COUNTRY COMPARATIVE GUIDES 2024

The Legal 500 Country Comparative Guides

Malta

PRIVATE CLIENT

Contributor

Fenech & Fenech Advocates

Dr Rosanne Bonnici

Partner | rosanne.bonnici@fenechlaw.com

Dr Rebecca Diacono

Senior Associate | rebecca.diacono@fenechlaw.com

This country-specific Q&A provides an overview of private client laws and regulations applicable in Malta.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

MALTA
PRIVATE CLIENT

1. Which factors bring an individual within the scope of tax on income and capital gains?

The Income Tax Act (the "**ITA"**) brings to charge income tax and capital gains, the latter with reference to a limited number of chargeable assets (these include immovable property, securities, interests in partnerships, intellectual property and beneficial interests in trusts; assets such as art, jewellery, antiques, fall outside scope).

Individuals fall within the scope of tax on income and capital gains (a) on a worldwide basis, should the individual concerned be ordinarily resident and domiciled in Malta for tax purposes, or (b) on a remittance basis, if either ordinarily resident or domiciled in Malta for tax purposes, or (c) on a territorial basis, solely with reference to income or capital gains arising in Malta, if the individual concerned is neither resident nor domiciled in Malta for tax purposes, all subject to any applicable double tax treaty. The nationality of an individual is not a connecting factor for tax purposes in Malta.

The ITA applies British derived concepts of "residence", "domicile" and "ordinary residence". In terms of the ITA, an individual may become tax resident in Malta in one of two ways:

- by spending 183 days or more in Malta over a 12-month period; or
- by moving to Malta to establish his residence here, basing himself in Malta and only spending as much time away for business or leisure purposes as would be in line with a claim that one is residing in Malta, in which case he shall become tax resident in Malta from the date of his arrival.

An individual who lives in Malta on a permanent or indefinite basis is ordinarily resident in Malta. A person who is in Malta for a temporary purpose may also become ordinarily resident in certain circumstances, typically following repeated stays in Malta over a number of years – the below referred guideline refers to a period of 3 years.

The concept of 'domicile' is not defined in the ITA. In the absence of detailed guidance and very limited case-law on the matter, the Revenue and practitioners have traditionally referred to UK law and caselaw as a source. An individual obtains a 'domicile of origin' upon birth, which usually follows the domicile of that individual's father. An individual may, however, acquire a domicile of choice, which would supersede the domicile of origin. Whilst the concept of 'domicile' is not defined in the ITA, more recently the Revenue has considered same in the *Remittance Basis of Taxation for Individuals* guideline. This guideline *inter alia* states that "*Individuals who are in Malta and consider Malta as their permanent home are domiciled in Malta. "Home" here refers to the place where a person belongs and implies stronger ties with a country than residence".*

Individuals who are ordinarily resident and domiciled in Malta are subject to tax on a 'worldwide basis', i.e. on their world-wide income and capital gains. Meanwhile, individuals who are either ordinarily resident or domiciled in Malta for tax purposes (so called "res non-doms") are taxable on a source and remittance basis of taxation, being subject to tax on:

- income arising in Malta;
- capital gains arising in Malta; and
- foreign sourced income, but only to the extent that it is remitted to Malta;

Accordingly, individuals who are either ordinarily resident or domiciled in Malta for tax purposes are not subject to tax on foreign sourced capital gains, even if same are remitted to Malta.

In terms of law, however, an individual:

- whose spouse is ordinarily resident and domiciled in Malta for tax purposes; or
- who is a long-term resident, or holds a permanent residence certificate or a

permanent residence card in terms of the *Status of Long-Term Residents (Third Country Nationals) Regulations* or the *Free Movement of European Nationals and their Family Members Order*;

is taxable on a worldwide basis, not on a remittance basis.

2. What are the taxes and rates of tax to which an individual is subject in respect of income and capital gains and, in relation to those taxes, when does the tax year start and end, and when must tax returns be submitted and tax paid?

Malta operates a self-assessment system of taxation. Income tax is generally computed and charged on the total income subject to tax in Malta for each fiscal year. Individuals who are tax resident in Malta are subject to tax at progressive rates of tax, with the maximum tax rate being 35%. There are three sets of tax rates which one may choose to apply (subject statutory conditions), namely the 'single', 'married' and 'parent' tax rates.

Individuals who are resident but not domiciled in Malta for tax purposes are subject to a minimum annual tax charge of €5,000, if in receipt of at least €35,000 worth of foreign-sourced income in the basis year concerned, irrespective of whether said foreign source income has been remitted to Malta or not.

The tax year for individuals is the calendar year (i.e. 1st January to 31st December). Should an individual be required to submit a tax return, the deadline to do so is the 30th of June of the following year.

Tax payable on certain sources of income is / may be deducted at source e.g. employment income, certain investment income. An individual in receipt of only such sources of income is typically not required to submit a personal tax return.

In addition, an individual may also opt to pay tax, e.g. on gross rental income, at a fixed rate of tax, currently 15%, subject to submission of the prescribed form; in this case, the tax settlement and reporting deadline is presently set at 30th April of the following year.

An individual may also be required to pay provisional tax on account of the current tax year's liability, e.g. if in self employment, or with respect to transactions falling within scope of capital gains tax. In such instances, the income or gain concerned is to be computed in line with the law and reported in a personal tax return the following year, with any underpaid or overpaid tax thereon taken into account at that stage.

3. Are withholding taxes relevant to individuals and, if so, how, in what circumstances and at what rates do they apply?

There are limited instances in which tax is withheld at source in terms of the ITA. These include a property transfer tax, which applies to certain transfers of immovable property situated in Malta and certain rights relating to same; in other instances, tax may be withheld at source by payors or certain financial intermediaries at the option of the taxpayer, e.g. with reference to interest paid on bank deposits and particular categories of investment income (as defined).

4. How does the jurisdiction approach the elimination of double taxation for individuals who would otherwise be taxed in the jurisdiction and in another jurisdiction?

Malta currently has some 80 double taxation agreements ("**DTTs**") in force. These DTTs are mostly based on the *OECD Model Tax Convention on Income and on Capital*; however, a handful of treaties, most notably the Malta-USA DTT, are based on the *United Nations Model Double Taxation Convention*.

The *Multilateral Convention (Implementing Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting)* (the "**MLI**") has been given effect in Malta and, accordingly Malta's DTTs, are now subject to the application of the MLI.

5. Is there a wealth tax and, if so, which factors bring an individual within the scope of that tax, at what rate or rates is it charged, and when must tax returns be submitted and tax paid?

There is no wealth tax currently in force in Malta.

6. Is tax charged on death or on gifts by individuals and, if so, which factors cause the tax to apply, when must a tax return be submitted, and at what rate, by whom and when must the tax be paid?

There is no gift tax or inheritance tax currently in force in Malta.

Transfers of particular chargeable assets may however trigger a charge to tax on capital gains (please see 1. and 7).

In addition, transfer duty is levied in terms of the Duty on Documents and Transfers Act ("**DDTA**"); the default rate is 2%, going up to 5% for property companies, partnership etc., in relation to transfers, made *inter vivos* or *causa mortis*, of a very limited list of assets, in certain cases only if the transfer document is made use of in Malta, if executed outside Malta. The assets falling within scope of the DDTA include immovable property and certain real rights thereon, marketable securities, partnership interests. In the latter case (i.e. transfers not involving immovable property). The DDTA caters for several exemptions, some with reference to specific transactions, others with reference to quantum of the value taxed. Transfer duty is typically levied on the document concerned, e.g. by the notary public, on publication of the deed of purchase.

Transfers to trusts and foundations of chargeable assets also fall within scope of the ITA and the DDTA; here again, certain transfers on settlement or endowment are exempt.

7. Are tax reliefs available on gifts (either during the donor's lifetime or on death) to a spouse, civil partner, or to any other relation, or of particular kinds of assets (eg business or agricultural assets), and how do any such reliefs apply?

Both the ITA and the DDTA cater for certain tax reliefs with reference to gifts made *inter vivos* or *causa mortis* to relatives or to certain entities.

Donations of chargeable assets (e.g. immovable property, securities) made to one's spouse, descendants and ascendants in the direct line and their respective spouses or, in the absence of descendants, to one's siblings and their descendants, are exempt from tax on capital gains. Donations to approved philanthropic institutions may also be exempt from tax on capital gains. As indicated above, assets such as cash, vehicles, jewellery, artwork, antiques and vessels, are not chargeable assets for the purposes of tax on capital gains.

Insofar as transfer duty is concerned, the DDTA caters for a number of exemptions and reduced rates of duty on transfers *causa mortis* of immovable property situated in Malta, including:

- A donee may benefit from a reduced rate of transfer duty on the donation of immovable property, with an exemption from transfer duty applying on the first €200,000 of the value of the property, subject to the donor being an ascendant in the direct line and provided the donee shall use such property as his/her sole ordinary residence. Transfer duty is levied with respect to the balance of the value of said immovable property at the time of transfer at the rate of 3.5% (down from 5%).
- The transfer *causa mortis* of a dwelling house which was the deceased's ordinary residence at the time of death to a surviving spouse, or by a parent to his/her descendants in the direct line, is exempt.
- Donations of marketable securities to one's spouse, descendants and ascendants in the direct line and their spouses or, in the absence of descendants, to one's siblings and their descendants, are subject to a reduced rate of 1.5% by way of transfer duty.

Where applicable, said reliefs are generally applied at source, in certain instances subject to the submission of prescribed forms.

8. Do the tax laws encourage gifts (either during the donor's lifetime or on death) to a charity, public foundation or similar entity, and how do the relevant tax rules apply?

Generally speaking, the ITA makes very limited provision for tax deductible donations to charities and organisations of a public and/or philanthropic character, with gifts to a limited number of philanthropic organisations being exempt from tax on capital gains. It is therefore fair to say that local tax laws do not encourage such donations in a material manner.

9. How is real property situated in the jurisdiction taxed, in particular where it is owned by an individual who has no connection with the jurisdiction other than ownership of property there?

There are no wealth or similar taxes currently in force in Malta. In addition, no municipal taxes or local council taxes are levied at present.

The only taxes that are levied directly with reference to real property in Malta are tax on capital gains in terms of the ITA, primarily in the form of a property transfer tax, and transfer duty with respect to transfers (as defined) in terms of the DDTA.

10. Does your jurisdiction have any specific rules in relation to the taxation of digital assets?

The Malta Tax & Customs Administration published three sets of Guidelines relative to the treatment of DLT Assets for the purposes of income tax (including capital gains tax), transfer duty and VAT. The Guidelines have adopted a principles-based approach, setting out the tax treatment of investments and transactions in DLT Assets with reference to general tax principles.

The Guidelines set out two categories of DLT Assets, namely "Coins" and "Tokens":

a. Coins: coins are those assets which are designed solely as a means of payment or medium of exchange, used in the same fashion as a fiat currency and therefore an alternative to legal tender (e.g., Bitcoin and Ethereum). Coins' utility, value and application are not related to the redemption of any goods and services and do not have any characteristic of a security or provide the holder an equity interest in the issuer or a role in a project.

b. Tokens: tokens are further subdivided into two categories: (i) Financial Tokens and (ii) Utility Tokens.

i. Financial Tokens (FT) – As the name denotes, FTs are those tokens which exhibit similar qualities to traditional financial instruments, such as securities, debentures, units in a collective investment scheme, derivatives and financial instruments, as defined in MiFID. Holders of FTs may have the right to receive a dividend from the issuer or to interest payments similar to bond holders, or to payments linked with the performance of the specific asset. An FT could also grant rewards on performance, voting rights, or represent ownership in the underlying assets. ii. Utility Tokens (UT) – This category refers to DLT Assets whose utility, value or application is restricted solely to the acquisition of goods or services either solely within the DLT platform on, or in relation to which they are issued or within a limited network of DLT platforms. Tokens not listed on a DLT Exchange, whose utility is restricted solely to the acquisition of goods or services and which may be transferred peer-to-peer would also qualify as UTs.

Coins are generally considered to be the equivalent of fiat currency for tax purposes. A person who buys and sells Coins in the course of a trade or business activity will be taxed on said trading or business profits in the normal manner. On the other hand, a person who, having bought some Coins and held same by way of investment, decides then to dispose of same is not taxable on the resulting capital gain as Coins are not a chargeable asset for capital gains tax purposes in terms of Maltese law.

Transactions in Coins fall outside the scope of transfer duty. Coins are also considered to be the equivalent of fiat currency / legal tender for VAT purposes and all relative exemptions apply also to transactions in Coins.

11. Are taxes other than those described above imposed on individuals and, if so, how do they apply?

Individuals may also be subject to the payment of social security contributions under the Social Security Act. Rates are currently capped at relatively low amounts.

12. Is there an advantageous tax regime for individuals who have recently arrived in or are only partially connected with the jurisdiction?

Individuals who are resident but not domiciled in Malta for tax purposes are subject to tax on a 'source and remittance basis of taxation', which regime is very attractive insofar as foreign sourced income (not capital gains) is only taxed to the extent that it is remitted to Malta (please see 1. above).

Malta also runs a number of attractive tax programmes for HNWI individuals, available to EU/EEA/Swiss nationals and third country nationals alike. Currently, the most commonly availed of tax programmes are the Residence Programme (available to EU/EEA/Swiss nationals) and the Global Residence Programme (applicable to non-EU/EEA/Swiss nationals). A beneficiary of such a programme benefits from a reduced flat rate of tax of 15% with respect to any foreign-sourced income remitted to Malta (as opposed to the standard progressive rates of tax which go up to 35%), subject to a minimum annual tax of €15,000.

With a view to incentivising highly skilled professionals to relocate to Malta and take up employment here in top positions with certain regulated entities, Malta also offers an attractive tax programme for employees in said positions, namely the Highly Qualified Persons Rules (the "**HQPR**"). Beneficiaries under the HQPR benefit from a reduced flat rate of 15% tax on their employment

income, said tax being levied on up to €5,000,000 worth of income, with the remaining employment income being exempt from tax in Malta.

With respect to remote workers and specifically third country nationals who are the holders of a Nomad Residence Permit issued by Residency Malta Agency, said individuals may be eligible to benefit from a flat rate of tax of 10% on their chargeable income derived from remote work in Malta and this in terms of the newly published Nomad Residence Permit (Income Tax) Rules (S.L 123.208).

13. What steps might an individual be advised to consider before establishing residence in (or becoming otherwise connected for tax purposes with) the jurisdiction?

An individual who wishes to establish his residence in Malta should take several preparatory steps before relocating here. One such recommendation, linked to Malta's remittance system of taxation relates, is for individuals to separate their income, capital and capital gain streams and segregate same into different bank accounts or similar prior to relocating to Malta. In so doing, the individual concerned may clearly determine (and provide evidence of same to the Revenue at some future point in time, if applicable) whether any amount remitted to Malta is foreign sourced income as opposed to foreign sourced capital or capital gains, when considering that the latter two categories fall outside the scope of tax in principle.

The relocation of an individual to Malta may also have tax implications on any entity he is an employee or a director/manager of, or any such entity that he is servicing as a representative of same, in terms of him constituting a permanent establishment of any such entity in Malta for tax purposes. On similar lines, any entity the management of whose business is carried out in Malta – through the actions of the individual concerned – will become tax resident in Malta. All this is subject to any applicable double tax treaty.

Attention should also be paid to non- tax related matters. For instance, married individuals should carry out the necessary planning around regulating their matrimonial property regime (also factoring any pre-nuptial or post-nuptial agreements into the equation), noting that the community of aquests is the default regime). Similarly, when considering that the EU *Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions, and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession* (the "**EU Succession Regulation**") is in force in Malta, planning around the succession laws that shall apply to one's estate on death should one become habitually resident in Malta is also recommended.

14. What are the main rules of succession, and what are the scope and effect of any rules of forced heirship?

The Civil Code regulates succession and forced heirship rules, more commonly referred to as the 'reserved portion,' in Malta and caters for both testate and intestate succession.

In terms of the forced heirship rules, a portion of the deceased's estate is reserved in favour of the descendants and the surviving spouse of the deceased. The portion of the deceased's estate which is due to the descendants and the surviving spouse is considered to be a right of credit, and said credit is due with interest at the rate of 8% from the date of the opening of succession if the reserved portion is claimed within two years from such date, or from the date of service of a judicial order if the claim is made after the expiration of the two-year period. The actual amount of the reserved portion is regulated by law and is dependent upon the existence of surviving descendants and/or a surviving spouse.

By way of general principle, British private international law rules have been applied by Maltese courts when dealing with cross-border property and succession law matters. Maltese courts opted for the system of scission, whereby immovable property is regulated by the *lex situs* and movable property is regulated by the *lex domicilii* at the time of death.

These rules are now subject to the EU Succession Regulation, which Regulation shall include all civil law aspects of this succession. The Regulation will cover all forms of transfers of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession. The Regulation applies to persons who died on or after 17th August 2015 and is binding throughout the EU, with the exception of Denmark and Ireland. Under this Regulation, by default, the law applicable to the succession of estate of the deceased taken as a whole shall be that of the deceased's country of habitual residence at the time of death, unless the deceased opted to apply the succession laws of his or her country of nationality.

15. Is there a special regime for matrimonial property or the property of a civil partnership, and how does that regime affect succession?

The Civil Code caters for three matrimonial property regimes, namely:

- Community of Acquests
- Separation of Estates
- Community of residue under separate administration ("**CORSA**").

None of these matrimonial property regimes have an impact on succession matters and the forced heirship rules referred to above apply irrespective of the matrimonial property regime opted for by the spouses.

The Community of Acquests

The community of acquests is the default matrimonial property regime which shall apply to a marriage celebrated in Malta, unless another regime is opted for by the spouses. The community of acquests comprises of all the property acquired by each spouse after marriage, thus excluding paraphernal property, e.g. property acquired by a spouse prior to marriage or through inheritance, although the fruits derived from such paraphernal property constitute part of the community property. Community property is held in ownership equally and is jointly administered by both spouses.

Separation of Estates

In terms of the separation of estates regime, each spouse retains one's own estate, retaining full control and administration of such property without any assets forming part of a common pool of assets. Should a couple wish to apply this regime to their matrimonial property, they are to appear before a notary to enter into a marriage contract, which contract must be made by means of a public deed and enrolled with the Public Registry.

Community of Residue under Separate Administration (CORSA)

Under the CORSA regime, the property which a spouse has and/or has acquired prior to a marriage remains the sole property of that spouse, whereas any property acquired during marriage by a spouse will be held and administered by the spouse making the acquisition as sole owner of same. Upon termination of the community of residue regime, by mutual consent, any remainder (after deducting any debts) shall be owned in equal parts by the spouses.

Malta also recognises cohabitation between partners, which cohabitation is regulated by the Cohabitation Act. A couple wishing to register as cohabitants and, accordingly, to fall within scope of the Act are required to regulate their cohabitation by means of a public deed. The parties to said public deed shall decide on the applicability or otherwise of the community of assets catered for in the Act to their agreement. If the parties fail to make a decision in this regard, it shall be presumed that the parties intended to exclude the application of the community of assets. The community of assets is not as broad in application as the community of acquests catered for by the Civil Code, comprising solely of the cohabitation home and movables to be found in said home. All other assets are considered to be paraphernal assets of the cohabitant concerned.

16. What factors cause the succession law of the jurisdiction to apply on the death of an individual?

As indicated at 13. above, Malta's succession laws are based on private international principles, with the *lex domicilii* applying to movables and the *lex situs* applying to immovables. Therefore, with respect to movables, it is the law of the country of domicile, the *lex domicilii*, of the deceased at the time of death that should govern the disposition of such assets, whereas it is the law of the country where the immovable property is situated, the *lex situs*, that applies to same. This is however subject to the EU Succession Regulation, in terms of which the law applicable to the succession of estate of the deceased on a worldwide basis shall be that of the deceased's country of habitual residence at the time of death, unless the deceased has opted to apply the succession laws of his/her country of nationality.

17. How does the jurisdiction deal with conflict between its succession laws and those of another jurisdiction with which the deceased was connected or in which the deceased owned property?

As indicated above, Malta applies the *lex domicilii* to the succession of movables and the *lex situs* to the succession of immovable property, subject to the application of the EU Succession Regulation, where relevant.

Malta's rules on private international law traditionally do not emanate from a particular codified piece of legislation. Historically, the Maltese courts have tended to rely on British (common law) principles on conflicts of law (or choice of law); however, sources of Maltese

private international law could also include some written legislation and judicial sources (case-law) that have developed rules or principles on the subject over time. This traditional reliance on common law principles and jurisprudence in private international law matters has, to a great extent, been supplanted with the entry into force of various EU Regulations, which are directly effective in Malta, setting out rules aimed at reducing conflict of law issues within the EU by achieving a degree of harmonisation across Member States.

18. In what circumstances should an individual make a Will, what are the consequences of dying without having made a Will, and what are the formal requirements for making a Will?

The Civil Code caters for both testate and intestate succession. With respect to testate succession, a testator may opt have a public or secret will. A public will must be drawn up before a notary and 2 witnesses, which will is then enrolled in the Public Registry. Should a testator opt to draw up a secret will, he/she must *inter alia* deliver the will to a notary or to the Court of Voluntary Jurisdiction, in the presence of a judge or magistrate, and, upon delivery, declare that the document so delivered contains his/her will. Should a secret will be delivered to a notary, the testator, notary and two witnesses must execute the will or the envelope containing such will. The notary is then required to deliver the secret will to the Court of Voluntary Jurisdiction within 4 working days.

Should the deceased die without a will, intestate succession is granted in favour of the descendants and the spouse of the deceased; in the absence of any such relatives, the estate will devolve in favour of the ascendants and collateral relatives of the deceased; in the absence of any such relatives, the estate will then devolve on the Government of Malta.

In light of the EU Succession Regulation and the applicability of the default rule therein – i.e. that it is the succession laws of the country of habitual residence of the deceased at the time of death which should apply to the estate – any individual establishing his/her residence in Malta should consider drawing up a will with a clear indication therein on the testator's part as to which laws are to apply for the purposes of the EU Succession Regulation, in particular in the exercise of the option for the succession laws of one's country of nationality (or any of them, where an individual has more than one citizenship)

Should an individual, not being resident in Malta, own immovable property in Malta, he/she may wish to consider drawing up a will in Malta to regulate same as, in terms of the aforementioned principles, Maltese succession law, Malta being the *lex situs*, should govern the disposition of said immovable property, subject to the application of the EU Succession Regulation.

19. How is the estate of a deceased individual administered and who is responsible for collecting in assets, paying debts, and distributing to beneficiaries?

The Civil Code provides that the heirs of the deceased may opt to either accept the inheritance or, alternatively, to renounce same. Acceptance may be either express or implicit, and the inheritance may be accepted unconditionally or with the benefit of inventory – i.e. the heirs are made aware of the assets and liabilities of the deceased and, accordingly, shall take an informed decision as to whether or not to accept or renounce the inheritance concerned. Said decision has retrospective effect, having effect as from the date of death of the testator.

In terms of Maltese law, a testamentary executor responsible for disposing the deceased's estate according to his/her wishes may be appointed by the testator through his/her will. In the absence of any such executor, the heirs who accept the inheritance are responsible to dispose of the estate, including the provision of the reserved portion and the transfer of any legacies to the legatees concerned. The Court of Voluntary Jurisdiction may dispose of the estate should the heirs consent.

20. Do the laws of your jurisdiction allow individuals to create trusts, private foundations, family companies, family partnerships or similar structures to hold, administer and regulate succession to private family wealth and, if so, which structures are most commonly or advantageously used?

Maltese law allows individuals to create trusts, private foundations, family companies, family partnerships or similar structures to hold, administer and regulate succession to private family wealth.

The most common utilised vehicle in Malta has traditionally been the limited liability company, although trusts and foundations have gained popularity over the years, particularly in the context of succession planning

for modern families. In fact, the Family Business Act was recently introduced with a view to incentivising the transfer of family businesses to future generations.

The Trust and Trustees Act (the "**TTA**") regulates *inter alia* trustees and trusts in Malta and is largely modelled on Anglo-Saxon laws. Relatively recently, the TTA was amended to cater for the concept of private trust companies which allows a settlor or a family office to have stronger controls over the family's assets settled on trust effectively through ownership/control of the trustee without the stringent regulation applicable to traditional regulated trustees. The private trust company is subject to a light regulatory regime administered by the Malta Financial Services Authority (the "**MFSA**") and presents a further option for families wishing to structure their wealth.

The Civil Code also regulates foundations and includes a full set of rules with respect to the creation, administration and termination of foundations. The Civil Code caters for various forms of foundations, with the most commonly used foundation in the context of family structures being the private interest foundation. A key attraction of foundations over trusts is the fact that a foundation is a legal person in its own right, with the foundation assets constituting a separate patrimony of assets. The Civil Code also caters for the creation of a number of cells within a foundation, thus catering for the attribution of particular assets, and the resulting income flows, to particular cells set up for the benefit of particular beneficiaries, making this a very flexible structure for estate planning purposes. Foundations having a similar structure to a Maltese foundation, incorporated or registered under the laws of a state within the EU or EEA may, subject to certain conditions, be continued (redomiciled) to Malta. Foundations tend to be the vehicle of choice over trusts for individuals from civil law jurisdictions that tend to prefer a vehicle that is a person at law and is therefore tangible, when compared to a trust.

21. How are these structures constituted and what are the main rules that govern them?

Companies are registered in terms of the Companies Act with the Malta Business Registry (the "**MBR**"). A company is typically registered with a memorandum and articles of association, the former including *inter alia* the name of the company, registered office, shareholders and their respective shareholdings, directors, company secretary and legal representatives of the company, the latter forming the contract between the shareholders. Shareholder agreements may also be executed to supplement same.

Partnerships may be constituted in terms of either of the Companies Act – these include the partnership '*en nom collectif*' as well as the partnership '*en commandite*' (more commonly referred to as the limited partnership) – or of the Civil Code.

Trusts are created in terms of the TTA and may come into existence unilaterally or otherwise by oral declaration, on a testamentary disposition or by judicial decision.

Foundations are established in accordance with the Civil Code, being established by virtue of a public deed published by a notary and enrolled with the Public Registry.

22. What are the registration requirements for these structures and what information needs to be made available to the relevant authorities? To what extent is that information publicly available?

With respect to companies these must be registered with the MBR, generally all statutory documentation (including details as to shareholders, directors, audited financial statements) is made available on the MBR's online portal and is therefore publicly available. In line with the 5th EU AML Directive, information on the ultimate beneficial owners of companies is recorded in a Beneficial Ownership Register administered by the MBR. Whereas access to the Beneficial Ownership Register was publicly available, in light of Joined Cases C-37/20 | Luxembourg Business Registers and C-601/20 Sovim brought before the Court of Justice of the European Union wherein the Court ruled that the accessibility of beneficial ownership registers to the general public is invalid on the basis that they cause a serious interference with the fundamental rights to respect for private life and to the protection of personal data, the general public no longer have access to the companies beneficial ownership register.

In terms of partnerships, currently, it is only partnerships constituted in terms of the Companies Act which are registered with the MBR. Partnerships *en nom collectif* and partnerships *en nom collectif* must also disclose information on their beneficial ownership in terms of the 5th EU AML Directive and like companies, this information is no longer available to the general public.

With respect to trusts, there is no requirement *per se* for trusts to be registered with an authority in Malta; this is however subject to any beneficial ownership disclosure,

FATCA and CRS reporting requirements. Furthermore, there is currently no online register of information on trusts which may be accessed by the public. Having said that, also further to the 5th EU AML Directive, details of the beneficial owners of trusts, as defined, having Maltese resident trustees must be disclosed to the MFSA. Currently, this information is not available to the public and may only be accessed by the Financial Intelligence Analysis Unit (the local AML authority), national tax authorities, subject persons for the purposes of carrying out their own due diligence checks and subject to proving same to the satisfaction of the MFSA, and any person, upon written request, who can demonstrate a legitimate interest to receive such information.

Details as to the name and address of a foundation are available on the MBR online portal and this information is publicly available. Subject to that, information on the founder, administrators, protectors, if any, and beneficiaries of a foundation is not publicly available; likewise, statutory documentation such as the public deed establishing the foundation or audited financial statements, if applicable, whilst uploaded on the MBR online portal are not publicly available. The administrators of a foundation are required to disclose information on the beneficial owners, as defined, of private interest foundations to the MFSA, said information being only accessible by the same authorities/persons indicated herein with respect to trust information and is therefore not publicly available.

23. How are such structures and their settlors, founders, trustees, directors and beneficiaries treated for tax purposes?

A Maltese company, as defined, is deemed to be resident and domiciled in Malta by reason of its incorporation and, accordingly, is taxable in Malta on a worldwide basis, subject to any applicable double tax treaties. Companies which are resident but not domiciled in Malta for tax purposes are taxed on a source and remittance basis. The standard corporate tax rate as applied to taxable income (i.e. income less a generous range of tax deductions, including for instance the notional interest deduction that intends to provide for equivalent tax treatment of debt and equity financing) is 35%. When a company distributes dividends out of profits on which it has paid tax at 35%, no further tax is due by the shareholders and a credit for the tax paid by the distributing company is available to the shareholders against their tax liability in terms of the full imputation system of taxation applicable to companies. Subject to statutory conditions, a dividend payment may trigger a right in the shareholder's hands to a tax-exempt refund of part or all of the Maltese tax paid by the company on the distributed profits. The standard tax refund is 6/7.

Participation Exemption

The ITA caters for an attractive participation exemption which applies to holdings in a number of scenarios, including where there is a minimum holding of 5% of equity, subject to several statutory conditions. The exemption applies *inter alia* to any gains or profits that a resident corporate taxpayer may derive from a holding (covering shareholdings, partnership interests, interests in investment funds,) that qualifies as a "participating holding", subject to applicable anti-abuse provisions. The participation exemption may be applied with respect to profits and capital gains deriving from non-resident and resident entities alike, and also applies to profits derived from permanent establishments of resident corporate taxpayers.

Tax Grouping

Malta has introduced tax grouping rules for companies, as defined, thus catering for one or more members of a group to opt to be treated as a "fiscal unit" for income tax purposes. Where a group exercises this option, the parent company (which may be non-resident) shall become the "principal taxpayer", with the underlying subsidiaries being treated as "transparent subsidiaries". The Rules regulate *inter alia* the manner of computation of the group's chargeable income. Intra-group transactions are generally to be ignored; the same goes for dividends, the payment of tax by subsidiaries and any resulting right to a tax refund at the level of the parent, with the resulting net tax charge being payable.

B. Trusts

With respect to trusts, from a tax perspective:

- A trust falls within the scope of tax where one of its trustees is resident in Malta for tax purposes. Tax shall be payable on any income attributable to said trust, provided that a trust shall be tax transparent in certain circumstances, e.g. where all income is foreign sourced and the beneficiaries are either not ordinarily resident or not domiciled in Malta; in such a case, the income in question shall not be subject to tax in Malta. Naturally, a trust is always taxable on income and capital gains arising in Malta.
- Income attributable to a trust means the aggregate of income that has accrued to, or is derived by, a trustee/s of a trust from property that was settled on said trust or from property that was acquired in the administration of such trust, including any

income resulting from the employment of such property.
- The trustee of a trust may opt to have the trust's income treated as if such income was derived by a company ordinarily resident and domiciled in Malta (further to which it shall become subject to the corporate tax regime in its entirety). This option is only available to trusts where the income attributable to same is comprised solely of income in the form of royalties, dividends, capital gains, interest, rents or any other income from investments.

C. Foundations

By default, a foundation is taxed as a company. However, a foundation may opt to be taxed as a trust for tax purposes (see above), with it being tax transparent in those instances where a trust would be so, e.g. where the assets are located outside of Malta and the foundation beneficiaries are not ordinarily resident or domiciled in Malta for tax purposes. The decision to exercise this option is irrevocable.

24. Are foreign trusts, private foundations, etc recognised?

Malta has adopted *the Hague Convention on the Law Applicable to Trusts and on their Recognition*, with foreign trusts being recognised thereunder. Accordingly, the validity of a foreign trust and its construction and administration are governed by said foreign law and recognised in Malta in terms of the Hague Convention.

Foundations having a similar structure to a Maltese foundation, incorporated or registered under the laws of a state within the EU or EEA may, subject to certain conditions, be continued (redomiciled) to Malta.

25. How are such foreign structures and their settlors, founders, trustees, directors and beneficiaries treated for tax purposes?

A trust falls within the scope of Maltese tax either if one of the trustees is resident in Malta for tax purposes or if trust derives Malta sourced income or capital gains. Accordingly, a foreign trust having beneficiaries who are resident in Malta for tax purposes but having non-resident trustees and no income or capital gains chargeable to tax in Malta shall fall outside the scope of tax in Malta. Where a trust is transparent for Malta tax purposes, any foreign sourced income derived by the trust but attributable to said beneficiary shall be taxable in Malta on the remittance basis of taxation, that is to say distributions of foreign sourced income should only be subject to tax in Malta if said income is remitted to Malta, with distributions of foreign sourced capital/capital gains falling outside the scope of tax in Malta, even if remitted by the beneficiary in receipt of same to Malta.

A foreign foundation, being a body of persons, falls within the scope of Maltese tax if it is controlled and managed from Malta, making it resident but not domiciled in Malta for tax purposes and, accordingly, subject to tax in Malta on a remittance basis. It is also subject to tax in Malta with respect to any income or capital arising in Malta. Foundations are taxed as a company by default. It may however opt to be treated as a trust for tax purposes, meaning that it may be tax transparent in particular cases such as where it only generates foreign sourced income and its beneficiaries are not ordinarily resident or domiciled in Malta for tax purposes, in which case the remittance basis of taxation should apply to any distributions made by the foundation.

The settlement of chargeable assets situated outside Malta by a settlor who is neither resident nor domiciled in Malta for tax purposes upon a trust should fall outside the scope of tax on capital gains in Malta; likewise, where a foundation is endowed with such assets by a founder who is neither resident nor domiciled in Malta for tax purposes. Where chargeable assets situated in Malta are involved, this may trigger a charge to tax on capital gains, subject to several exemptions, e.g. where a settlor settles assets on trust for his sole benefit.

26. To what extent can trusts, private foundations, etc be used to shelter assets from the creditors of a settlor or beneficiary of the structure?

In principle, trusts and foundations may not be used for the purposes of defrauding one's creditors.

A domestic trust may only serve as protection against forced heirship claims, divorce claims or creditor claims if the settlor is domiciled outside Malta at the time of settlement of the property on the trust and, if the asset is an immovable, if it is located outside Malta. A foreign trust may only serve as protection against forced heirship claims, divorce claims or creditor claims if the settlor is domiciled outside Malta at the time of settlement of the trust.

The protections afforded by law in relation to application of the rules of mandatory application (such as the rules relative to the proprietary effects of marriage, succession rights including the application of forced

heirship rules, rules affording protection to creditors) with reference to trusts apply equally to foundations.

27. What provision can be made to hold and manage assets for minor children and grandchildren?

In terms of the Civil Code, parents are responsible for the administration of their minor children's property, implying that minors may own property under Maltese law. Acts of ordinary administration of such property may be performed by one of the parents acting alone; acts of extraordinary administration must be performed by both parents acting jointly. The parents shall have the usufruct of any property which devolves on their child by succession, donation, or any other gratuitous title, and they shall retain such usufruct until the child attains majority.

Trusts and foundations may be set up for the benefit of one's children or grandchildren, including

28. Are individuals advised to create documents or take other steps in view of their possible mental incapacity and, if so, what are the main features of the advisable arrangements?

It is quite common for individuals to appoint a mandatory who is granted power of attorney, in general terms or to administer specific assets and/or perform particular acts; ownership of any assets involved remains with the mandator unless the power of attorney relates to the transfer of same. Once the mandator becomes mentally incapacitated, however, this type of power of attorney effectively terminates by operation of the law.

This has been addressed through amendments to the Civil Code that now specifically caters for a so-called 'living power of attorney' in place, which power of attorney is put in place through attendance by the mandator and mandatory in front of a notary. This power of attorney may be triggered when mental incapacitation sets in and is therefore well suited to this eventuality.

29. What forms of charitable trust, charitable company, or philanthropic foundation are commonly established by individuals, and how is this done?

Maltese law caters for the creation of charitable trusts and foundations, these being regulated in terms of the Voluntary Organisations Act. Charitable trusts and foundations are, generally speaking, created in the same manner as private trusts and foundations are (see above), with additional requirements in terms of their objects, and being subject to registration with the Commissioner of Voluntary Organisations, this resulting in several compliance obligations in the interest, primarily, of transparency.

30. What is the jurisdiction's approach to information sharing with other jurisdictions?

As a member of the EU, Malta has transposed the EU Directives on Administrative Cooperation, more commonly known as DAC. Accordingly, Malta has transposed the Common Reporting Standard, automatic exchange of information on tax rulings, country-by-country reporting and, more recently, the mandatory disclosure rules on cross-border tax arrangements, more commonly referred to as *DAC 6* or the *Tax Intermediaries Directive*.

Malta has also implemented FATCA as a stand-alone instrument under *the Exchange of Information (United States of America) (FATCA) Order*.

In addition to the above, Malta has close to 80 double tax treaties, most of which cater for exchange of information requests between the states parties to same.

31. What important legislative changes do you anticipate so far as they affect your advice to private clients?

We do not anticipate any important legislative changes that should affect advice provided to private clients with respect to Malta.

Contributors

Dr Rosanne Bonnici
Partner
rosanne.bonnici@fenechlaw.com

Dr Rebecca Diacono
Senior Associate
rebecca.diacono@fenechlaw.com