L.N. 333 of 2005

INCOME TAX ACT
(CAP. 123)

Tax Credit (Electronic Business) Rules, 2005

IN exercise of the powers conferred by articles 14(2) and 96 of the Income Tax Act, hereinafter referred to as "the Act", the Prime Minister and Minister of Finance has made the following rules:-

Title.

1. (1) The title of these rules is the Tax Credit (Electronic Business) Rules, 2005.

(2) These rules shall apply in respect of qualifying expenditure incurred on or after the 1st January, 2005.

(3) The equivalent of the benefits under the scheme shall be an amount specifically appropriated in Government's financial estimates for a particular financial year.

Definitions.

2. In these rules, unless the context otherwise requires –

"allowable expenditure" has the meaning assigned to it in rule 9;

"approved project" means a project approved in accordance with rule 5, as subject to any conditions that may be applicable in terms of rule 5(2);

"company" means a company, as defined in the Act, that qualifies as a small or medium-sized enterprise:

Provided that with respect to qualifying expenditure incurred as from such date as the Minister responsible for finance may prescribe, "company" shall also include a company as defined in the Act that does not qualify as a small or medium sized enterprise;

"content" means the presentation and interlinking of information and data held in textual or graphical formats;

"the Corporation" means the Malta Enterprise Corporation;

"eligible developer" means a company that is mainly and substantially engaged in the development, upgrading, maintenance and integration of systems, internally designed or acquired, that enable or facilitate the processing of business transactions over an electronic medium between two third parties or the international dissemination of content through electronically accessed media;

"eligible user" means a small or medium-sized enterprise which carries on a trade, business profession or vocation and which incurs or intends to incur qualifying expenditure for or in connection with the development or acquisition of content, mainly resulting in the sale of its tangible goods or services through business transactions processed over a publicly accessible electronic medium;

"maximum qualifying expenditure" has the meaning assigned to it in rule 6;

"project period" means the period commencing on the earliest date of commencement and ending on the latest date of completion of the project in question as determined in terms of rule 7(1)(d);

"qualifying company" means an eligible developer or an eligible user;

"qualifying expenditure" means expenditure incurred in the carrying out of an approved project for -

(i) the acquisition, construction, development or improvement, by an eligible developer, of any immovable property or industrial structure, including related labour costs which are capitalised as part of the cost of such acquisition, construction, development or improvement;

(ii) the acquisition of plant and machinery, excluding motor vehicles, works of art, antiques and any assets whose use is wholly or mainly of a decorative nature or whose cost is related to their intrinsic value rather than to their specific usefulness for a qualifying project;

(iii) the acquisition by an eligible developer of intellectual property rights from third parties under open market conditions the cost of which is amortisable;

"qualifying project" means a project carried out or to be carried out by a qualifying company for the creation, development or acquisition of systems of information and content referred to in the definition of eligible developer.

Tax credit in respect of allowable expenditure.

3. (1) Subject to the other provisions of these rules, when a qualifying company incurs allowable expenditure in the carrying out of an approved project, it becomes entitled to claim a tax credit in accordance with these rules.

(2) The said tax credit shall be in addition to and without prejudice to the right of that company to a deduction, if any, that may be allowable in respect of the said expenditure in accordance with the provisions of article 14 of the Act.

Application to the Corporation.

4. (1) When a qualifying company incurs or intends to incur qualifying expenditure in carrying out a qualifying project it may apply to the Corporation for the approval of that project.

(2) An application under this rule shall be made on such form as may be acceptable to the Corporation and shall:

(a) provide such particulars of the applicant as are necessary to determine whether it qualifies or not as a small and medium sized enterprise;

(b) indicate the line of economic activity to which the project is linked and in respect of which the company proposes to claim a tax credit under these rules;

(c) describe the project, its purpose and the expected date of its commencement and its duration;

(d) contain a description of each item of qualifying expenditure that the applicant has incurred or intends to incur in the carrying out of the project, which items shall be grouped according to the categories of expenditure listed in the definition of qualifying expenditure;

(e) grant the authorisation referred to in sub-rule (3);

(f) contain such other information, breakdowns and details, and be accompanied by such documents and certifications as the Corporation may require;

(g) be made by not later than three months prior to the company's tax return date for the year of assessment that immediately follows the first year in which the company incurs the expenditure to which the application refers.

(3) The authorisation referred to in sub-rule (2)(e) shall -

(a) grant to the Corporation and its officers access to any premises or works as the Corporation may consider necessary in order to ascertain any matter relevant to the approval of an application and the right to a tax credit under these rules;

(b) authorise the Corporation to disclose to the Commissioner any information and to pass on to the Commissioner originals or copies of any documents and records that the Corporation may have obtained in connection with the application.

Approval of project.

5. (1) When the Corporation is satisfied that a project to which an application made under rule 4 refers is a *bona fide* qualifying project and that the application complies with the requirements of these rules, it may approve the project and proceed to make a determination and issue a letter of approval as provided in rules 6 and 7:

Provided that–

(a) the Corporation shall not approve any project after the 31st December, 2008 or after such earlier date as the Corporation may specify by means of a notice in the Gazette;

(b) the Corporation shall not approve a project whose expected duration is more than thirty-six months.

(2) The Corporation may make the approval of a project subject to such conditions as it may consider appropriate.

Determination of maximum qualifying expenditure.

6. When the Corporation approves a project it shall determine the extent to which, in its opinion, the expenditure referred to in the application constitutes qualifying expenditure and is necessary and reasonable in the light of the purpose for which it is intended to be incurred, and the amount so determined shall constitute the maximum qualifying expenditure.

Letter of approval.

7. (1) In respect of every approved project the Corporation shall issue a letter of approval showing:

(a) particulars of the applicant;

(b) a description of the project, with such conditions as the Corporation may have considered appropriate pursuant to rule 5(2);

(c) the maximum qualifying expenditure for each item of expenditure, indicating the category under the definition of "qualifying expenditure" in rule 2 to which each such item belongs;

(d) the maximum aggregate State aid intensity to which the applicant is entitled;

(e) the earliest date by which the project must commence and the latest date by which it must be completed;

(f) the shortest period for which the investment must be retained in terms of rule 9(2);

(g) the line of economic activity in respect of which the project was approved;

(h) such other particulars as the Corporation may consider appropriate.

(2) The Corporation shall deliver the letter of approval to the applicant and a copy thereof to the Commissioner.

(3) The Corporation shall issue the said letter of approval by not later than the company's relative tax return date.

Certification of completion by the company.

8. (1) Upon the completion of the approved project and not later than sixty days therefrom, the company shall deliver to the Corporation a certificate drawn up by a person who is recognised by the Corporation as competent for this purpose, showing:

(a) the date of completion of the project;

(b) the amount of allowable expenditure, indicating the applicable description under the definition of "allowable expenditure" in rule 2 to which each item belongs;

(c) whether, where applicable, the conditions that may have been made applicable to the project in terms of rule 5(2) have been observed.

(2) Where the approved project includes qualifying expenditure listed under paragraph (i) of the definition of "qualifying expenditure" in rule 2, the certificate referred to in sub-rule (1) shall be

accompanied by a statement written by the architect under whose direction or supervision the works were carried out, confirming that the expenditure was incurred in the carrying out of the project as approved.

(3) The company shall, within the time limit set out in sub-rule (1), deliver a copy of the certificate and, where applicable, of the accompanying statement, to the Commissioner.

(4) The Commissioner may, after receiving a copy of the certificate, request an independent opinion from the Corporation or any other competent technical person regarding the contents thereof.

Allowable expenditure.

9. (1) Expenditure shall constitute allowable expenditure if and to the extent that it meets all the following conditions:

(a) it is qualifying expenditure actually incurred by a company in carrying out an approved project and is not reimbursed to or otherwise recoverable by it;

(b) it is an item of expenditure to which a letter of approval issued under rule 7 refers, which does not exceed the maximum qualifying expenditure for that item, and in respect of which any conditions that may have been made applicable in terms of rule 5(2) have been satisfied;

(c) it was incurred during the project period and for the purpose for which the project was approved;

(d) it is correctly, clearly and separately recorded in the records of the company and supported by documentary evidence.

(2) The investment represented by allowable expenditure shall be retained within the company for at least five years after the termination of the project period.

(3) If an investment or part thereof is not retained within the company for the period referred to in sub-rule (2), the amount of expenditure corresponding to that investment or part thereof, as the case may be, that is not so retained shall be deemed to have never constituted allowable expenditure and the provisions of rule 11 shall apply.

Calculation of the tax credit.

10. (1) The tax credit due for a year of assessment under these rules shall be equivalent to the following percentages of the allowable expenditure incurred in the year immediately preceding that year of assessment –

(a) in the case of expenditure incurred by an eligible developer:

(i) if it relates to capital expenditure for the acquisition of information technology hardware and software, 17.5%;

(ii) if it relates to other capital expenditure, 10.5%;

(b) in the case of expenditure incurred by an eligible user, 17.5%.

(2) Notwithstanding the provisions of sub-rule (1), the tax credit due to a company in respect of an approved project shall not exceed, in the aggregate, –

(a) in the case of a small or medium sized enterprise, 50% of the total cost of the project in question and in conformity with Article 4 of Commission Regulation (EC) No 70/2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, as subsequently amended; and

(b) in the case of any other company, 40% net grant equivalent of the total cost of the project in question:

Provided that where the company in question has benefited from any State aid in respect of expenditure incurred in the carrying out of the project, other than as provided for in these rules, the threshold referred to in paragraph (a) or (b), as the case may be, shall be reduced by the value of that other benefit;

Provided further that the correct calculation of the said reduction, where applicable, shall be the sole responsibility of the company.

(3) The tax credit shall be availed of by way of a deduction from the tax chargeable on gains or profits derived solely from the activities for which the investment to which the approved project refers is made, and shall not be allowable as a credit against tax chargeable on gains or profits from any other source; and any amount of tax credit due for a year of assessment that is not so absorbed in that year may be carried forward and deducted from the tax chargeable in subsequent years on income from the said activities:

Provided that any part of the tax credit that is not availed of up to the year of assessment 2013 shall not be carried forward and the right to a tax credit in respect thereof will lapse.

(4) Where, for a year of assessment, a company qualifies for a tax credit under the Business Promotion Act and also under the provisions of these rules, it shall avail itself of the tax credit under the Business Promotion Act before any set-off is made in respect of the tax credit due under these rules.

(5) A tax credit due in accordance with these rules shall not give rise to a right for any refund.

Reversal or recalculation of tax credit.

11. (1) In the circumstances mentioned in rules 9(3) the tax credit in question shall be reversed or recalculated, as the case may be.

(2) The reversal or recalculation of a tax credit shall give rise to an obligation of the company to pay an amount of tax, in addition to any other tax liability, equivalent to the reduction in the tax credit resulting from the reversal or recalculation, and such amount shall be deemed to be tax chargeable under the Act for the year of assessment in which the cause for the reversal or recalculation subsists, and shall be reported and paid by the company in question accordingly.

Submission of copy of tax return to the Corporation.

12. A company to whom a letter of approval has been issued in terms of rule 7 shall submit to the Corporation, by not later than two months after the relative tax return date, a copy of the tax return for the earliest year of assessment for which the relative tax credit may first be claimed in terms of the said approval and for each subsequent year of assessment for which the said tax credit remains available to it under these rules, irrespective of whether the benefit is utilised or not.

Monitoring by the Corporation.

13. (1) When the Corporation issues a letter of approval to a company in terms of rule 7, it may, from time to time, make such reviews of books and documents, hold on-site inspections on premises of that company and make such other monitoring as it may consider necessary for the purposes of these rules and for any matter relevant to an approved application.

(2) In addition to the database kept under the provisions of the Business Promotion Regulations, 2001, the Corporation shall also keep a database of all assistance provided to, or claimed by, a company under these rules for ten years from the date on which the last individual assistance was granted, in order to enable it to –

(a) verify whether the provisions of these rules have been complied with;

(b) provide the State Aid Monitoring Board with such information as it may require; and

(c) inform the Commissioner whether the credits claimed in terms of these rules have been properly calculated.

Powers of the Commissioner.

14. Notwithstanding the other provisions of these rules, the Commissioner may make such enquiries and verification as he deems fit in accordance with the provisions of the Income Tax Act, and shall, after consulting the Corporation, have the right not to allow any tax credit if any default is committed by the applicant in respect of any provision of the Income Tax Act or the Social Security Act or any subsidiary legislation issued thereunder.

Electronic tax return.

15. No tax credit shall be due to a company under these rules for a year of assessment unless it is claimed in the appropriate section of a tax return submitted by electronic means by not later than the relative tax return date.

Further conditions.

16. The following further conditions must also be fulfilled for eligibility to the benefit under these regulations:

(a) no other benefits are being claimed or may subsequently be claimed by a person on the same activity or project under any other legislation granting fiscal incentive schemes;

(b) all tax liabilities including amounts due in respect of FSS tax as well as social security contributions due up to the time of the application, except for any tax still in dispute, must have been settled or is being settled in accordance with a formal agreement drawn up with the Commissioner.

Commission Regulation (EC) No. 70/2001

17. Insofar as they provide for and regulate benefits for small and medium-sized enterprises, these rules are prescribed and shall be applied in accordance with Commission Regulation (EC) No. 70/2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, as subsequently amended.

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