

SUBSIDIARY LEGISLATION 123.187

**EUROPEAN UNION ANTI-TAX AVOIDANCE
DIRECTIVES IMPLEMENTATION REGULATIONS**

1st January, 2019

LEGAL NOTICE 411 of 2018, as amended by Legal Notices 348 of 2019 and 29 of 2020.

1. The title of these regulations is the European Union Anti-Tax Avoidance Directives Implementation Regulations. Citation.

2. (1) These regulations implement the provisions of Directive (EU) 2016/1164 of 12 July 2016, as amended by Directive (EU) 2017/952 of 29 May 2017, adopted by the Council of the European Union, laying down rules against tax avoidance practices that directly affect the functioning of the internal market. Scope.
Amended by:
L.N. 348 of 2019.

(2) These regulations apply to all companies as well as other entities, trusts and similar arrangements that are subject to tax in Malta in the same manner as companies, including entities that are not resident in Malta but that have a permanent establishment in Malta provided that they are subject to tax in Malta as companies. Such persons are hereinafter referred to as "taxpayers".

(3) Regulation 10 shall also apply to all entities that are treated as transparent for tax purposes in terms of the Income Tax Acts.

3. For the purposes of these regulations, unless the context otherwise requires: Definitions.
Amended by:
L.N. 348 of 2019.

"associated enterprise" means:

(a) an entity in which the taxpayer holds directly or indirectly a participation in terms of voting rights or capital ownership of 25 per cent or more or is entitled to receive twenty-five per cent (25%) or more of the profits of that entity;

(b) an individual or entity which holds directly or indirectly a participation in terms of voting rights or capital ownership in a taxpayer of twenty-five per cent (25%) or more or is entitled to receive twenty-five per cent (25%) or more of the profits of the taxpayer:

If an individual or entity holds directly or indirectly a participation of twenty-five per cent (25%) or more in a taxpayer and one or more entities, all the entities concerned, including the taxpayer, shall also be regarded as associated enterprises

For the purposes of regulations 9 and 10:

- (i) where the mismatch outcome arises under paragraph (b), (c), (d), (e) or (g) of the definition of "hybrid mismatch" or where an adjustment is required under regulation 9(3) or regulation 10, the definition "associated enterprise" is modified so that the 25 per cent (25%) requirement is replaced by a 50 per cent (50%) requirement;
- (ii) a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person;
- (iii) an associated enterprise also means an entity that is part of the same consolidated group for financial accounting purposes as the taxpayer, an enterprise in which the taxpayer has a significant influence in the management or an enterprise that has a significant influence in the management of the taxpayer;;

"borrowing costs" means interest expenses on all forms of debt, other costs economically equivalent to interest and expenses incurred in connection with the raising of finance taking into consideration definitions found in Maltese law, including, without being limited to, payments under profit participating loans, imputed interest on instruments such as convertible bonds and zero coupon bonds, amounts under alternative financing arrangements, such as Islamic finance, the finance cost element of finance lease payments, capitalised interest included in the balance sheet value of a related asset, or the amortisation of capitalised interest, amounts measured by reference to a funding return under transfer pricing rules where applicable, notional interest amounts under derivative instruments or hedging arrangements related to an entity's borrowings, certain foreign exchange gains and losses on borrowings and instruments connected with the raising of finance, guarantee fees for financing arrangements, arrangement fees and similar costs related to the borrowing of funds;

"consolidated group for financial accounting purposes" means a group consisting of all entities which are fully included in consolidated financial statements drawn up in accordance with the International Financial Reporting Standards or any other financial reporting system as may be determined by means of guidelines issued under article 96(2) of the Act;

"exceeding borrowing costs" means the amount by which the deductible borrowing costs of a taxpayer in terms of the Act, were it not

for the provisions of these regulations, exceed taxable interest revenues and other economically equivalent taxable revenues that the taxpayer receives;

"financial undertaking" means any of the following entities:

(a) a credit institution or an investment firm as defined in point (1) of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council or an alternative investment fund manager (AIFM) as defined in point (b) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council or an undertaking for collective investment in transferable securities (UCITS) management company as defined in point (b) of Article 2(1) of Directive 2009/65/EC of the European Parliament and of the Council;

(b) an insurance undertaking as defined in point (1) of Article 13 of Directive 2009/138/EC of the European Parliament and of the Council;

(c) a reinsurance undertaking as defined in point (4) of Article 13 of Directive 2009/138/EC;

(d) an institution for occupational retirement provision falling within the scope of Directive 2003/41/EC of the European Parliament and of the Council;

(e) pension institutions operating pension schemes which are considered to be social security schemes covered by Regulation (EC) No 883/2004 of the European Parliament and of the Council and Regulation (EC) No 987/2009 of the European Parliament and of the Council as well as any legal entity set up for the purpose of investment of such schemes;

(f) an alternative investment fund (AIF) managed by an AIFM as defined in point (b) of Article 4(1) of Directive 2011/61/EU or an AIF supervised under the Investment Services Act; Cap. 370.

(g) UCITS in the meaning of Article 1(2) of Directive 2009/65/EC;

(h) a central counterparty as defined in point (1) of Article 2 of Regulation (EU) No 648/2012 of the European Parliament and of the Council;

(i) a central securities depository as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council;

"hybrid mismatch" means a situation involving a taxpayer or, with respect to regulation 9(3), an entity, where:

- (a) a payment under a financial instrument gives rise to a deduction without inclusion outcome and:
 - (i) such payment is not included within a reasonable period of time; and
 - (ii) the mismatch outcome is attributable to differences in the characterisation of the instrument or the payment made under it.

For the purposes of sub-paragraph (i), a payment under a financial instrument shall be treated as included in income within a reasonable period of time where:

- (A) the payment is included by the jurisdiction of the payee in a tax period that commences within twelve (12) months of the end of the payer's tax period; or
 - (B) it is reasonable to expect that the payment will be included by the jurisdiction of the payee in a future tax period and the terms of payment are those that would be expected to be agreed between independent enterprises;
- (b) a payment to a hybrid entity gives rise to a deduction without inclusion and that mismatch outcome is the result of differences in the allocation of payments made to the hybrid entity under the laws of the jurisdiction where the hybrid entity is established or registered and the jurisdiction of any person with a participation in that hybrid entity;
- (c) a payment to an entity with one (1) or more permanent establishments gives rise to a deduction without inclusion and that mismatch outcome is the result of differences in the allocation of payments between the head office and permanent establishment or between two (2) or more permanent

- establishments of the same entity under the laws of the jurisdictions where the entity operates;
- (d) a payment gives rise to a deduction without inclusion as a result of a payment to a disregarded permanent establishment;
 - (e) a payment by a hybrid entity gives rise to a deduction without inclusion and that mismatch is the result of the fact that the payment is disregarded under the laws of the payee jurisdiction;
 - (f) a deemed payment between the head office and permanent establishment or between two (2) or more permanent establishments gives rise to a deduction without inclusion and that mismatch is the result of the fact that the payment is disregarded under the laws of the payee jurisdiction; or
 - (g) a double deduction outcome occurs:

Provided that for the purposes of this definition:

- (i) payment representing the underlying return on a transferred financial instrument shall not give rise to a hybrid mismatch under paragraph (a) where the payment is made by a financial trader under an on-market hybrid transfer provided the payer jurisdiction requires the financial trader to include as income all amounts received in relation to the transferred financial instrument;
- (ii) a hybrid mismatch shall only arise under paragraphs (e), (f) or (g) to the extent that the payer jurisdiction allows the deduction to be set off against an amount that is not dual-inclusion income;
- (iii) a mismatch outcome shall not be treated as a hybrid mismatch unless it arises between associated enterprises, between a taxpayer and an associated enterprise, between the head office and permanent establishment,

between two (2) or more permanent establishments of the same entity or under a structured arrangement:

Provided further that for the purposes of this definition and regulations 9, 10 and 11:

"deduction" means the amount that is treated as deductible from the taxable income under the laws of the payer or investor jurisdiction. The term "deductible" shall be construed accordingly;

"deduction without inclusion" means the deduction of a payment or deemed payment between the head office and permanent establishment or between two (2) or more permanent establishments in any jurisdiction in which that payment or deemed payment is treated as made (payer jurisdiction) without a corresponding inclusion for tax purposes of that payment or deemed payment in the payee jurisdiction. The payee jurisdiction is any jurisdiction where that payment or deemed payment is received, or is treated as being received under the laws of any other jurisdiction;

"disregarded permanent establishment" means any arrangement that is treated as giving rise to a permanent establishment under the laws of the head office jurisdiction and is not treated as giving rise to a permanent establishment under the laws of the other jurisdiction;

"double deduction" means a deduction of the same payment, expenses or losses in the jurisdiction in which the payment has its source, the expenses are incurred or the losses are suffered (payer jurisdiction) and in another jurisdiction (investor jurisdiction). In the case of a payment by a hybrid entity or permanent establishment the payer jurisdiction is the jurisdiction where the hybrid entity or permanent establishment is established or situated;

"dual inclusion income" means any item of income that is included under the laws of both jurisdictions where the mismatch outcome has arisen;

"financial instrument" means any instrument to the extent that it gives rise to a financing or equity return that is taxed under the rules for taxing debt, equity or

derivatives under the laws of either the payee or payer jurisdictions and includes a hybrid transfer;

"financial trader" is a person or entity engaged in the business of regularly buying and selling financial instruments on its own account for the purposes of making a profit;

"hybrid entity" means any entity or arrangement that is regarded as a taxable entity under the laws of one (1) jurisdiction and whose income or expenditure is treated as income or expenditure of one (1) or more other persons under the laws of another jurisdiction;

"hybrid transfer" means any arrangement to transfer a financial instrument where the underlying return on the transferred financial instrument is treated for tax purposes as derived simultaneously by more than one (1) of the parties to that arrangement;

"inclusion" means the amount that is taken into account in the taxable income under the laws of the payee jurisdiction.

A payment under a financial instrument shall not be treated as included to the extent that the payment qualifies for any tax relief solely due to the way that payment is characterised under the laws of the payee jurisdiction. The term "included" shall be construed accordingly;

"mismatch outcome" means a double deduction or a deduction without inclusion;

"on-market hybrid transfer" means any hybrid transfer that is entered into by a financial trader in the ordinary course of business, and not as part of a structured arrangement;

"person" means an individual or entity;

"tax relief" means a tax exemption, reduction in the tax rate or any tax credit or refund (other than a credit for taxes withheld at source);

"structured arrangement" means an arrangement involving a hybrid mismatch where the mismatch outcome is priced into the terms of the arrangement or an arrangement that has been designed to produce a hybrid mismatch outcome, unless the taxpayer or an associated enterprise could not reasonably have been expected to be aware of the hybrid mismatch and did not share in the value of the tax benefit resulting from the hybrid mismatch;

"tax period" means the year immediately preceding the year of assessment referred to in articles 10 and 11 of the Act, as applicable;

"transfer of assets" means an operation whereby Malta loses the

right to tax the transferred assets, whilst the assets remain under the legal or economic ownership of the same taxpayer and "transferred assets" shall be construed accordingly;

"transfer of tax residence" means an operation whereby a taxpayer ceases to be resident for tax purposes in Malta, whilst acquiring tax residence in another EU Member State or third country;

"transfer of a business carried on by a permanent establishment" means an operation whereby a taxpayer ceases to have taxable presence in Malta whilst acquiring such presence in another EU Member State or third country without becoming resident for tax purposes in that Member State or third country.

Interest limitation
rule.
Amended by:
L.N. 348 of 2019.

4. (1) Exceeding borrowing costs shall be deductible in the tax period in which they are incurred only up to thirty per cent (30%) of the taxpayer's earnings before interest, tax, depreciation and amortisation (hereinafter referred to as "EBITDA").

For the purpose of this regulation, and in accordance with guidelines issued by the Commissioner, the following may also be treated as a taxpayer:

(a) an entity which is permitted or required to apply the rules on behalf of a group, as recognised for the purposes of Maltese tax law;

(b) an entity in a group, as recognised for the purposes of Maltese tax law, which does not consolidate the results of its members for tax purposes.

In such circumstances, exceeding borrowing costs and the EBITDA may be calculated at the level of the group and comprise the results of all its members.

(2) The EBITDA shall be calculated by adding back to the income subject to tax the tax-adjusted amounts for exceeding borrowing costs as well as the tax-adjusted amounts for depreciation and amortisation. Tax exempt income shall be excluded from the EBITDA.

(3) Notwithstanding the provisions of sub-regulation (1), the taxpayer may:

(a) deduct exceeding borrowing costs up to three million euro (€3,000,000):

Provided that where under the provisions of sub-regulation (1) a group is treated as a taxpayer, the amount of three million euro (€3,000,000) shall be considered for the entire group;

(b) fully deduct exceeding borrowing costs if the

taxpayer is a standalone entity. For the purposes of this paragraph, "a standalone entity" means a taxpayer that is not part of a consolidated group for financial accounting purposes and has no associated enterprise or permanent establishment.

(4) The following exceeding borrowing costs shall be excluded from the scope sub-regulation (1):

(a) costs incurred on loans which were concluded before 17 June 2016, but the exclusion shall not extend to any subsequent modification of such loans;

(b) costs incurred on loans used to fund a long-term public infrastructure project where the project operator, borrowing costs, assets and income are all in the European Union, where the Commissioner is satisfied that the financing arrangements for the project have special features which justify such treatment with regards to other financing arrangements subject to the provisions of this regulation:

Provided that –

(i) a long-term public infrastructure project means a project to provide, upgrade, operate and/or maintain a large-scale asset that is considered in the general public interest by an EU Member State; and

(ii) any income arising from a long-term public infrastructure project shall be excluded from the EBITDA of the taxpayer, and any excluded exceeding borrowing cost shall not be included in the exceeding borrowing costs of the group vis-à-vis third parties referred to in paragraph (b) of sub-regulation (5).

(5) Where the taxpayer is a member of a consolidated group for financial accounting purposes, the taxpayer may fully deduct its exceeding borrowing costs if it can demonstrate that the ratio of its equity over its total assets is equal to or higher than the equivalent ratio of the group and subject to the following conditions:

(a) the ratio of the taxpayer's equity over its total assets is considered to be equal to the equivalent ratio of the group if the ratio of the taxpayer's equity over its total assets is lower by up to two (2) percentage points; and

(b) all assets and liabilities are valued using the same method as in the consolidated financial statements drawn up in accordance with the International Financial Reporting Standards or any other financial reporting system as may be determined by means of guidelines issued under article 96(2) of the Act.

(6) The taxpayer may carry forward, without time limitation, exceeding borrowing costs and, for a maximum of five (5) years, unused interest capacity, which cannot be deducted in the current tax period under sub-regulations (1) to (5).

(7) Financial undertakings shall be excluded from the scope of sub-regulations (1) to (6), including where such financial undertakings are part of a consolidated group for financial accounting purposes.

(8) For the purpose of this regulation, the consolidated group for financial accounting purposes consists of all entities which are fully included in consolidated financial statements drawn up in accordance with the International Financial Reporting Standards or any other accounting standard as determined by means of guidelines issued under article 96(2) of the Act.

Exit taxation.

5.* (1) A taxpayer shall be subject to tax on capital gains that are to be calculated at an amount equal to the market value of the transferred assets, at the time of exit of the assets, less their value for tax purposes, in any of the following circumstances:

(a) a taxpayer transfers assets from its head office in Malta to its permanent establishment in another EU Member State or in a third country in so far as Malta no longer has the right to tax capital gains from the transfer of such assets due to the transfer;

(b) a taxpayer transfers assets from its permanent establishment in Malta to its head office or another permanent establishment in another EU Member State or in a third country in so far as Malta no longer has the right to tax capital gains from the transfer of such assets due to the transfer;

(c) a taxpayer transfers its tax residence from Malta to another EU Member State or to a third country, except for those assets which remain effectively connected with a permanent establishment in Malta;

(d) a taxpayer transfers the business carried on by its permanent establishment from Malta to another EU Member State or to a third country in so far as Malta no longer has the right to tax capital gains from the transfer of such assets due to the transfer.

(2) The exit tax referred to in sub-regulation (1) shall be paid by not later than the taxpayer's tax return date in such manner as may be determined by the Commissioner. A taxpayer may however defer the payment of an exit tax referred to in sub-regulation (1) by paying it in

*Applicable from 1st January, 2020.

instalments over five (5) years, in any of the following circumstances:

- (a) a taxpayer transfers assets from its head office in Malta to its permanent establishment in another EU Member State or in a third country that is party to the Agreement on the European Economic Area (EEA Agreement);
- (b) a taxpayer transfers assets from its permanent establishment in Malta to its head office or another permanent establishment in another EU Member State or a third country that is party to the EEA Agreement;
- (c) a taxpayer transfers its tax residence from Malta to another EU Member State or to a third country that is party to the EEA Agreement;
- (d) a taxpayer transfers the business carried on by its permanent establishment in Malta to another EU Member State or a third country that is party to the EEA Agreement.

The provisions of this sub-regulation relating to deferment of payment of the exit tax shall apply –

- (a) also to third countries that are party to the EEA Agreement if they have concluded an agreement with Malta or with the European Union on the mutual assistance for the recovery of tax claims, equivalent to the mutual assistance provided for in Council Directive 2010/24/EU; and
- (b) where the Commissioner has approved a request made in writing for such deferment.

(3) (a) Where a taxpayer defers the payment in accordance with sub-regulation (2), interest shall be charged in accordance with the provisions of article 44(2A) of the Income Tax Management Act.

Cap. 372.

(b) Where there is a demonstrable and actual risk of non-recovery, the Commissioner may request taxpayers to provide a guarantee as a condition for deferring the payment in accordance with sub-regulation (2).

(4) Where sub-regulation (2) applies, the deferral of payment shall be immediately discontinued, and the tax debt becomes recoverable in the following cases:

- (a) the transferred assets or the business carried on by the permanent establishment of the taxpayer are sold or otherwise disposed of;
- (b) the transferred assets are subsequently transferred to a third country;

- (c) the taxpayer's tax residence or the business carried on by its permanent establishment is subsequently transferred to a third country;
- (d) the taxpayer goes bankrupt or is wound up;
- (e) the taxpayer fails to honour its obligations in relation to the instalments and does not correct its situation over a reasonable period of time, which shall not exceed twelve (12) months:

Provided that paragraphs (b) and (c) shall not apply to third countries that are party to the EEA Agreement if they have concluded an agreement with Malta or with the European Union on the mutual assistance for the recovery of tax claims, equivalent to the mutual assistance provided for in Directive 2010/24/EU.

Cap. 372.

(5) Where assets, tax residence or the business carried on by a permanent establishment is transferred to Malta from another EU Member State, the starting value of the relevant assets for tax purposes in Malta shall be that established by that other EU Member State, unless the Commissioner determines through an enquiry and assessment made in accordance with the provisions of article 31 of the Income Tax Management Act that such value does not reflect the market value. For the purposes of the said determination, the Commissioner shall engage an independent person that is an expert in the field.

(6) For the purposes of sub-regulations (1) to (5), "market value" means the amount for which an asset can be exchanged, or mutual obligations can be settled between willing unrelated buyers and sellers in a direct transaction.

(7) The provisions of this regulation shall not apply in the case of asset transfers related to the financing of securities, assets posted as collateral or where the asset transfer takes place in order to meet prudential capital requirements or for the purpose of liquidity management:

Provided that such assets are set to revert to Malta within a period of twelve (12) months from the time of exit of such assets from Malta.

General anti-abuse rule.

6. (1) For the purposes of calculating the tax liability in according with the Income Tax Acts, there shall be ignored an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

(2) For the purposes of sub-regulation (1), an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

(3) Where arrangements or a series thereof are ignored in accordance with sub-regulation (1), the tax liability shall be calculated in accordance with the provisions of the Income Tax Acts.

7. (1) An entity, or a permanent establishment of which the profits are not subject to tax or are exempt from tax shall be treated as a controlled foreign company where the following conditions are met:

Controlled foreign company rule.

(a) in the case of an entity, the taxpayer by itself, or together with its associated enterprises holds a direct or indirect participation of more than fifty per cent (50%) of the voting rights, or owns directly or indirectly more than fifty per cent (50%) of capital or is entitled to receive more than fifty per cent (50%) of the profits of that entity; and

(b) the actual corporate tax paid on its profits by the entity or permanent establishment is lower than the difference between the tax that would have been charged on the entity or permanent establishment under the Income Tax Acts and the actual corporate tax paid on its profits by the entity or permanent establishment:

Provided that for the purposes of this paragraph, the permanent establishment of a controlled foreign company that is not subject to tax or is exempt from tax in the jurisdiction of the controlled foreign company shall not be taken into account:

Provided also that the tax that would have been charged in Malta means the tax as computed according to the Income Tax Acts.

(2) Where an entity or permanent establishment is treated as a controlled foreign company under sub-regulation (1), there shall be included in the tax base the non-distributed income of the entity or permanent establishment arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.

For the purposes of this sub-regulation, an arrangement or a series thereof shall be regarded as non-genuine to the extent that the entity or permanent establishment would not own the assets or would not have undertaken the risks which generate all, or part of, its income if it were not controlled by a company where the significant people functions, which are relevant to those assets and risks, are carried out and are instrumental in generating the controlled company's income:

Provided that the said company is the taxpayer and the said significant people functions are carried out in Malta.

- (3) There shall be excluded from the scope of sub-regulation (2) an entity or permanent establishment:

(a) with accounting profits of no more than seven hundred and fifty thousand euro (€750,000), and non-trading income of no more than seventy-five thousand euro (€75,000); or

(b) of which the accounting profits amount to no more than ten per cent (10%) of its operating costs for the tax period:

Provided that the operating costs may not include the cost of goods sold outside the country where the entity is resident, or the permanent establishment is situated, for tax purposes and payments to associated enterprises.

Computation of controlled foreign company income.

8. For the purposes of regulation 7 -

(a) the income to be included in the tax base of the taxpayer shall be limited to amounts generated through assets and risks which are linked to significant people functions carried out by the controlling company. The attribution of controlled foreign company income shall be calculated in accordance with the arm's length principle;

(b) the income to be included in the tax base shall be calculated in proportion to the taxpayer's participation in the entity as defined in paragraph (a) of regulation 7(1);

(c) the income shall be included in the tax period of the taxpayer in which the tax year of the entity ends;

(d) where the entity distributes profits to the taxpayer, and those distributed profits are included in the taxable income of the taxpayer, the amounts of income previously included in the tax base pursuant to regulation 7 shall be deducted from the tax base when calculating the amount of tax due on the distributed profits, in order to ensure there is no double taxation;

(e) where the taxpayer disposes of its participation in the entity or of the business carried out by the permanent establishment, and any part of the proceeds from the disposal previously has been included in the tax base pursuant to regulation 7, that amount shall be deducted from the tax base when calculating the amount of tax due on those proceeds, in order to ensure there is no double taxation;

(f) there shall be allowed a credit of the tax paid by the entity or permanent establishment against the tax liability of the taxpayer. The credit shall be calculated in accordance with the provisions of articles 77 and 82 of the Act.

9.* (1) To the extent that a hybrid mismatch results in a double deduction:

Hybrid mismatches.
Added by:
L.N. 348 of 2019.

(a) the deduction shall be denied if Malta is the investor jurisdiction; and

(b) the deduction shall be denied if Malta is the payer jurisdiction and the deduction is not denied in the investor jurisdiction:

Provided that, any such deduction shall be eligible to be set off against dual inclusion income whether arising in a current or subsequent tax period.

(2) To the extent that a hybrid mismatch results in a deduction without inclusion:

(a) the deduction shall be denied if Malta is the payer jurisdiction; and

(b) the amount of the payment that would otherwise give rise to a mismatch outcome shall be included in income if Malta is the payee jurisdiction and the deduction is not denied in the payer jurisdiction.

(3) No deduction shall be allowed for any payment by a taxpayer to the extent that such payment directly or indirectly funds deductible expenditure giving rise to a hybrid mismatch through a transaction or series of transactions between associated enterprises or entered into as part of a structured arrangement except to the extent that one (1) of the jurisdictions involved in the transaction or series of transactions has made an equivalent adjustment in respect of such hybrid mismatch.

(4) There shall be excluded from the scope of application:

(a) paragraph (b) of sub-regulation (2), hybrid mismatches as defined in paragraph (b), (c), (d) or (f) of the definition of "hybrid mismatch" in regulation 3;

(b) paragraphs (a) and (b) of sub-regulation (2), hybrid mismatches resulting from a payment of interest under a financial instrument to an associated enterprise where:

(i) the financial instrument has conversion, bail-in or write down features;

(ii) the financial instrument has been issued with the sole purpose of satisfying loss absorbing

*Applicable from 1st January, 2020.

capacity requirements applicable to the banking sector and the financial instrument is recognised as such in the taxpayer's loss absorbing capacity requirements;

(iii) the financial instrument has been issued:

(A) in connection with financial instruments with conversion, bail-in or write down features at the level of a parent undertaking;

(B) at a level necessary to satisfy applicable loss absorbing capacity requirements;

(C) not as part of a structured arrangement; and

(iv) the overall net deduction for the consolidated group under the arrangement does not exceed the amount that it would have been had the taxpayer issued such financial instrument directly to the market:

Provided that the provisions of this paragraph (b) shall only apply until 31 December 2022.

(5) To the extent that a hybrid mismatch involves income of a disregarded permanent establishment of a taxpayer resident in Malta which is not otherwise subject to tax in Malta, that taxpayer shall include in its income the income that would otherwise be attributed to the disregarded permanent establishment. This applies unless Malta is required to exempt the income of the permanent establishment in terms of a double taxation treaty entered into by Malta with a third country.

(6) To the extent that a hybrid transfer is designed to produce a relief for tax withheld at source on a payment derived from a transferred financial instrument to more than one (1) of the parties involved, the benefit of such relief shall be limited in proportion to the net taxable income regarding such payment.

Reverse hybrid mismatches.
Added by:
L.N. 348 of 2019;
Amended by:
L.N. 29 of 2020.

10. (1) As from 1 January 2022, where one (1) or more associated non-resident entities holding in aggregate a direct or indirect interest in fifty per cent (50%) or more of the voting rights, capital interests or rights to a share of profit in a hybrid entity that is incorporated or established in Malta are located in a jurisdiction or jurisdictions that regard the hybrid entity as a taxable person, the hybrid entity shall be regarded as a resident of Malta and taxed on its income to the extent that that income is not otherwise taxed under any other provision of the Income Tax Acts or in any other jurisdiction.

(2) Sub-regulation (1) shall not apply to a collective investment vehicle. For the purposes of this regulation, "collective

investment vehicle" means an investment fund or vehicle that is widely held, holds a diversified portfolio of securities and is subject to investor-protection regulation in the country in which it is established.

11.* To the extent that a deduction for payment, expenses or losses of a taxpayer who is resident for tax purposes in Malta and in another jurisdiction is deductible from the tax base in Malta and in that other jurisdiction, the deduction shall be denied to the extent that the other jurisdiction allows the duplicate deduction to be set off against income that is not dual-inclusion income. If the other jurisdiction is a Member State, the deduction shall be denied only if the taxpayer is not deemed to be resident in Malta according to the double taxation treaty between Malta and the other Member State concerned.

Tax residency
mismatches.
Added by:
L.N. 348 of 2019.

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