuation of companies in and out of that jurisdiction.
- Through the application of the implemented EU company law Merger Directive, mergers and division of companies as mentioned may also be carried out cross-border with companies incorporated in other EU Member States. The general rule is that the company law procedure that is usually followed in a cross-border merger is the company law of the country in which the resultant company or companies (acquiring company or recipient companies) will remain.

Among other things, the procedure to effect a merger or a division involves preparing the draft terms of merger and division, which must be filed with the Registrar of Companies for registration and approved by a shareholders' extraordinary resolution (of each of the companies involved in the merger or division) within one month of the registration. The companies may be required to redeem the shares of any dissenting shareholders.

Company law in Malta requires the application of IFRS as adopted by the EU in the preparation of financial statements. EU-endorsed IFRS may differ from IFRS as published by the International Accounting Standards Board (IASB) if, at any point in time, new or amended IFRS has not been endorsed by the EU. The accounting guidance provided by IFRS on M&A has undergone significant amendment since 2004. The Endorsement Status Report is updated frequently and can be found at: http://www.efrag.org/Front/c1-306/Endorsement-Status-Report_EN.aspx.

Following revisions to IFRS issued in January 2008, the definition of a business combination, which formerly referred to the bringing together of separate entities or businesses into one reporting entity, was narrowed. The new definition refers only to a transaction or other event in which an acquirer obtains control of one or more businesses. In other words, the definition of business combinations has been narrowed to include only acquisitions. Mergers are transactions in which the shareholders come together in a partnership for the mutual sharing of the risks and rewards of the combined entity and in which no party to the transaction in substance obtains control over any other, hence obviating the requirements of the standard dealing with business combinations.

IFRS does not allow merger accounting or the pooling of interests method as an alternative to acquisition accounting or the purchase method. Following the abolition of the pooling of interests method, IFRS has provided additional guidance on the identification of the acquirer in a business combination (or acquisition), restricting such guidance to accounting for acquisitions. The acquisition method always views a combination from the perspective of the acquirer, where the identifiable assets acquired and liabilities assumed are measured at their acquisition date fair values. The acquirer is required to recognize goodwill acquired in the business combination as an asset and initially measure that goodwill at its cost, being the excess of the cost of the business combination over the acquirer's interest in the net fair value of the identifiable assets, liabilities and contingent liabilities recognized. After initial recognition, the acquirer is required to measure goodwill acquired in a business combination at cost less any accumulated impairment losses. The acquirer does not amortize this goodwill but tests it annually for impairment.

IFRS is silent on the accounting for the combination of entities or businesses under common control of corporate entities or individuals. Such arrangements include mergers as defined earlier in this chapter. When encountering similar transactions, IFRS requires management to use its judgment in developing an accounting policy that is relevant and reliable. In exercising its judgment, management may consider the most recent pronouncements of other standard-setting bodies that use a similar conceptual framework. In practice, entities apply either the book value (carry-over) basis accounting method or the purchase method in accounting for business combinations involving entities under common control.

IFRS is also silent on the accounting for the formation of a jointly controlled entity. In practice, jointly controlled entities apply the principles of accounting for business combinations by analogy in measuring the fair values of the contributed assets, including the requirements for recognition and fair value measurement of contributed contingent liabilities.

The Companies Act also requires the preparation of consolidated financial statements, although a number of exemptions are available where certain conditions are met. These exemptions include:

- the small group exemption, provided certain thresholds relative to turnover, total assets and employees are not exceeded
- the financial holding company exemption, provided the Maltese holding company does not interfere in the management of subsidiary undertakings
- the exemption available when consolidated financial statements of a parent of the Maltese holding company are filed with the registrar.

Group relief/consolidation

Maltese tax legislation does not provide for full tax-consolidation. Nevertheless, group relief may be claimed provided that certain conditions are met:

- The surrendering and claimant company must fall within the scope of the ITA's group relief provisions. Thus, both companies must be resident for tax purposes in Malta and not resident in any other country. Further, the companies are deemed to be members of the group if one is the majority shareholder of the other or both are subsidiaries of a third company resident in Malta that is the majority shareholder. The term 'majority shareholder' refers to a situation where the parent company owns, directly or indirectly, more than 50 percent of a) the ordinary share capital and voting rights of the subsidiary; b) any profits of the subsidiary available for distribution; and (c) any assets of the subsidiary available for distribution on a wind-up.
- Both companies must be members of the same group, as defined above, throughout the year preceding the year of assessment for which the relief is claimed.
- In the year in which the surrendering company incurs an allowable trading tax loss, both companies must have accounting periods that begin and end on the same dates (other than for newly incorporated companies and companies that are wound up).
- A claim for group relief must be made by means of a certificate signed by both companies and furnished to the Maltese tax authorities within 12 months following the end of the company's accounting period.

Transfer pricing

Malta does not impose specific transfer pricing rules.

Dual residency

A company incorporated in another country and deemed to be tax resident therein as a result may also be tax resident in Malta by reason of its effective management being exercised in Malta. Under Malta's tax treaties, such a company is treated as resident in Malta if its place of effective management is in Malta. As noted, such a company is tax resident in Malta but not domiciled in Malta and is subject to Malta tax on Malta source income and gains and on foreign income received in Malta. Any foreign source capital gains are not subject to Malta tax even if received in Malta.

Foreign investments of a local target company

Malta does not have any controlled foreign company legislation.

Comparison of asset and share purchases

Advantages of asset purchases

- An unrelated purchaser can claim tax depreciation and other tax deductions based on the cost at which the assets were acquired. Such assets may include intangible assets generated by the seller that would not be recorded on the books of the target.
- An asset purchase is ideal when only part of a business is to be acquired or when non-core business and assets are not to be acquired, thus avoiding a split of the target prior to a share purchase deal.
- In an asset purchase deal, the purchaser does not acquire the target along with its liabilities and obligations, some of which could be unknown or contingent.
- Interest incurred to finance an asset purchase is deductible against the operating income generated from the business/assets acquired, thus avoiding the need for debt pushdown planning at a later stage.
- A step-up in the cost-base of assets for tax purposes is obtained.

Disadvantages of asset purchases

- Possible need to renegotiate supply, employment and technology agreements.
- A higher capital outlay is usually involved (unless debts of the business are also assumed).
- Unutilized tax losses and depreciation are not taken over.
- Where an asset purchase deal results in higher tax for the seller, the purchase price may be higher.
- Purchaser may need to reapply for licenses.
- Higher transfer duties may apply, especially where real estate is involved.

Advantages of share purchases

- Possibility of participation exemption and capital gains exemption for non-resident seller, so probably more attractive for the seller even from a commercial perspective.
- Possibility of exemption from transfer/document duty.
- Usually involves a lower capital outlay (purchase of net assets only).
- Purchaser normally benefits from unutilized tax depreciation and tax losses.
- Contractual continuity since there is only a shareholding change in the target; avoids need to renegotiate contracts.

Disadvantages of share purchases

- Buyer effectively becomes liable for any claims or previous liabilities of the entity (including tax).
- Buyer misses out on potentially higher depreciable asset values in an asset purchase deal.
- If debt-financed, interest expense is not immediately deductible against operating profits of target but only against dividends with the right of refund of the underlying tax, creating a cash flow disadvantage and thus a need for debt pushdown strategies (e.g. merger of target with acquisition company).
- Where an exemption from transfer and document duty is not available, additional duty on the value of the shares may be incurred.

Malta – Withholding tax rates

This table sets out reduced WHT rates that may be available for various types of payments to non-residents under Malta's tax treaties. This table is based on information available up to 1 February 2014. Note that a new treaty with Israel took effect as of January 2014.

Source: International Bureau of Fiscal Documentation, 2014

	Dividends		Interest[1] (%)	Royalties (%)
	Individuals, companies (%)	Qualifying companies (%)		
Domestic rates				
Companies:	0	0	0	0
Individuals:	0	N/A	0	0
Treaty rates				
Treaty with:				
Albania	0	0	5	5
Australia	0	0	15	10
Austria	0	0	5	0/10[2]
Bahrain	0	0	0	0
Barbados	0	0	15	0/5[3]
Belgium	0	0	0/10[4]	0/10[3]
Bulgaria	0	0	0	10
Canada	0	0	15	10
China (People's Rep.)	0	0	10	10[5]
Croatia	0	0	0	0
Cyprus	0	0	10	10
Czech Republic	0	0	0	5
Denmark	0	0	0	0
Egypt	0	0	10	12
Estonia	0	0	10	10
Finland	0	0	0	0
France	0	0	5	0/10[3]
Georgia	0	0	0	0
Germany	0	0	0	0
Greece	0	0	8	8
Guernsey	0	0	0	0

	Dividends		Interest[1] (%)	Royalties (%)
	Individuals, companies (%)	Qualifying companies (%)		
Hong Kong	0	0	0	3
Hungary	0	0	10	10
Iceland	0	0	0	5
India[6]	0	0	10	15
Ireland	0	0	0	5
Isle of Man	0	0	0	0
Israel	0	0	0/5[7]	0
Italy	0	0	0/10[8]	0/10[3]
Jersey	0	0	0	0
Jordan	0	0	10	10
Korea (Rep.)	0	0	10	0
Kuwait	0	0	0	10
Latvia	0	0	10	10
Lebanon	0	0	0	5
Libya	0	0	5	5
Lithuania	0	0	10	10
Luxembourg	0	0	0	10
Malaysia	0	0	15	15
Montenegro	0	0	10	5/10[3]
Morocco	0	0	10	10
Netherlands	0	0	10	0/10[2]
Norway	0	0	10	0/10[3]
New Treaty	0	0	0	0
Pakistan	0	0	10	0/10[3]
Poland	0	0	5	5
Portugal	0	0	10	10
Qatar	0	0	0	5

	Dividends		Interest[1] (%)	Royalties (%)
	Individuals, companies (%)	Qualifying companies (%)		
Romania	0	0	5	5
San Marino	0	0	0	0
Saudi Arabia	0	0	0	5/7[9]
Serbia	0	0	10	5/10
Singapore	0	0	7/10[10]	10
Slovak Republic	0	0	0	5
Slovenia	0	0	5	5
South Africa	0	0	0/10[7]	10
Spain	0	0	0	0
Sweden	0	0	0	0
Switzerland	0	0	10	0
Syria	0	0	10	18
Tunisia	0	0	12	12
Turkey	0	0	10	10
United Arab Emirates	0	0	0	0
United Kingdom	0	0	10	10
United States	0	0	10[11]	10
Uruguay	0	0	10	5[12]

Notes:

1. Many treaties provide for an exemption for certain types of interest, e.g. interest paid to the state, local authorities, other public bodies, the central bank, export credit institutions or in relation to sales on credit, interest payable on loans granted or guaranteed by the State. Such exemptions are not considered in this column.
2. The zero rate applies to copyright royalties, excluding films.
3. The zero rate applies to copyright royalties, including films.
4. The zero rate applies to interest received on commercial debt claims.
5. The rate applies to 70 percent of the gross amount of royalties for the use of, or the right to use, industrial, commercial or scientific equipment.
6. Effective from 1 January 2014 (for Malta) and 1 April 2014 (for India).
7. The zero rate applies, inter alia, to (certain) debt instruments.
8. The lower rate applies, inter alia, to interest paid by public bodies.
9. The lower rate applies to the royalties which are paid for the use of, or the right to use, industrial, commercial or scientific equipment.
10. The lower rate applies if the interest is received by a bank.
11. Domestic rate may apply to interest that is an excess inclusion with respect to a residual interest in a real estate mortgage investment conduit.
12. The lower rate applies to royalties for the use of, or the right to use, any industrial, commercial or scientific equipment, and copyright of literary, artistic or scientific work.

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