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L.N. 408 of 2014

INCOME TAX ACT
(CAP. 123)

Cooperation with Other Jurisdictions on Tax Matters (Amendment) Regulations, 2014

IN exercise of the powers conferred by articles 76 and 96 of the Income Tax Act, the Minister for Finance has made the following regulations:-

Citation.

1. The title of these regulations is the Cooperation with Other Jurisdictions on Tax Matters (Amendment) Regulations, 2014, and these regulations shall be read and construed as one with the Cooperation with Other Jurisdiction on Tax Matters Regulations, hereinafter referred to as "the principal regulations".

S.L. 123.127

Amends regulation 2 of the principal regulations.

2. In regulation 2 of the principal regulations, immediately after the definition "express trusts" there shall be added the following new definitions:

" "FATCA Agreement" means the Agreement between the Government of the Republic of Malta and the Government of the United States of America to Improve International Tax Compliance and to Implement the Foreign Account Tax Compliance Act, in accordance with the Schedule to the Exchange of Information (United States of America) (FATCA) Order;

S.L. 123.156

"FATCA Regulations" means regulations 23 to 34, inclusive of both regulations;".

Amends regulation 11 of the principal regulations.

3. Sub-regulation (2) of regulation 11 of the principal regulations shall be substituted by the following:

"(2) For the purposes of the EU Administrative Cooperation Directive -

"person" shall mean -

(a) a natural person;

(b) a legal person;

(c) where Maltese legislation in force so provides, an association of persons recognised as having the capacity to perform legal acts but lacking the status of a legal person; or

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(d) any other legal arrangement of whatever nature and form, regardless of whether it has legal personality, owning or managing assets, which, including income derived therefrom, are subject to any of the taxes covered by the EU Administrative Cooperation Directive;

"tax" shall mean all taxes of any kind levied in Malta except for:

(a) value added tax, customs duties and excise duties covered by other Union legislation on administrative cooperation between Member States;

(b) compulsory social security contributions payable in Malta;

(c) fees, such as for certificates and other documents issued by public authorities; and

(d) dues of a contractual nature, such as consideration for public utilities.".

Amends regulation 12 of the principal regulations.

4. Immediately after sub-regulation (2) of regulation 12 of the principal regulations there shall be added the following:

"(3) When specifically requested by a requesting authority of an EU Member State, the competent authority in Malta shall communicate original documents provided that this is not contrary to the provisions in force in Malta.".

Adds new regulations to the principal regulations.

5. Immediately after regulation 22 of the principal regulations there shall be added the following new regulations:

"Implementation and interpretation.

23. (1) The FATCA Agreement and the FATCA Regulations shall be implemented and interpreted (unless the context otherwise requires) in accordance with the guidelines published on the website of the Inland Revenue Department under the provisions of article 96(2) of the Income Tax Act.

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(2) For the purposes of the FATCA Regulations, words and expressions shall, unless the subject in context otherwise requires, have the same meaning and the same interpretation as the meanings and interpretations contained in the FATCA Agreement and in the published guidelines referred to in sub-regulation (1).

Registration requirements in relation to FATCA.

24. A Malta Financial Institution shall register with the Commissioner for the purposes of the FATCA Regulations by 31st December, 2014 or thirty days following which an entity becomes a Malta Financial Institution, whichever date is the later.

Obligations of Reporting Malta Financial Institutions.

25. A Reporting Malta Financial Institution shall:

(a) have the obligations found in Article 4(1)(a) to (e) of the FATCA Agreement as implemented by the FATCA Regulations;

(b) obtain, where this is required under the FATCA Agreement:

(i) satisfactory self-certification documentation; and

(ii) the U.S. TIN of each Specified U.S. Person, including the U.S. TIN for pre-existing individual accounts from 1st January, 2017 onwards.

Use of third party service provider.

26. A Reporting Malta Financial Institution may use third party service providers to fulfil its obligations contemplated in the FATCA Regulations: provided that these obligations shall remain the sole responsibility of the Reporting Malta Financial Institution.

Information to be maintained.

27. A Reporting Malta Financial Institution shall maintain the information specified in Article 2(2)(a) and Article 3(2) of the FATCA Agreement with respect to all U.S. Reportable Accounts taking into account the timing specified in Article 3 of the FATCA Agreement.

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Due diligence obligations.

28. (1) For the purposes of the FATCA Regulations, a Reporting Malta Financial Institution shall apply the due diligence procedures specified in Annex 1 of the FATCA Agreement to identify U.S. Reportable Accounts and accounts held by Non-participating Financial Institutions. For this purpose -

(a) the due diligence procedures in respect of Pre-existing Individual Accounts shall be regulated in accordance with the provisions of section II of Annex I of the FATCA Agreement. A Reporting Malta Financial Institution may elect, either with respect to all Pre-existing Individual Accounts or, separately, with respect to any clearly identified group of such accounts not to review, identify and report Pre-existing Individual Accounts referred to in section II.A of Annex I of the FATCA Agreement. Such an election shall be made in such manner as the Commissioner may determine;

(b) the due diligence procedures in respect of New Individual Accounts shall be regulated in accordance with the provisions of section III of Annex I of the FATCA Agreement;

(c) the due diligence procedures in respect of Pre-existing Entity Accounts shall be regulated in accordance with the provisions of section IV of Annex I of the FATCA Agreement;

(d) the due diligence procedures in respect of New Entity Accounts shall be regulated in accordance with the provisions of section V of Annex I of the FATCA Agreement.

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(2) Notwithstanding the provisions of sub-regulation (1), and in accordance with the provisions of Section I paragraph C of Annex 1 of the FATCA Agreement, a Reporting Malta Financial Institution may opt to rely on procedures, described in the relevant U.S. Treasury Regulations to establish whether an account is a U.S. Reportable Account or an account held by a Non-participating Financial Institution:

Provided that the Reporting Malta Financial Institution shall make such an option separately for each section of the said Annex I with respect to all relevant Financial Accounts and it shall inform the Commissioner of this option on such form and in such manner as the Commissioner shall determine.

Retention obligations. Cap. 372.

29. Subject to the provisions of article 19 of the Income Tax Management Act, a Reporting Malta Financial Institution shall:

(a) retain the information specified in Article 2(2)(a) and Article 3(2) of the FATCA Agreement for a minimum period of five years starting from the end of the year to which such information relates;

(b) retain the information that is required to be used as evidence in determining the status of the account holder under regulation 28 of the FATCA Regulations for a minimum period of five years starting from the end of the year to which such information relates.

Reporting obligations.

30. (1) A Reporting Malta Financial Institution shall annually report the information specified in Article 2(2)(a) and Article 3(2) of the FATCA Agreement on U.S. Reportable Accounts by not later than 30 April after the end of the calendar year to which such information relates:

Provided that such reporting shall take into account the timing and exclusions specified in Article 3 of the FATCA Agreement.

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(2) The information shall be reported to the Commissioner in the manner set out in guidelines published on the website of the Inland Revenue Department under the provisions of article 96(2) of the Income Tax Act.

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Access to information.

31. The Commissioner may use any information-gathering power under the Income Tax Acts, including those under the provisions of article 10A and article 20 of the Income Tax Management Act, to obtain any information specified in Article 2(2)(a) and Article 3(2) of the FATCA Agreement, notwithstanding that the said information may not be required for the purposes of the Income Tax Acts. The provisions of this regulation shall be interpreted widely in the same manner as the interpretation found in regulation 5.

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Anti-avoidance.

32. If a Reporting Malta Financial Institution enters into any transactions or schemes, the main purpose or one of the main purposes of which is to avoid any obligation under the FATCA Agreement or the FATCA Regulations, these regulations are to have effect as if such transactions or schemes had not been entered into.

Imposition of penalties.

33. (1) Where a Reporting Malta Financial Institution fails to comply with any of the obligations set out in the FATCA Agreement or the FATCA Regulations, the Reporting Malta Financial Institution shall be liable to the following penalties:

(a) where a Reporting Malta Financial Institution fails to maintain the information required to be maintained in terms of Article 2(2)(a) and Article 3(2) of the FATCA Agreement, to a penalty of two thousand five hundred euro (€2,500);

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(b) where a Reporting Malta Financial Institution fails to apply the due diligence procedures specified in Annex I of the FATCA Agreement to identify U.S. Reportable Accounts and accounts held by Non-participating Financial Institutions, to a penalty of five thousand euro (€5,000);

(c) where a Reporting Malta Financial Institution fails to report the information required to be reported in terms of regulation 30 within the time stipulated in said regulation, to a penalty of:

(i) two thousand five hundred euro (€2,500); and

(ii) one hundred euro (€100) for every day during which the default existed: provided that this penalty shall not exceed in total twenty thousand euro (€20,000);

(d) where a Reporting Malta Financial Institution fails to report the information required to be maintained in terms of Article 2(2)(a) and Article 3(2) of the FATCA Agreement in a complete and accurate manner, to a penalty of:

(i) in the case of minor errors -

(aa) two hundred euro (€200); and

(bb) fifty euro (€50) for every day during which the default existed: provided that this penalty shall not exceed in total five thousand euro (€5,000);

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(ii) in the case of significant non-compliance, fifty thousand euro (€50,000). Furthermore, where the United States commences to treat a Reporting Malta Financial Institution as a Non-participating Financial Institution and its details are published by the IRS, the Commissioner shall publish details identifying such an institution on the website of the Inland Revenue Department and inform any relevant regulator in Malta of such;

(e) where a Reporting Malta Financial Institution fails to comply with a request for information by the Commissioner made consequent to regulation 31, to a penalty of:

(i) one thousand euro (€1000); and

(ii) one hundred euro (€100) for every day during which the default existed: provided that this penalty shall not exceed in total thirty thousand euro (€30,000).

(2) Where, notwithstanding any action taken by the Commissioner under these regulations, the penalties remain outstanding or the default in respect of which such penalties have been imposed continues to subsist, as the case may be, the Commissioner may serve further default notices in accordance with this regulation on the said Reporting Malta Financial Institution imposing with each successive notice double the amount of the said penalties, provided that such penalties shall not exceed in total fifty thousand euro (€50,000) in respect of each specific default:

Provided that each such successive notice shall supersede the previous notice served on the Reporting Malta Financial Institution for the same default but any payment made in respect of that previous notice shall be taken into account accordingly.

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Annex II of the FATCA Agreement.

34. (1) The Entities referred to in Annex II to the FATCA Agreement are to be treated as exempt beneficial owners or deemed compliant Foreign Financial Institutions, as the case may be.

(2) The accounts referred to in Annex II to the FATCA Agreement are to be excluded from the definition of Financial Accounts.

(3) Annex II of the FATCA Agreement may be modified by an arrangement entered into between the competent authorities of Malta and the United States:

(a) to include additional Entities and accounts that present a low risk of being used by U.S. Persons to evade U.S. tax and that have similar characteristics to the Entities and accounts described in the said Annex II as of the date of signature of the Agreement; or

(b) to remove Entities and accounts that, due to changes in circumstances, no longer present a low risk of being used by U.S. Persons to evade U.S. tax. Any such addition or removal shall be effective on the date of signature of the said arrangement, unless otherwise provided therein. Procedures for reaching such an arrangement may be included in the arrangement described in paragraph 6 of Article 3 of the FATCA Agreement.

Contestation procedure in relation to penalties.

35. (1) Where a person fails to comply with any of the obligations set out under these regulations, the Commissioner shall advise such person by means of a default notice regarding the amount of the penalty being imposed and the reason for its imposition and require it to rectify the default within ten days from the date such notice is served upon it in accordance with sub-regulation (3).

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(2) The notice referred to in sub-regulation (1) may be served on the relevant person either personally or by being sent by registered post to its registered office informing it of its rights under the provisions of sub-regulation (3).

(3) If a person feels aggrieved by a default notice served upon him under sub-regulation (1), he may apply to the Commissioner by a letter of contestation within ten days from the date the default notice is served upon it by the Commissioner in accordance with sub-regulation (2).

(4) Where the Commissioner refuses the contestation referred to in sub-regulation (3) against a default notice or where the person upon whom the default notice has been served has failed to contest such notice as provided in sub-regulation (3), the Commissioner shall inform the said person accordingly and serve him with a demand notice advising it that unless the latter notice is contested in a court of law within fifteen days from its date of service it shall constitute an executive title in terms of article 40(1)(d) of the Income Tax Management Act. For this purpose only, the relevant penalty shall be considered to be a tax which should have been paid.

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(5) Where the Commissioner is satisfied that the default in respect of which the penalties have been imposed under sub-regulation (1) were not due to any fault or neglect on the part of the relevant person, he shall remit the whole of the said penalties and, in any other case, may remit such part or all of the said penalties as he may think fit. In every case the Commissioner shall inform the said person accordingly.

(6) The payment by any person of any penalties imposed under these regulations shall in no way exonerate that person from its obligations under these regulations.".

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