Guidelines in relation to the Consolidated Group (Income Tax) Rules

Consolidated Group (Income Tax) Rules ("the Rules")

It is hereby clarified that:

Fiscal Unit registration process

(i) Eligibility to form part of a fiscal unit

In order to join or form part of a fiscal unit, a company should neither have any outstanding balances due nor any outstanding filings required in terms of the Income Tax Acts, the Value Added Tax Act and the Final Settlement System Rules.

For the avoidance of doubt, the above does not include the income tax balance due by a company after the end of the period allocated by these guidelines to register a fiscal unit, i.e. such balance is not required to be settled prior to joining or forming part of a fiscal unit.

In addition to the above, it is also hereby clarified that in order for a company to join a previously established fiscal unit, the said fiscal unit would also need to have no overdue balances and/or penalties due to the CfR.

Moreover, when the principal taxpayer elects for a ninety-five percent (95%) subsidiary to join or form part of the fiscal unit, and such company has already filed an income tax return for that year of assessment, the election will enter into effect as from the following year of assessment.

In order to join or form part of a fiscal unit, a company must be a ninety-five (95%) subsidiary of its parent company at the end of the year preceding the year of assessment in which an election to form such fiscal unit is made. Furthermore, the said companies must have coterminous accounting periods. However, the provisions of article 18(2) of the Income Tax Act shall apply *mutatis mutandis*.

(ii) Timeline

The principal taxpayer shall be granted a 6-month period in order to register a fiscal unit, starting from the morrow of the financial period end, but not before 1 August of the calendar year of the financial period end.

For the following years of assessment, the principal taxpayer shall be granted a 6-month period in order to inform the CfR of any changes to the composition of the fiscal unit for the applicable year of assessment. Such period shall start from the morrow of the financial period end, but not before 1 August of the calendar year of the financial period end.

The above timeframes for the first year of assessment are outlined in Schedule A below and are subject to the discretion of the CfR (exceptionally, the first timeframe for registering a fiscal

unit shall run from the launch date of the application till 31 August 2020). The timeframes for the following years of assessment should be construed accordingly.

Following the lapse of the 6-month period, the principal taxpayer may not add or remove any subsidiary companies to the fiscal unit and may only remove existing transparent subsidiaries in instances where a change is effected in the structure.

In order to remove transparent subsidiaries from the fiscal unit post the 6-month period mentioned above where there is a change in the structure, a request in writing should be made to the CfR.

The obligation to notify the CfR of any changes rests with the principal taxpayer.

Schedule A

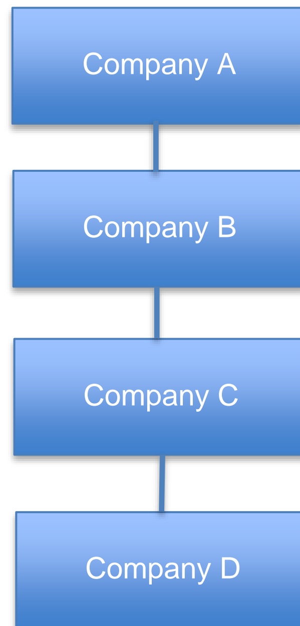
Basis year		**Year of assessment**	**Income tax return statutory deadline**	**Time window for applying for fiscal unity**	
Start:	**End:**			**Start:**	**End:**
01/01/2019	31/12/2019	2020	30/09/2020	Launch Date	31/08/2020
01/02/2019	31/01/2020	2021	31/03/2021	01/08/2020	31/01/2021
01/03/2019	28/02/2020	2021	31/03/2021	01/08/2020	31/01/2021
01/04/2019	31/03/2020	2021	31/03/2021	01/08/2020	31/01/2021
01/05/2019	30/04/2020	2021	31/03/2021	01/08/2020	31/01/2021
01/06/2019	31/05/2020	2021	31/03/2021	01/08/2020	31/01/2021
01/07/2019	30/06/2020	2021	31/03/2021	01/08/2020	31/01/2021
01/08/2019	31/07/2020	2021	30/04/2021	01/08/2020	31/01/2021
01/09/2019	31/08/2020	2021	31/05/2021	01/09/2020	28/02/2021
01/10/2019	30/09/2020	2021	30/06/2021	01/10/2020	31/03/2021
01/11/2019	31/10/2020	2021	31/07/2021	01/11/2020	30/04/2021
01/12/2019	30/11/2020	2021	31/08/2021	01/12/2020	31/05/2021
01/01/2020	31/12/2020	2021	30/09/2021	01/01/2021	30/06/2021

(iii) Registration process

Registration of the fiscal unit may only be done through the online profile of the principal taxpayer as accessed from the CfR income tax portal.

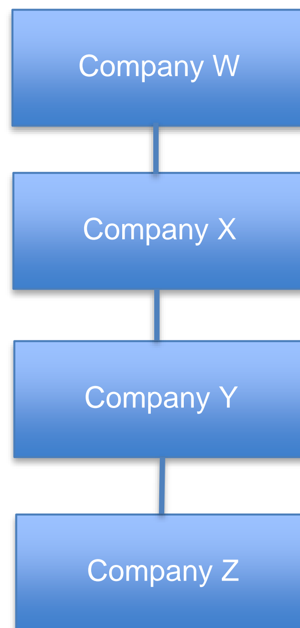
Upon the initial formation of the fiscal unit, the registered tax representative is required to enter the total number of transparent subsidiaries that will be forming part of the fiscal unit, in which the principal taxpayer has direct or indirect ownership.

In order for the registered tax representative to add a company to the fiscal unit, the majority shareholder of such company should already be included within the registration form of the fiscal unit. Therefore, by way of an example, in order to add Company D to the fiscal unit, one must first add Company B in the registration form, followed by Company C prior to adding Company D.



The registered tax representative may only remove a company from the fiscal unit once all subsidiaries of such company have already been removed from the registration form of the fiscal unit. This is done to ensure that parent companies are not removed prior to the removal of the subsidiary companies.

By way of an illustrative example, for Company X to leave the fiscal unit, Company Z must first be removed, followed by Company Y. Company X may then be removed from the fiscal unit.



The registered tax representative will have the possibility to save any changes made to the structure of the fiscal unit (both during and subsequent to the formation of the fiscal unit) as ‘draft’. Upon saving as draft, a notification will be added to the online profile of the transparent subsidiaries, notifying the tax representative that the said company may form part of a fiscal unit.

(iv) Registered tax representative

In order for a company to join or form part of a fiscal unit, such company must be represented by the same registered tax representative as that of the principal taxpayer. The registered tax representative should have authorisation to submit the income tax returns of all companies which are to join or form part of the fiscal unit as at the date of the election as set out in Rule 3(1) of the Rules.

In the instance where the principal taxpayer changes its registered tax representative with respect to the submission of the income tax return, it is deemed that the new registered tax representative is the representative of all companies within the fiscal unit for the purpose of submitting an income tax return, even when a company exits the fiscal unit.

During the period in which a transparent subsidiary forms part of a fiscal unit, the option to alter its registered tax representative with respect to the submission of the income tax return will not be available.

(v) Approval of minority shareholder/(s)

In terms of Rule 3(1) and Rule 4(1) of the Rules, where the approval of the holders of the equity shares which are not owned, directly or indirectly, by the parent company is required, such approval is to be maintained by the principal taxpayer to be available in the event that this is requested by the CfR.

(vi) Non-resident company registration

In terms of the Rules, in order for a company that is not resident in Malta to form part of a fiscal unit and act as a Principal Taxpayer, that company should fall within the definition of “a company registered in Malta”.

In order to satisfy such a definition for the purposes of the Rules, a foreign principal taxpayer would need to appoint a fiscal representative in Malta. Such a fiscal representative may be a Maltese-resident transparent subsidiary forming part of the fiscal unit.

Furthermore, any company that is not resident in Malta that registers to form part of a fiscal unit, would be required to register with the CfR in order to be granted a Maltese income tax registration number prior to being registered as part of a fiscal unit.

(vii) Termination of a fiscal unit

Prior to terminating a fiscal unit, all transparent subsidiaries must be removed from the registration form of the fiscal unit.

Where the principal taxpayer is the exiting company in terms of Rule 5(1) of the Rules, the fiscal unit is deemed to cease existing with effect from the start of the basis year in which the principal taxpayer exits.

<u>Technical clarifications</u>

(viii) Rule 2(1) - Voting rights

“Voting rights” in the definition of “Parent company” in Rule 2(1) of the Rules, shall mean the rights conferred on shareholders in respect of their shares or, in the case of an undertaking not having share capital, on members, to vote at general meetings (or equivalent) of such undertaking on all, or substantially all, matters.

(ix) Rule 4(1)(a) - Balances c/fwd

The provisions of Rule 4(1) are to be interpreted as meaning that either all balances of a transparent subsidiary (that is not a hundred per cent (100%) subsidiary) are transferred to the principal taxpayer, or all balances of the said subsidiary are kept in abeyance (i.e. there can be no mix of balances partly kept in abeyance and partly transferred). A different decision may be adopted for different transparent subsidiaries.

Notwithstanding the above, any unabsorbed notional interest deduction balance existing at the end of the basis year preceding that with regard to which the election for the subsidiary (irrespective of whether the subsidiary is a ninety-five per cent (95%) subsidiary, or a one hundred per cent (100%) subsidiary) to join the fiscal unit becomes effective, should be kept in abeyance upon joining or commencing to form part of the fiscal unit. However, any unabsorbed notional interest deduction balance existing at the level of the principal taxpayer may continue to be carried forward and claimed in accordance with the Notional Interest Deduction Rules.

(x) Rule 4(1)(a) - Tax account balances

The summation of all balances of profits allocated to the tax accounts, excluding the untaxed account, of all transparent subsidiaries existing at the end of the basis year preceding that with regard to which the election for the subsidiary (whether a ninety-five per cent (95%) subsidiary that has not elected to keep its balances in abeyance, or a one hundred per cent (100%) subsidiary) to join the fiscal unit becomes effective, shall be added to the tax account balances of the principal taxpayer.

Notwithstanding the above:

a) for the purposes of Article 48(4) and (4A) of the Income Tax Management Act, any dividend distributed from pre-tax consolidated profits shall be deemed to be made from the transparent subsidiary's tax account balances existing at the end of the basis year preceding that with regard to which the election for the transparent subsidiary to join the fiscal unit becomes effective;

b) for presentation purposes, the principal taxpayer is required to keep a record of the pre-tax consolidation tax account balances of itself and of the transparent subsidiaries forming part of the fiscal unit in a format as determined by the Commissioner for Revenue. In this respect, irrespective of whether the tax account balances are kept in abeyance or otherwise, for presentation purposes, the pre-tax consolidation tax account balances are to be reported on a standalone basis as part of the standalone data which is to be submitted as part of the consolidated income tax return.

Any dividend distributed by a transparent subsidiary from profits derived while it forms part of a fiscal unit shall be made from its Untaxed Account, and the withholding tax obligations arising in terms of article 61 of the Act shall be applicable.

(xi) Deductibility of expenses

In terms of Rule 6(1)(b), the nature of any income brought to charge in the name of the principal taxpayer shall remain the same as determined at the level of the individual members of the fiscal unit, and therefore the assessment of whether an expense is deductible or otherwise shall be made in the same manner.

(xii) Income attributable to a foreign subsidiary in terms of Rule 6(1)(f)

Rule 6(1)(f) of the Rules stipulates that the "income or gains derived by a transparent subsidiary that is not resident in Malta shall be deemed to be attributable to a permanent establishment of the principal taxpayer situated outside Malta".

In terms of article 12(1)(u)(2) of the Act, the profits or gains attributable to the permanent establishment "shall be calculated as if the permanent establishment is an independent enterprise operating in similar conditions and at arm's length".

Thus, in a situation where there are intercompany transactions between a Maltese entity and the non-Maltese resident subsidiary which would be ignored transactions in terms of the Rules, one would need to assess the profits attributable to the foreign subsidiary (which is treated as a permanent establishment of the principal taxpayer) on an arm's length basis - and it is only such profits which may be subject to the exemption contemplated under article 12(1)(u)(2).

By way of example, Company A, a Maltese resident company, fully owns Company B, a non-Maltese resident company, and together they form a fiscal unit. Company A has provided an interest-bearing loan to Company B and generates arm's length interest income from this said loan of €100. Company B generates income of €500 and has accounting profits of €400.

In terms of the Rules, the €100 interest income / interest expense would be an ignored transaction, with the €500 income generated by Company B being taxable in the hands of the principal taxpayer. However, as the income is generated by Company B (i.e. a non-Maltese resident subsidiary), one must assess the extent of income that would be attributable to Company B in terms of article 12(1)(u)(2), i.e. as an independent enterprise.

Therefore, for the purpose of applying the exemption in terms of article 12(1)(u)(2), one would attribute €400 (i.e. the standalone profit) to Company B. The remaining €100 will be brought to charge.

(xiii) Rule 6(1)(g)

The provisions of Rule 6(1)(g) are also applicable to companies which are both not ordinarily resident and not domiciled in Malta.

(xiv) Rule 6(2)

The rate of income tax applied to the chargeable income of the principal taxpayer in terms of this sub-rule is not linked to a dividend distribution or the availability of profits for distribution.

The term "claimable" refers to the refund that would have been claimable by a shareholder upon receipt of a dividend subject to the satisfaction of the statutory criteria (e.g. registration of shareholder entitled to claim the refund for the purposes of such refund, including the provision of details in respect of ultimate beneficial owners, etc.) had such a dividend been distributed.

Furthermore, for the avoidance of doubt, it is also clarified that no refunds in terms of Article 48(4) and (4A) of the Income Tax Management Act may be claimed by any member of the fiscal unit and/or their shareholders in respect of income subject to tax in terms of Rule 6(2).

(xv) Rule 6(2) – Amounts claimable

The total amounts claimable referred to in Rule 6(2) shall be computed by reference to the amount of chargeable income in the Maltese Taxed Account and Foreign Income Account of the fiscal unit.

By way of example, Company A ('Parent Company') fully owns Company B and Company C. All companies are resident in Malta, and together they form a fiscal unit. Company B and Company C have chargeable income allocated to the Maltese Taxed Account before taking into account any trading losses brought forward amounting to €200,000 and €50,000 respectively. Company C has unabsorbed trading losses brought forward from previous years amounting to €100,000.

	Company A (Parent)	**Company B**	**Company C**	**Fiscal Unit**
	€	€	€	€
Chargeable income before trading losses b/fwd	0	200,000	50,000	250,000
Trading loss absorbed	0	0	(50,000)	(100,000)
Chargeable income (allocated to the Maltese Taxed Account)	0	200,000	0	150,000
Tax charge	**0**	**70,000**	**0**	***7,500**

The amount of chargeable income allocated to the Maltese Taxed Account of the fiscal unit amounts to €150,000 from which a maximum claim of €45,000 (€150,000 x 35% x 6/7ths) can otherwise be claimed.

*Effective tax rate = 35% - $\frac{45,000\ (income\ tax\ refund\ claimable)}{150,000\ (chargable\ income\ of\ the\ fiscal\ unit)}$ = 5%.

Note: This example does not take into account any tax that may be chargeable on a deemed dividend in terms of Rule 13.

(xvi) Rule 6(2) - Specifically empowered

With respect to Rule 6(2) of the Rules, the term 'specifically empowered' requires such empowerment at the level of the principal taxpayer.

(xvii) Rule 8(3) - Rule 9 elections

When a principal taxpayer makes, or has made, an election in terms of Rule 9 of the Tax Accounts (Income Tax) Rules (hereinafter referred to as the "Rule 9 election"), irrespective of whether such election was made before the formation of the fiscal unit or when the principal taxpayer already formed part of the fiscal unit, such election shall apply to the whole of the fiscal unit.

When a parent company that has not made a Rule 9 election makes an election in order for itself and its subsidiary to form a fiscal unit, and such transparent subsidiary had made a Rule 9 election prior to joining the fiscal unit, the transparent subsidiary will be deemed to have renounced its Rule 9 election in terms of Rule 9(d) of the Tax Accounts (Income Tax) Rules.

Consequently, immediately prior to joining such fiscal unit;

a) the transparent subsidiary must re-allocate its after-tax profits to its tax accounts in accordance with the provisions of the Tax Accounts (Income Tax) Rules from the year of assessment from which the said election was effective, as if the said transparent subsidiary had never made such election; and

b) any dividend distributions made by the transparent subsidiary from profits earned up to the end of the basis year immediately preceding the first basis year during which the transparent subsidiary forms part of the fiscal unit shall, notwithstanding the Rule 9 election, be deemed to have been made as if the Rule 9 election has not been renounced.

In the event that a ninety-five percent (95%) transparent subsidiary has elected to keep its balances in abeyance in terms of Rule 4(2), then paragraphs a) and b) above would not apply.

When a company exits a fiscal unit, it shall be deemed upon exit to have the same Rule 9 election status as that of the principal taxpayer of the fiscal unit of which it formed part immediately before exiting.

(xviii) Rule 13(2)

Any income tax payment that is required to be made with respect to the advance arising in terms of Rule 13(1) in respect of an accounting year is required to be settled by the principal taxpayer by not later than the fourteenth day following the tax return date of the year of assessment relative to that accounting year.

The tax return date as set-out in rule 13(2) is the statutory filing date as determined by Rule 2 of the Income Tax (Statutory Dates) Rules (S.L 372.16).

(xix) Other considerations

(A) The “group relief provisions” - Articles 16 to 22 of the ITA

Any company which, notwithstanding the Rules, would have been eligible to surrender losses and/or claim losses under the group relief provisions, may still do so with a fiscal unit if such company and the principal taxpayer (taking into account Rule 6(1)(h)) satisfy the conditions set out in articles 16 to 22 of the ITA.

(B) Different reporting currencies

The currency to be adopted in computing and completing the consolidated income tax return shall be that in which the share capital of the principal taxpayer is denominated.

The standalone data which is to accompany the submission of the consolidated income tax return is to be reported in the currency of each respective entity in the fiscal unit, being the currency in which the share capital thereof is denominated.

(C) Exiting a fiscal unit

When a transparent subsidiary elects to leave the fiscal unit, prior settlement of the income tax liability of the fiscal unit shall be a necessary prerequisite for such a change.

On the other hand, in the event that the transparent subsidiary is forced to leave the fiscal unit, either due to a change in the company’s year-end, or due to a change in the ownership thereof such that the said transparent subsidiary no longer satisfies the conditions of Rule 3, the settlement of the income tax liability of the fiscal unit shall not be a necessary prerequisite for such a change.

(D) Other obligations

In line with Rule 3(6) of the Rules, given that FSS obligations are excluded from fiscal consolidation, PE numbers will not be issued to a fiscal unit and each entity forming part of the fiscal unit will continue to maintain its obligations under the FSS Rules. In a similar manner, this would also apply for any VAT obligations.

(E) Non-resident entities

Any standalone data which is to accompany the submission of the consolidated income tax return, is not required to be submitted for any non-resident entity forming part of the fiscal unit, unless such entity derives any income which is liable to tax in Malta.