SUBSIDIARY LEGISLATION 123.101

TAX ACCOUNTS (INCOME TAX) RULES

19th February, 2008

LEGAL NOTICE 79 of 2008, as amended by Legal Notices 205 of 2008, 247 of 2011, 183 of 2015 and 38 of 2018 and 194 of 2019.

Citation.

1. The title of these rules is the Tax Accounts (Income Tax) Rules.

Commencement.

2. The provisions of these rules shall be deemed to have come into force as from year of assessment 2008.

Profits allocated to the final tax account. *Amended by: L.N. 247 of 2011; L.N. 183 of 2015. L.N. 38 of 2018; L.N. 194 of 2019.*

3. (1) With effect from year of assessment 2008 and subsequent years of assessment an amount of distributable profits resulting from the following shall be allocated to the final tax account:

(*a*) profits after tax resulting from income which has been charged to tax under the investment income provisions, and where such investment income is that referred to in article 41(*a*)(viii) (2), (3), (4) and (5) of the Act such income shall be allocated to the final tax account of the company only when such company has actually received that income;

(*b*) profits which have been exempt from tax under the provisions of any Maltese law and where the distribution of such profits by the company is exempt from tax in the hands of the shareholders;

(*c*) the amount of chargeable income the tax chargeable on which has been relieved from payment by any tax credits where the distribution of such profits is exempt from tax in the hands of the shareholders;

(*d*) dividends paid out of profits allocated to the final tax account of another company;

(*e*) the profits after tax derived from the transfer of property chargeable to tax under article 5A of the Income Tax Act, hereinafter referred to as "the Act", such profits to be determined as prescribed in terms of article 5A(10)(*d*);

(*ee*) gains or profits chargeable to tax in accordance with the provisions of article 23 of the Act;

(*f*) any profits after tax which under the provisions of Maltese law are not subject to tax when such profits are distributed by a company to any person and where upon such a distribution no person is entitled to claim any tax credit in respect of any tax paid on such profits;

(*g*) the amount of chargeable income after tax of a company which has exercised the option referred to in article 48(4A)(*b*)(i)(1) of the Income Tax Management Act earned while it was not an international trading

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company;

(*h*) the amount which should be allocated to the Maltese Taxed Account computed in accordance with rule 13 of the Sale of Agricultural Produce Rules;

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(*i*)* profits after tax resulting from transfers in accordance with the provisions of article 27G of the Act;

(*j*) profits resulting from any grant or subsidy where the distribution of such profits is exempt from tax in the hands of the shareholders;

(*k*) profits after tax resulting from rents to which articles 31A to 31D of the Act is applicable;

(*l*) the amount of the chargeable income the tax chargeable on which has been relieved from payment by any tax credits under any of the following rules or regulations:

S.L. 325.06 (i) the Business Promotion Regulations;

S.L. 123.71 (ii) the Reinvestment Tax Credit (Income Tax) Regulations;

S.L. 123.82 (iii) the Deductions and Tax Credits (Research and Development) Rules;

S.L. 123.83 (iv) the Tax Credit (Back Office Operations) Rules;

S.L. 123.84 (v) the Tax Credits (Owners and Operators of Warehouses Situated in Free Zones) Rule;

S.L. 123.85 (vi) the Tax Credit (Electronic Business) Rules;

S.L. 123.86 (vii) the Reinvestment Tax Credit (Income Tax) Rule;

S.L. 123.87 (viii) the Deductions and Tax Credits (General and Specific Qualifications) Rules;

S.L. 478.02
Cap. 478. (ix) the Tax Credit (Audiovisual Infrastructure) Regulations, made under the Malta Film Commission Act;

(*m*) profits referred to in any of the preceding paragraphs which as at the end of the accounting period ending in the year preceding year of assessment 2007 have not been distributed:

Provided that with effect from year of assessment 2015 the provisions of paragraphs (*c*) and (*l*) shall no longer be applicable and the amount of chargeable income the tax on which has been relieved from payment by any tax credits shall after deducting the tax chargeable thereon and adding the amount of tax credits utilised to relieve the payment of such tax be allocated to the Maltese taxed account.

(2) Where profits of a company are relieved from tax through the deduction referred to in paragraph (o) of sub-article (1) of article 14 of the Act, or any rules issued in terms of that paragraph,

*Shall be applicable from the year of assessment 2020.

an amount corresponding to one hundred and ten per cent (110%) of the amount of profits which are so relieved from tax shall be allocated to the company's final tax account in the following manner:

(*a*) an amount corresponding to one hundred per cent (100%) of the amount of profits which are so relieved from tax shall be allocated directly to the final tax account (hereinafter referred to as the "direct allocation"); and

(*b*) an additional reallocation of profits of an amount corresponding to ten per cent (10%) of the relieved profits, out of the tax account to which such relieved profits would, ignoring the provisions of this sub-rule, otherwise fall to be allocated (hereinafter referred to as the "additional reallocation"):

Provided that if the amount of the additional reallocation exceeds the total profits of the undertaking for the particular basis year that would have, ignoring the provisions of this sub-rule, been allocated to the tax account to which such profit would otherwise have been allocated, any such excess shall be ignored for the purposes of the additional reallocation:

Provided further that:

(i) the additional reallocation shall be effected subsequent to any tax account reallocation required in terms of sub-rules (4) and (7) of rule 5; and

(ii) the direct allocation and the additional reallocation shall not be effected in respect of deemed interest that is claimed as a deduction in terms of sub-rule (1) of rule 3 of the Notional Interest Deduction Rules against interest income deemed to be received by the shareholder or partner of the undertaking in terms of rule 5 of the Notional Interest Deduction Rules. S.L.123.176

4. For the purpose of rule 3, the amount of profits the tax chargeable on which has been relieved by any tax credits referred to in the said rule 3 shall be calculated by dividing the amount of the tax credit by the rate or rates of tax at which the company's chargeable income is chargeable, and where such chargeable income has been taxed at different rates of tax the tax credit shall first be deemed to have relieved that part of the chargeable income which has been taxed at the lowest rate. Calculation of amount of profit.

5. (1) With effect from year of assessment 2008 and in subsequent years of assessment an amount of distributable profits arising in any year immediately preceding any of such years of assessment which have suffered tax and which do not stand to be allocated to the final tax account shall be allocated to the immovable property account. Such amount of distributable profits shall consist of the aggregate of the amounts referred to in sub-rules (2) and (3). Immovable property account. *Amended by: L.N. 247 of 2011; L.N. 183 of 2015.*

(2) (*a*) Dividends paid out of profits allocated to the immovable property account of another company.

(*b*) The amount of chargeable income after tax resulting from any profits or gains in respect of which a company has exercised its option to make an election in accordance with rule 9.

(3) Any profits, gains or income derived, directly or indirectly, from immovable property situated in Malta consisting of:

(*a*) the amount of chargeable income after tax resulting from any profits or gains of whatever nature derived from the transfer of such immovable property or of any rights whatsoever on such property or in relation thereto;

(*b*) the amount of chargeable income after tax derived from rents, premiums , provision of accommodation and any income or gains however described and of whatever nature derived, directly or indirectly, from such immovable property including:

(i) any gains or profits derived from any timeshare operation or any other operation of a similar nature;

(ii) any gains or profits derived from the provision of accommodation as defined in the Value Added Tax Act such gains or profits being calculated by reference to the value of sales which are subject to Value Added Tax at the rate established in terms of item 1 of the Eighth Schedule of the Value Added Tax Act or which would have been so subject but for the fact that the company is not required to charge Value Added Tax by virtue of it being registered under article 11 of the Value Added Tax Act (hereinafter in these rules such sales being referred to as the "Vatable Sales"); and where such gains or profits are derived from the carrying on of a trade, business or other activity which includes the provision of other services or goods in addition to the provision of such accommodation, such gains or profits shall be calculated by dividing the total chargeable income of the said company derived from that trade, business or other activity by the value of its total sales of that trade, business or other activity and multiplying the result by the value of its Vatable Sales of that same trade, business or other activity. For this purpose companies which derive income from the provision of accommodation must maintain accounting records such that the gains or profit derived from the provision of accommodation may be readily ascertained in the manner provided herein. Where a company derives income from the provision of accommodation

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and does not maintain such accounting records the whole of its profit shall be deemed to be derived from the provision of accommodation;

(iii) the amount of chargeable income after tax resulting from profits directly derived from, and not merely from the utilisation of, services provided through the use of cables, wires, pipes and any other material, device or apparatus, where such cable, wire, pipe, material, device or apparatus is annexed to a tenement or installed in the ground permanently to remain incorporated therewith. For the purpose of this sub-paragraph, the provision of services shall include the provision of electricity, energy, gas, fuel, water, telephone services, tele-communication infrastructures, electronic communications services, electronic communication networks, associated facilities, services and data, radio and television;

(*c*) the amount of chargeable income after tax, derived from work carried out on or in relation to such immovable property consisting of brokerage and professional services, construction work, project management of construction work and work of tradesmen;

(*d*) the amount of chargeable income after tax resulting from profits derived from the provision of management services in relation to any activity as a result of which income is derived from the provision of accommodation referred to in paragraph (*b*)(ii), and where as a result of that activity income is derived from the provision of other services or goods in addition to the provision of such accommodation, such profit shall be calculated by dividing the income derived from the said management services by the value of the total sales of that activity and multiplying the result by the value of sales of that same activity which are vatable sales;

(*e*) the following amounts which shall be determined gross before any deductions whatsoever:

(i) the interest, fees or any other consideration howsoever described derived, directly or indirectly, from the granting of loans or from any form of credit to finance the acquisition, development, construction, refurbishment, renovation of such immovable property or any right thereon including professional fees related thereto (including fees related to the acquisition of finance) and any other matter which increases or enhances the value of such immovable property or any right thereon; and

(ii) insurance premiums related to the insurance of

such property:

Provided that where the allocation of profits in terms of this paragraph cannot for any year be made because there are no or insufficient profits which have suffered tax, the amount required to be allocated to the immovable property account in accordance with this paragraph, or part thereof, which for such reason could not be allocated shall, in so far as not allocated to the immovable property account of a related company or companies in accordance with sub-rule (7), be added to the amount to be allocated for the following year and deemed to be part of that amount, or if there is no such amount in respect of that year, be deemed to be the amount to be allocated for that year and so on for subsequent years;

(*f*) any other profits however described where the Commissioner is of the opinion that the said profits are directly or indirectly derived from such immovable property and in such case the Commissioner may determine the manner in which such profits are to be determined;

(*g*) profits or gains after tax however described derived from the disposal of shares or other interests in any entity which, directly or indirectly, principally owns such immovable property;

(*h*) the amount of the annual market rent of such immovable property owned and used by the company for the purpose of its activities (excluding property which is rented by the said company to other parties) calculated by multiplying the aggregate surface area in square metres of all floors of such premises so owned and used by two hundred and fifty euro (€250) per annum: provided that the allocation of profits to the immovable property account in accordance with this paragraph shall be made after all allocations have been made in accordance with sub-rule (2) and the other paragraphs of this sub-rule, and where the allocation of profits in terms of this paragraph cannot for any year be made because there are no or insufficient profits which have suffered tax, the amount required to be allocated to the immovable property account in accordance with this paragraph, or part thereof, which for such reason could not be allocated shall, in so far as not allocated to the immovable property account of a related company or companies in accordance with sub-rule (7), be added to the amount to be allocated for the following year and deemed to be part of that amount, or if there is no such amount in respect of that year, be deemed to be the amount to be allocated for that year and so on for subsequent years.

(4) For the purpose of allocating profits to the immovable property account in accordance with sub-rule (3)(*e*) and (*h*) the

allocation of profits to the tax accounts shall first be made ignoring the provisions of the said two paragraphs and thereafter the amounts which are to be allocated to the immovable property account in accordance with the said two paragraphs shall (so far as not already transferred to the immovable property account in terms of this sub-rule) be transferred from the amount of distributable profits derived in the accounting period ending in the year preceding year of assessment 2008 and subsequent years of assessment which would have, ignoring the provisions of the said two paragraphs, been allocated to the Maltese Taxed Account and the Foreign Income Account; and for this purpose such amount shall first be transferred from amounts which would have been allocated to the Maltese Taxed Account and then from amounts which would have been allocated to the Foreign Income Account.

(5) The amount which cannot be allocated to the immovable property account in terms of sub-rule (3)(*e*) and (*h*) because there are no or insufficient profits which have suffered tax shall be the amount which cannot be allocated to the immovable property account in accordance with the procedure set out in sub-rule (4).

(6) The provisions of this rule shall be without prejudice to the fourth proviso to the definition of "Foreign Income Account" in article 2 of the Act and sub-rule (3)(*e*) and (*h*) shall, up to year of assessment 2011, not apply to companies to which the said proviso was applicable for all years of assessment from year of assessment 2008 to year of assessment 2011.

(7) (*a*) Where, in accordance with the provisions of sub-rule (3)(*e*) and (*h*), the allocation of profits in terms of the said paragraphs cannot for any year be made by a company because there are no or insufficient profits which have suffered tax, or is not made as a result of the company making an election in accordance with rule 9, the amount required to be allocated to the immovable property account in accordance with the said paragraphs, which for such reason could not be so allocated or is not so allocated, shall be allocated to the immovable property account of a related company. For the purpose of this sub-rule a related company excludes a company which has made an election in accordance with rule 9:

Provided that the amount allocated to the immovable property account of the related company shall not exceed the amount of distributable profits derived by the related company, which would have, ignoring the provisions of this sub-rule, been allocated to the Maltese Taxed Account and the Foreign Income Account.

(*b*) For the purpose of allocating profits to the immovable property account of a related company in accordance with this sub-rule, the allocation of profits to the tax accounts of the related company shall first be made ignoring this sub-rule and thereafter the amounts which are to be allocated to the immovable property

account in accordance with this sub-rule shall be transferred from the amount of distributable profits derived by the related company in the accounting period ending in the year preceding year of assessment 2012 and subsequent years of assessment which would have, ignoring the provisions of this sub-rule, been allocated to the Maltese Taxed Account and the Foreign Income Account; and for this purpose such amount shall first be transferred from amounts which would have been allocated to the Maltese Taxed Account and then from amounts which would have been allocated to the Foreign Income Account.

(*c*) Where the company referred to in paragraph (*a*) is related to more than one company, the amount to be allocated in accordance with this sub-rule shall first be allocated by the related company in which the parent company, as defined in sub-rule (9)(*a*), has the highest percentage beneficial entitlement to the amount of distributable profits derived in the respective accounting period allocated to the Maltese Taxed Account and the Foreign Income Account, and any balance of the amount not so allocated by the said related company shall then be allocated by the related company in which the said parent company has the second highest percentage beneficial entitlement to the amount of distributable profits derived in the respective accounting period allocated to the Maltese Taxed Account and the Foreign Income Account, and so on:

Provided that, for the purposes of determining the related company in which the parent company has highest percentage beneficial entitlement to the amount of distributable profits derived in the respective accounting period allocated to the Maltese Taxed Account and the Foreign Income Account as required in terms hereof, the parent company shall, itself, constitute one of the related companies by which an allocation must be made in terms of paragraph (*a*) and, for the purposes of determining the hierarchy in the manner as prescribed immediately above, the parent company shall be deemed to hold a 100% beneficial entitlement to the amount of distributable profits derived in the respective accounting period allocated to the parent company's Maltese Taxed Account and the Foreign Income Account:

Provided also that the percentage beneficial entitlement shall be that existing at the end of the respective accounting period. For the purposes of this sub-rule, "percentage beneficial entitlement" shall mean the percentage of the profits available for distribution to the ordinary shareholders represented by the profits available for distribution to the holders of those shares.

(*d*) Where the tax return date, as determined in accordance

with article 10 of the Income Tax Management Act, of the company referred to in paragraph (*a*) is later than the tax return date of the related company, the amount to be allocated to the immovable property account of the related company in accordance with the said paragraph shall be transferred from the amount of distributable profits derived by the related company in the accounting period ending in the year preceding the year of assessment immediately following the year of assessment of the company referred to in the said paragraph.

(*e*) Dividends received from a company registered in Malta shall be disregarded for the purposes of the allocation referred to in paragraph (*a*) and for the purposes of making the hierarchical determination required in terms of paragraph (*c*) and the term 'distributable profits' shall, throughout this sub-rule, be read and construed accordingly.

(8) Where a company derives profits consisting of interest, royalties, fees or any other consideration howsoever described from the granting of loans or any form of credit or from the provision of services to a related company or from the use of tangible or intangible assets by a related company where the profits of the related company would have been allocated to the Immovable Property Account, were it not for the said transaction or transactions, and where such a transaction or transactions from which such profits are derived are entered into with the sole or main purpose of a shareholder or shareholders of any of the said companies obtaining a refund of an amount of tax in terms of article 48(4) or (4A) of the Income Tax Management Act to which the said shareholder or shareholders would not have been entitled were it not for the said transaction or transactions, the provisions of article 48(10) of the Income Tax Management Act shall apply. Cap. 372.

(9) (*a*) For the purpose of sub-rules (7) and (8), a company shall be deemed to be related to another company if at the end of the year preceding the relevant year of assessment both companies are:

(i) resident in Malta; and

(ii) one is a subsidiary of the other or both are subsidiary companies of a third company, resident in Malta.

For the purpose of this sub-rule a company shall be deemed to be a subsidiary of another company, hereinafter referred to as the "parent company":

(i) if and so long as more than 50% of its ordinary share capital and more than 50% of its voting rights are owned directly or indirectly by the parent company; or

(ii) the parent company is beneficially entitled either directly or indirectly to more than 50% of any profits available for distribution to the ordinary shareholders of the subsidiary company; or

(iii) the parent company would be beneficially entitled either directly or indirectly to more than 50% of any assets of the subsidiary company available for distribution to its ordinary shareholders on a winding up.

The Commissioner may, in his absolute discretion, deem a company to be related to another company where, in his opinion, the relationship between the companies has been structured with the sole or main purpose of circumventing the provisions of sub-rule (7) and (8).

(*b*) Notwithstanding anything contained in these rules, where during the year immediately preceding year of assessment 2015 or any year thereafter, as a result of a change in the direct or indirect shareholders of a company (hereinafter referred to as "Company A"), or a change in the rights attached to the shares issued by Company A, such company becomes related to another company (hereinafter referred to as "Company B") within the meaning of paragraph (a) of this sub-rule, the Commissioner may, on application made by either Company A or Company B, in his absolute discretion, determine that such companies are not related to one another for the purposes of sub-rules (7) and (8):

Provided that the Commissioner will only issue such determination where, in his opinion, the relationship between the companies has not been structured with the sole or main purpose of obtaining any advantage which has the effect of avoiding, reducing or postponing liability to tax, or of obtaining any refund or set-off of tax.

(10) Where a person enters into an artificial arrangement intended to shift profits between tax accounts to create an entitlement to a refund in terms of article 48(4) or (4A) of the Income Tax Management Act, the provisions of article 48(10) of the Income Tax Management Act shall apply.

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Interpretation.
Amended by: L.N. 247 of 2011.

6. (1) Work of tradesmen shall include but shall not be limited to, work consisting of or related to electrical works, plumbing, tile laying, pointing and rendering, plastering, painting, excavation and clearing of site, demolition works, dry wall gypsum works and any other work carried on or in relation to such immovable property.

(2) For the purpose of rule 5(3)(*h*):

(*a*) property held by a company under title of emphyteusis shall be deemed to be owned by the said company; and

(*b*) where a company uses any immovable property for the purpose of its activities owned by a related person for no consideration or for a consideration which in the opinion of the Commissioner is less than the market rental value of that property and the said consideration is less than two hundred and fifty euro (€250) per

square metre per annum, the said immovable property shall be deemed to be owned by the said company and the amount which shall be allocated to the immovable property account in accordance with rule 4(3)(*h*) shall be reduced by the amount of consideration paid by the said company to the related person for the use of the said immovable property; and for this purpose a person shall be deemed to be related to a company if:

(i) that person and the company are, directly or indirectly, controlled or beneficially owned to the extent of more than 25% by the same persons; or

(ii) that person owns, directly or indirectly, more than 25% of the ordinary share capital or voting rights of the company; or

(iii) that person, in any capacity whatsoever including that of a trustee, holds the said property or receives the said consideration for and on behalf of or for the benefit of a related person.

Materially incorrect tax accounting.

7. Where in a tax return the allocation of profits to be made in accordance with these rules and the Act is materially incorrect, the Commissioner may regard that tax return as not being complete in all material respects for the purposes of article 10(5) of the Income Tax Management Act.

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Collective investment schemes. *Amended by: L.N. 205 of 2008.*

8. Notwithstanding the other provisions of these rules, these rules shall with regard to a collective investment scheme apply with effect from year of assessment 2010 and subsequent years of assessment and for this purpose the words "year of assessment 2007" in rule 3(*m*) shall be substituted by the words "year of assessment 2009".

Election made by company. *Added by: L.N. 247 of 2011. Amended by: L.N. 183 of 2015.*

9. (*a*) Notwithstanding the provisions contained in the definitions of "Foreign Income Account" and "Maltese Taxed Account" in article 2 of the Act, but without prejudice to any obligation to allocate profits to the final tax account and the immovable property account, a company may elect that the profits or gains derived on or after the effective date of the election, which would, in accordance with the above definition, stand to be allocated to the Foreign Income Account and the Maltese Taxed Account will not be so allocated:

Provided that an election as aforesaid may only be made by notice on such form as the Commissioner may require, and which notice shall indicate acceptance by all the directors of the company or by the company secretary where such election is approved by the board of directors of the company:

Provided also that when an election as aforesaid has been made, it shall also apply to all subsequent years and may not at any time be renounced unless, upon being requested, the Commissioner gives his

permission in writing and in granting his permission the Commissioner may impose such conditions as he deems fit and reasonable, and where the company which has requested permission to renounce the election accepts the conditions laid down by the Commissioner, such conditions shall be operative notwithstanding any provisions of these rules and the Act:

Provided further that, when an election as aforesaid has been made, the profits or gains derived by the company which have been allocated to the Maltese Taxed Account and Foreign Income Account, which, as at the effective date of the election, have not been distributed, shall be allocated to the immovable property account.

(*b*) Where a company makes an election in accordance with the provisions of paragraph (*a*), the provisions of rule 5(3)(*e*) and (h) shall, subject to the requirement to allocate profits to a related company in accordance with rule 5(7), not be applicable to the said company.

(*c*) Such election, made as aforesaid, shall become effective from the first day of the financial year of the company making the election, preceding the financial year during which the election has been made, and the said election shall apply to the whole of the profits or gains referred to in paragraph (*a*) derived by the company during the said preceding financial year and subsequent years.

(*d*) When an election as aforesaid has been made, it shall also apply to all subsequent years, and may not at any time be renounced unless, upon being requested, the Commissioner gives his permission in writing:

Provided that the request for the renunciation of the election may only be made on such form as the Commissioner may require, and which request shall indicate acceptance by all the directors of the company or by the company secretary where such request is approved by the board of directors of the company:

Provided also that the Commissioner shall only give his permission if the company which has requested permission to renounce the election re-allocates its profits after tax to its tax accounts in accordance with the provisions of these rules from the year of assessment from which the said election was effective, as if the said company had never made such election:

Provided also that the re-allocation referred to in this paragraph shall not require the submission of a further or further returns in accordance with article 13 of the Income Tax Management Act, but shall only require a change in the amounts brought forward in the return of income of the year of assessment from which the

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renunciation shall apply:

Provided further that where, at the time of the request for the renunciation of the election, the company making such request is in default of furnishing a return or returns of income, the Commissioner may impose such other conditions as he deems fit and reasonable, and where such company accepts the conditions laid down by the Commissioner, such conditions shall be operative notwithstanding any provisions of these rules and the Act.