

L.N. 284 of 2022

**INCOME TAX ACT
(CAP. 123)**

Transfer Pricing Rules, 2022

IN EXERCISE of the powers conferred by article 51A of the Income Tax Act, the Minister responsible for finance has made the following rules:-

1. (1) The title of these rules is the Transfer Pricing Rules, 2022. Citation and applicability.

(2) These rules shall apply for basis years commencing on or after 1st January 2024 in relation to any arrangement entered into on or after that date, and for those arrangements entered into before that date, these rules shall apply to those arrangements that are materially altered on or after that date.

2. (1) In these rules, unless the context otherwise requires: Interpretation.

"Act" means the Income Tax Act; Cap. 123.

"advance pricing agreement" means an agreement entered into between the competent authority and a relevant foreign competent authority under the provisions for a mutual agreement procedure found in:

(a) an arrangement as provided for in article 76 of Act;

(b) the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC); or

(c) any rules or regulations made in accordance with the provisions of article 52B of the Act,

which agreement determines in advance of cross-border arrangements between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment in line with the arm's length standard as developed through international tax standards;

"arrangement" means:

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(a) any transaction, agreement or dealing of any kind, where, at the relevant time, the parties to such an arrangement are associated enterprises. An arrangement shall also include a series of transactions, agreements and dealings of any kind; or

(b) any notional dealing between a body of persons and its permanent establishment;

"associated enterprises" means bodies of persons where:

(a) one (1) of the bodies of persons controls the other body of persons whether as a result of the fact that it holds, directly or indirectly, a participation of more than seventy-five per cent (75%) in the voting rights, or the ordinary capital, of the other body of persons or by virtue of any powers conferred by the articles of association or other document regulating the other body of persons; or

(b) the same person or persons controls two (2) or more bodies of persons whether as a result of the fact that it holds, directly or indirectly, a participation of more than seventy-five per cent (75%) in the voting rights, or the ordinary capital, of the two (2) or more bodies of persons or by virtue of any powers conferred by the articles of association or other document regulating the two (2) or more bodies of persons:

Provided that, for the purposes of paragraphs (a) and (b) of this definition, where such bodies of persons are constituent entities of a MNE group as defined in item 3 of Section I of Annex III of the Cooperation with Other Jurisdictions on Tax Matters Regulations the percentage interest in the voting rights or the ordinary capital referred to therein shall be fifty per cent (50%);

"company" has the meaning as is assigned to it in article 2(1) of the Act:

Provided that the term "company" shall not include any micro, small or medium-sized enterprise;

"competent authority" means the Minister or his authorised representative. An authorised representative shall be the competent official that is identified as such and whose name and designation are published on the website of the Commissioner;

"cross-border arrangement" means an arrangement between

associated enterprises where any one (1) of the following conditions is satisfied:

(a) at least one (1) party to the arrangement is not resident in Malta and at least one (1) party to the arrangement is a company resident in Malta and the arrangement is relevant in ascertaining the total income of that company;

(b) at least one (1) party to the arrangement maintains a permanent establishment situated outside Malta to which the arrangement is effectively connected and at least one (1) party to the arrangement is a company resident in Malta and the arrangement is relevant in ascertaining the total income of that company;

(c) at least one (1) party to the arrangement is not resident in Malta and at least one (1) other party, not being resident in Malta, is a company which maintains a permanent establishment situated in Malta to which the arrangement is effectively connected, or otherwise derives income or gains arising in Malta, and the arrangement is relevant in ascertaining the total income of that company;

"micro, small or medium-sized enterprise" means undertakings fulfilling the criteria laid down in Annex I of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, as in force at the relevant time;

"relevant material change" means:

(a) a change of facts from those described in the request for the relevant unilateral transfer pricing ruling or advance pricing agreement, including any other communication connected thereto, and on which the substance of the unilateral transfer pricing ruling or advance pricing agreement, or any other matter that is not trivial in connection thereto, was based:

Provided that such change has occurred after the date of the request of the said unilateral transfer pricing ruling or advance pricing agreement;

(b) a change in the relevant legislation on which the substance of the unilateral transfer pricing ruling or

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advance pricing agreement, or any other matter that is not trivial in connection thereto, was based:

Provided that such change has occurred after the date of the said unilateral transfer pricing ruling or advance pricing agreement; or

(c) a decision of the directly interested party to withdraw the unilateral transfer pricing ruling;

"relevant time" means the earlier of:

(a) the date on which the arrangement becomes binding on the parties thereto; or

(b) the date of commencement of the execution of the arrangement:

Provided that this definition shall be subject to such other methodology as may be determined by means of guidelines issued in accordance with article 96(2) of the Act.

"unilateral transfer pricing ruling" means a ruling issued by the Commissioner that determines, in advance of an arrangement, an appropriate set of criteria for the determination of the transfer pricing for that arrangement. The said criteria include the method used to arrive at the transfer pricing, comparables and appropriate adjustments thereto and critical assumptions as to future events;

(2) Any terms not defined in sub-rule (1) shall, unless the context otherwise requires, have the meaning assigned to them in the Act.

Ascertaining the total income.

3. In ascertaining the total income of any company in accordance with the Act:

(a) where any amount incurred or due in the year preceding the year of assessment under any cross-border arrangement to which these rules apply differs from the arm's length amount, it shall be deemed that the arm's length amount was incurred or due instead of the actual amount incurred or due;

(b) where any amount accrued or derived in the year preceding the year of assessment under any cross-border arrangement to which these rules apply differs from the arm's length amount, it shall be deemed that the arm's length amount was accrued or derived instead of the actual amount accrued or

derived:

Provided that any adjustment made in terms of paragraphs (a) or (b) shall apply exclusively for the purpose of ascertaining the total income of one (1) or more parties to the cross-border arrangement as the case may be and shall not affect any other person.

4. For the purposes of these rules the "arm's length amount" in relation to an arrangement is the amount that independent parties would have agreed to in relation to the arrangement had those independent parties entered into that arrangement in comparable circumstances.

Definition of arm's length amount.

5. The arm's length amount shall be determined on the basis of such methodologies as shall be designated by the Commissioner in guidelines issued in terms of article 96(2) of the Act.

Transfer pricing methods.

6. A company, in relation to an arrangement to which these rules apply, shall prepare on a timely basis and retain such records as may reasonably be required for the purposes of determining whether, in relation to the arrangement, the total income of the company has been ascertained in accordance with the provisions of these rules.

Records.

7. Where:

Use of the arm's length amount.

(a) the total income of a person liable to tax in Malta is computed such that, instead of the actual amount incurred, due, accrued or derived under the terms of an arrangement, the arm's length amount in relation to that arrangement were incurred, due, accrued or derived as the case may be; and

(b) any other party to the arrangement is liable to tax in Malta and the arrangement is relevant in ascertaining the total income of that person,

then, subject to this rule, the total income of any person referred to in paragraph (b) shall be computed as if, instead of the actual amount incurred, due, accrued or derived under the terms of the arrangement, the arm's length amount in relation to that arrangement were incurred, due, accrued or derived as the case may be.

8. Without prejudice to the provisions of any other law, any adjustments made in furtherance of the requirements of these rules shall be relevant only for the purposes of the Income Tax Acts.

Relevance of these rules.

9. These rules shall not apply where:

Exceptions.

(a) the arrangement comprises a securitisation transaction in terms of the Securitisation Transactions S.L. 123.128.

S.L. 123.128.

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(Deductions) Rules; or

(b) (i) the aggregate arm's length value of all items of income and expenditure of a revenue nature forming part of cross-border arrangements in the year preceding the year of assessment, does not exceed six million euro (€6,000,000); and

(ii) the aggregate arm's length value of all items of income and expenditure of a capital nature forming part of cross-border arrangements in the year preceding the year of assessment, does not exceed twenty million euro (€20,000,000):

Provided that where the parties to cross-border arrangements referred to in paragraphs (a) and (b), make a request in writing to the Commissioner for the issuance of a determination stipulating that the provisions of these rules shall apply and the Commissioner issues such a determination, the provisions of these rules shall apply as may be determined.

Ascertaining the total income of a permanent establishment.

10. (1) For the purpose of ascertaining the total income of any body of persons not resident in Malta, where such body of persons maintains a permanent establishment situated in Malta, these rules shall apply, *mutatis mutandis*, to the arrangements between the permanent establishment and the body of persons.

(2) For the purpose of ascertaining any income derived by a company registered in Malta which is attributable to a permanent establishment situated outside Malta, these rules shall apply, *mutatis mutandis*, to the arrangements between the permanent establishment and the company registered in Malta:

Provided that for the purposes of this rule:

(a) the term "associated enterprises" shall be construed as including the relationship between a permanent establishment and the company;

(b) the term "cross-border arrangement" shall be construed as including an arrangement, as defined in this rule, between a non-resident company and its permanent establishment situated in Malta and between a company registered in Malta and its permanent establishment situated outside Malta; and

(c) a "permanent establishment" shall be treated as if it were a separate and independent enterprise engaged in the same

or similar activities under the same or similar conditions:

Provided further that this rule shall be construed, interpreted and applied to ensure, as far as practicable, consistency between the effect which is to be given to this rule, and the 2010 Report on the Attribution of Profits to Permanent Establishments approved on 22 June 2010 by the Committee on Fiscal Affairs and by the OECD Council on 22 July 2010, as supplemented, modified, revised or otherwise replaced, as may by notice be designated by the Minister responsible for Finance for the purposes of this rule.

11. (1) The Commissioner may issue a unilateral transfer pricing ruling in order to provide certainty in relation to the application of these rules to a cross-border arrangement. Unilateral transfer pricing rulings.

(2) A request for a unilateral transfer pricing ruling shall be made by a party to the arrangement or his authorised representative (hereinafter in this rule referred to as "directly interested party"). Such a request shall:

- (a) be made in writing;
- (b) be made in relation to a specific cross-border arrangement;
- (c) include a reference to these rules;
- (d) disclose the identities of the directly interested parties and all other persons involved in the relevant arrangement including the direct and ultimate beneficial owners of such persons. Where any of such parties or persons are not in existence at the time of the request, the request shall indicate this fact, and the details shall be provided as soon such persons come into existence including all the relevant details of the relevant arrangement; and
- (e) any other details as determined by guidelines issued under the Income Tax Acts.

(3) A request for a unilateral transfer pricing ruling may be made in connection with the tax treatment of a cross-border arrangement commencing on or after the date that the request was made:

Provided that where the relevant arrangement had already commenced on the date when the said request was made, the scope of the request may be extended as follows:

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(a) in the case of a cross-border arrangement which does not consist of a series of transactions, agreements and dealings to transactions, agreements and dealings taking place in the year preceding the year of assessment in which the request was made; and

(b) in any other case, to transactions, agreements and dealings that took place within the three (3) previous basis years and that form part of that arrangement.

(4) A unilateral transfer pricing ruling may only be issued once all the necessary information, including all the identification details and any other relevant information requested by the Commissioner has been provided and the applicable fees have been paid by the directly interested party.

(5) A unilateral transfer pricing ruling shall specify that it has been issued under the provisions of these rules.

(6) The Commissioner shall not unreasonably withhold the issuing of a unilateral transfer pricing ruling. The Commissioner may, however, decline to issue a unilateral transfer pricing ruling where the Income Tax Acts, and any rules, regulations and guidelines made or issued thereunder, clearly provide sufficient certainty with regard to the tax treatment of the relevant arrangement. When the Commissioner declines to issue such a ruling on this basis, he shall issue a notice in writing that includes a reference to the provisions that provide such certainty. The Commissioner may withhold the issuing of a unilateral transfer pricing ruling where the interested party is not up-to-date in relation to the obligations in relation to tax returns at the time that such request is made.

(7) A non-refundable fee of three thousand euro (€3,000) shall be paid when making a request for a unilateral transfer pricing ruling.

(8) A unilateral transfer pricing ruling shall remain binding on the Commissioner for a period of five (5) years from the date the unilateral transfer ruling takes effect:

Provided that the Commissioner may, when issuing a unilateral transfer pricing ruling and after considering the circumstances of the request, stipulate that such ruling shall only remain binding for a shorter period, which period shall be indicated in the ruling itself:

Provided further that a unilateral transfer pricing ruling may also cover the period referred to in the proviso to sub-rule (3)

where a request has been made to this effect by the directly interested party. The provisions of this proviso shall not affect the operation of any provision relating to interests and penalties provided for in the Income Tax Acts.

(9) A directly interested party shall notify the Commissioner of any relevant material change within thirty (30) days from the later of the date of its occurrence or the date from when such party becomes aware thereof. Where such notification includes a request for a modification of the relevant unilateral transfer pricing ruling, such a request may be considered to be a new request for a unilateral transfer pricing ruling, as the Commissioner may deem fit.

(10) A unilateral transfer pricing ruling shall have no effect as from the date on which the Commissioner notifies the directly interested party that a relevant material change has taken place.

(11) A unilateral transfer pricing ruling shall be null and void where the notification referred to in sub-rule (9) has not been made or where the unilateral transfer pricing ruling issued by the Commissioner was based on a misrepresentation or the withholding of any relevant facts.

(12) (a) A directly interested party that has made a request under the provisions of sub-rule (2) may refer a matter relating to that request to the Administrative Review Tribunal established by article 5 of the Administrative Justice Act, hereinafter in these rules referred to as "the Tribunal". Such reference may only be made in relation to matters that had been first raised in correspondence with the Commissioner within the parameters of this rule. Cap. 490.

(b) A reference to the Tribunal in accordance with paragraph (a) shall be made by means of an application which shall state clearly all the facts relevant to the matter and the manner in which, in the opinion of the applicant, that matter should be determined. A copy of the correspondence with the Commissioner referred to in paragraph (a) shall form part of the reference to the Tribunal made by the directly interested party.

(c) The reference to the Tribunal in accordance with paragraph (a) shall be made not later than one hundred and eighty-three (183) days from the date that establishes any of the following instances:

(i) where the Commissioner has issued the unilateral transfer pricing ruling or a refusal in terms of sub-rule (6), the date of such ruling or refusal, as the case

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may be;

(ii) where the Commissioner has not issued the unilateral transfer pricing ruling or a refusal in terms of sub-rule (6), the date when a period of one hundred and eighty-three (183) days have lapsed from the date that the Commissioner received the request for a unilateral transfer pricing ruling or such other longer period as agreed between the Commissioner and the directly interested party;

Cap. 372.

(d) Where a directly interested party institutes a reference to the Tribunal in accordance with this sub-rule, article 34 of the Income Tax Management Act shall apply, *mutatis mutandis*.

(e) A decision by the Tribunal and by any subsequent Court of Appeal on a reference made under this sub-rule shall be binding on the Commissioner and the directly interested person with respect to the specific matter referred to it:

Provided that such decision shall be so binding only if the relevant facts have been correctly stated in the application or otherwise recorded in the records of the case and shall remain binding only as long as there has not been a relevant material change.

Renewal of
unilateral
transfer pricing
ruling.

(13) A directly interested party may request a renewal of a unilateral transfer pricing ruling dealing with an ongoing cross-border arrangement under the same conditions as prescribed in this rule where there has not been a relevant material change since the date of its issue. A request for such renewal shall be made in writing to the Commissioner during the six (6) months preceding the expiry of the relevant unilateral transfer pricing ruling. A non-refundable fee of one thousand euro (€1,000) shall be paid when making a request for a renewal of a unilateral transfer pricing ruling. Except for the provisions of sub-rule (7), the provisions of this rule shall also apply to a request for a renewal of a unilateral transfer pricing ruling.

Advance pricing
agreements.

12. (1) The competent authority may enter into an advance pricing agreement with the relevant foreign competent authority. An advance pricing agreement may be of a bilateral or multilateral nature.

(2) A request for an advance pricing agreement may be made in connection with the tax treatment of a cross-border arrangement commencing on or after the date that the advance pricing agreement takes effect:

Provided that, where the arrangement has already

commenced on the date of the request, the scope of the request may be extended to such transactions that took place during the previous three (3) basis years.

(3) The provisions of rule 11(2), (4) and (5) shall apply, *mutatis mutandis*, to a request for an advance pricing agreement:

Provided that, with respect to a request under this rule, the requirements under rule 11(2)(c) shall also include a reference to the relevant provision concerning the mutual agreement procedure.

(4) A non-refundable fee of five thousand euro (€5,000) shall be paid when making a request for an advance pricing agreement.

(5) An advance pricing agreement may be entered into for a duration of a period not exceeding five (5) years from the date the advance pricing agreement takes effect as determined during the relevant mutual agreement procedure.

(6) In addition to the period provided for in sub-rule (5), an advance pricing agreement may also cover a period not exceeding three(3) basis years preceding the date of the request for the advance pricing agreement where a request has been made to this effect by the directly interested party.

(7) A directly interested party shall notify the competent authority of any relevant material change within thirty (30) days from the date of its occurrence or the date from when such party becomes aware thereof. Where such notification includes a request for a modification of the relevant advance pricing agreement, such a request may only be considered to be a new request for an advance pricing agreement if the competent authority and the other competent authorities so agree.

(8) An advance pricing agreement shall have no effect as from the date on which the competent authority notifies the directly interested party that a relevant material change has taken place. The competent authority shall obtain the agreement of the other competent authorities involved before issuing such notification.

(9) An advance pricing agreement shall be null and void where the notification referred to in sub-rule (7) has not been made or where it is based on a misrepresentation or withholding of any relevant facts:

Provided that the provisions of this sub-rule shall only apply where there is agreement to this effect with the other foreign competent authorities involved.

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(10) A directly interested party may request a renewal of an advance pricing agreement under the same conditions as prescribed in this rule where there has not been a relevant material change since the date of its issue. A request for such renewal shall be made in writing to the competent authority during the six (6) months preceding the expiry of the relevant advance pricing agreement. The competent authority shall obtain the agreement of the other competent authorities involved before confirming such a renewal. A non-refundable fee of two thousand euro (€2,000) shall be paid when making a request for a renewal of an advance pricing agreement. Except for the provisions of sub-rule (4), the provisions of this rule shall also apply to a request for a renewal of an advance pricing agreement.
