THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2024

MODULE 2.07 – MALTA OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

FWL falls within the definition of a “company” in terms of Article 2(1) of the Income Tax Act (ITA). Since it is a partnership en commandite that was incorporated prior to 1st January 2015, it is deemed to have made an election to be treated as a company in terms of Article 27(6) of the Income Tax Management Act (ITMA). This therefore means that the partnership is considered to be opaque, and for the purposes of income tax, the provisions applicable to a company are relevant.

Most importantly, it is implied that although the partners are non-resident and non-domiciled in Malta, the partnership is nonetheless a tax resident of Malta by virtue of its incorporation in Malta. Hence it is taxable in Malta on its worldwide income.

Dismissal of Maltese resident employees

Article 4(1)(b) of the ITA stipulates that all gains or profits derived from an employment, regardless of whether they are received in cash or in kind and whether they are received in terms of the normal conditions of the contract of service or by way of a special or ex gratia allowance are subject to income tax. However, termination payments made ex gratia, such as the case here, are out of scope of income tax and are hence not taxable income. Therefore, the employees will not be taxed on their termination benefit. On the other hand, the payment is a non-deductible expense for the employer.

Dismissal of German resident CEO

The terminal benefit would be taxable in terms of Article 4(1)(b) of the ITA. The Highly Qualified Persons rules may potentially be applicable for the CEO (subject to the satisfaction of the applicable criteria for a qualifying contract of employment), since the position of a CEO meets the criteria of ‘eligible office’ in which case, provided the necessary conditions are met, the CEO’s employment income would be taxable at 15% in Malta. The payment is a deductible expense for FWL.

Transfer of Intellectual Property

Capital gains or profits from a transfer of intellectual property are taxable in terms of Article 5(1)(a)(ii). FWL will be taxed at the rate of 35% on any gains from the transfer of the intellectual property.

The partner acquiring the intellectual property will not be subject to any tax or duty in Malta.

Transfer of right of ownership over immovable property in Malta to a third party

Transfers of rights over immovable property in Malta are regulated by Article 5A. FWL will be subject to a final tax of 8% of the transfer value, in terms of Article 5A(5)(a) of the ITA. The person acquiring the property will be subject to duty equal to 5% of the transfer value.

Transfer of right of ownership over immovable property in Malta to a partner

FWL will incur a final withholding tax of 8% of the transfer value (being the higher of the market value of that property and the consideration payable for the transfer). The partner will be subject to 5% duty on the transfer value of the property.

Transfer of tenancy rights to a Maltese company

The transfer of tenancy rights also falls within the scope of Article 5A, due to the definition of “property” in Article 5A including also “any right over such property”. FWL will be taxed at a final tax of 8% of the transfer value, in the event that the market value is higher than the consideration (which is nil in this case). Conversely, duty only applies to any immovable property or any real right over an immovable property.

Auction of all the antique furniture and paintings

No capital gains tax or duty will be levied on FWL upon the sale of its capital assets since furniture and paintings are outside the scope of income tax on capital gains and duty.

Disposal of furniture

No capital gains tax will be levied on FWL. However, the partnership will be required to draw up a balancing statement and calculate any balancing charge or allowance arising from the disposal. The balancing charge, if any, is taxable at the corporate tax rate of 35%. On the other hand, a balancing allowance is deductible against the partnership's trading income, or can be carried forward to the next financial period if there are insufficient profits (albeit it will likely not be possible to use any carried forward balancing allowance in view of the envisaged winding up of the partnership).

The acquirers will not be subject to any income tax or duty.

Gifting and scrapping of motor vehicles

No capital gains tax will be levied on FWL since capital gains on the transfer of motor vehicles are outside the scope of the Income Tax Act. FWL will however need to draw up a balancing statement, since it was previously claiming capital allowances on the assets.

The vehicle gifted to the CEO is a taxable fringe benefit and, provided that the CEO is taxable on his employment income in Malta, then the value of the gift shall be assessed to tax as Article 4(1)(b) income.

Assignment of distributorship agreement

The transfer of a distributorship agreement gives rise to a tax on capital gains, since it is a transfer of a right over business, and therefore included within the scope of Article 5(1)(a)(ii).

Sale of stock

The sale of stock in the ordinary course of trade of the partnership is considered to be Article 4(1)(a) income and as such the net income after any allowable deductions is taxable at the corporate tax rate of 35%. Since the stock will be sold at a loss, FWL will not incur any tax on this income; rather it may carry forward the trading loss to subsequent years and claim against its other chargeable income that the partnership derives (if at all applicable in view of the envisaged winding up).

Distribution of remaining cash

The cash being distributed may either represent a return of capital or a distribution of income which was derived by FWL. In case of the latter, and in terms of Article 47 of the Income Tax Act, such distribution is deemed to be a dividend paid to the partners. In either case, however, since the partners are foreign individuals, no further tax will be levied on the receipt of the cash. In the case that these are dividends made out of the FIA or MTA accounts, the partners may be eligible to claim a refund in terms of the refundable tax credit system.

Question 2

MHL will be considered a company that is resident and domiciled in Malta, and therefore it will be taxed in Malta on its worldwide income.

Warehouse in Malta

The rental income received from the rent of the warehouse in Malta to a foreign related party is taxable under the provisions of Article 4(1)(e) at the corporate rate of 35%. In this regard, deductions against rental income are limited to the following:

a) Interest expense is allowed, provided that it relates to the asset which produces the income;
b) Rent, ground rent or similar burden incurred in relation to the same property being leased;
c) License fees where these are paid for the purposes of Maltese tourism law (presumably this is not applicable since MHL is renting a warehouse, not tourist accommodation);
d) A further deduction of 20% of the net income remaining after deducting from the gross rent the expenditure referred to at (b) above, i.e. the rent or relative ground rent and (c) i.e. any license fees.

Beyond these, no further deductions are allowed, and hence any other expenses that are incurred specifically in relation to this rental income are non-deductible.

Furthermore, it is pertinent to note that the final withholding tax of 15% as contemplated in Article 31D cannot be applied in this case, because the lessee is a related party in terms of Article 16 of the Income Tax Act.

The profits derived from the rent of the warehouse are allocated to the Immovable Property Account. Upon a distribution, the shareholder shall not be obliged to disclose the existence of such dividend in any return made pursuant to the provisions of the Income Tax Acts, and the shareholder will not be charged to further tax under the Income Tax Act. Additionally, Mr. A will not be able to claim any refund of tax, in terms of the refundable tax credit system, out of profits received from the IPA of MHL.

MHL will be required to distribute profits allocated in the IPA before distributing any profit allocated in the MTA, if any, as required by Article 68(3) of the ITA.

Shopping mall in Malta

Similar to the above, rental income derived by MHL is considered to be Article 4(1)(e) income, and therefore the same rules as above apply. However, in this case, since the lessee is non-related party, MHL may opt to apply the 15% final rate as contemplated in Article 31D. If this is applied, no deductions may be claimed against the rental income, and the gross rental income is taxed at 15%. To benefit from the final withholding tax rate of 15%, MHL must complete the prescribed TA24 form and submit it, together with the payment of tax, within the prescribed period.

It is also imperative to note that if MHL chooses to pay tax on rental income at the 15% final withholding rate as provided for in Article 31D of the ITA, it must apply this rate to all of its rental income received from non-related parties during that same year.

Should MHL opt to apply the final withholding tax of 15%, then the net profits are allocated to the Final Tax Account. Upon a distribution, Mr. A will not be assessed to further tax in Malta, and will not be able to claim any tax refund under the refundable tax credit system on profits distributed from the FTA.

Malta government stocks

Interest income received by MHL can be classified as Article 4(1)(c) income, and is taxable at the corporate rate of 35%. MHL may claim a deduction for expenses incurred in direct relation to this income, if any. Otherwise, since interest from Malta Government Stocks meets the definition of “investment income” in Article 41(a) of the Income Tax Act, and since MHL is a “recipient” as defined in Article 41(c), MHL may opt to apply the Investment Income Provisions (IIP) and have this income taxed at source at a 15% rate applied on the gross income.

In the case that MHL opts to apply the IIP and have its income taxed at 15%, the net income will be allocated to the Final Tax Account. Upon a distribution, Mr. A will not be assessed to further tax in Malta and will not be able to claim any tax refund under the refundable tax credit system on profits distributed from the FTA. On the other hand, if the income is taxed at the corporate rate of 35%, the net profit is allocated to the Maltese Taxed Account. Upon a dividend distribution, Mr A will not be assessed further tax under the Maltese income Tax Act, and he will be able to claim a refund of five-sevenths of the tax incurred by MHL on those profits.

Cash held in Maltese bank account

Similar to (iii) above, the interest received may either be taxed as Article 4(1)(c) income at the corporate tax rate of 35%, or otherwise, since the term “investment income” also includes income received from a “person carrying on the business of banking under the Banking Act”, MHL may apply the IIP and opt for the gross income to be taxed at 15%.

In case of the former, the net profit will be attributed to the MTA, and in case IIP are applied, the income is attributed to the FTA.

Malta Stock Exchange-listed shares

The tax treatment of dividends received from other Maltese companies will depend on the tax account from which the dividend is distributed. No tax is charged on dividend income received from the Final Tax Account and from the Untaxed Account of another company. On the other hand, gross dividends received from the Immovable Property Account, Maltese Taxed Account and Foreign Income Account are taxable at the corporate rate of 35%. MHL may claim deductions against the dividend income if it incurred any expenses in direct relation to the acquisition of the shares.

By application of Articles 59 and 60 of the Income Tax Act, Malta’s full imputation system is applicable on dividends received out of the IPA, MTA or FIA accounts. MHL will therefore be able to claim in its tax return a tax credit equal to the corporate tax suffered on those profits by the distributing entity.

Dividend income received from a Maltese company is allocated to the same tax account from which it was distributed.

Shareholding in Italian company

Dividends received from participating holdings, as defined in Article 2 of the Income Tax Act, and which meet the conditions in Article 12(1)(u)(1) are, at the option of the taxpayer, exempt from Malta income tax. Since MHL holds 100% shareholding in the Italian company, assuming that the shares it holds are ‘equity shares’ as defined in Article 2 of the ITA, and since the subsidiary is a company resident in Italy (an EU country), dividends received from such subsidiary are exempt from tax by virtue of the participation exemption.

The income received is therefore allocated to the Untaxed account, and no further tax is levied upon distribution to Mr A.

Italian branch

In terms of Article 12(1)(u)(2), the participation exemption is also applicable to profits attributable to a permanent establishment situated outside of Malta, at the option of the taxpayer. These profits are therefore exempt from tax in Malta and hence are allocated to the UTA.

Shareholding in US corporation

Since MHL does not own at least 5% of the equity shares in the US corporation, and assuming that none of the other participating holding criteria are met, any dividends received from the US company are taxable at the corporate rate of 35%, and the net profit is allocated to the FIA.

In the case that MHL has suffered foreign withholding tax on the distribution of the dividend, MHL may claim double tax relief in terms of the double tax agreement between Malta and the US.

Upon a dividend distribution, Mr A will not be assessed to further tax on the dividend income, and may claim a refund of six-sevenths on the corporate tax paid by MHL on this income. However, if the profits will be subject to double taxation relief, the refund is equal to two-thirds of the Advance Company Income Tax.

Portfolio investment in Luxembourg fund

Since MHL does not own a participating holding in the collective investment scheme, the dividend will be taxed at the corporate tax rate of 35%, and the net profit allocated to the FIA. If however the dividend is paid through an authorised financial intermediary, the profits may be subject to the Investment Income Provisions and subject to a 15% final withholding tax, at the taxpayer’s option. In that case, the profits would be allocated to the FTA.

Shareholding in Latvian company

Since the company is incorporated in an EU country, then despite the tax exempt status, MHL can apply the participation exemption contemplated in Article 12(1)(u) of the ITA. Hence the dividend income is exempt from Malta tax, and the profits are allocated to the UTA.

Warehouse in China

The rental income received from the rent of the warehouse in China is taxable in Malta as Article 4(1)(e) income. Deductions as discussed in 1) above may be claimed against this income, and the final withholding tax rate contemplated in Article 31D is not applicable for rent of property situated outside of Malta. The net income will be allocated to the FIA.

In the case that MHL incurs any foreign tax in China, MHL may claim double tax relief in accordance with the double taxation treaty between Malta and China.

Upon a distribution, Mr A will not be subject to any further tax in Malta, and he may claim a refund of six-sevenths (or two-thirds, in case double tax relief is claimed by MHL) of the Advanced Company Income Tax suffered on this income.

Cash held in Swiss bank account

Since MHL is taxable in Malta on its worldwide income, the interest derived from the Swiss bank account is also taxable in Malta as Article 4(1)(c) income. The net income is attributed to the FIA, and the company may claim double tax relief if it suffered any foreign taxes on the interest income in accordance with the double tax treaty between Malta and Switzerland.

Upon a distribution, Mr A will not be subject to any further tax in Malta, and he may claim a refund of five-sevenths (if the interest income qualifies as passive interest primarily on the basis that it has suffered foreign tax of less than 5%) or of six-sevenths (if the interest does not qualify as passive interest), or alternatively of two-thirds (in case DTR is claimed by MHL), of the Advanced Company Income Tax suffered on this income.

PART B

Question 3

Malta

Since CL is incorporated in Malta, it is, in terms of the Maltese domestic law, resident and domiciled in Malta for income tax purposes, and hence CL is taxed in Malta on its worldwide income. The fact that the shareholder is not Maltese and does not reside in Malta is irrelevant for the purposes of establishing the company's tax residence in Malta.

Prof. Bronx, being a non-Maltese resident for income tax purposes is eligible to claim a refund of tax under the refundable tax credit system. In this respect, Prof. Bronx must be registered as a shareholder for the purposes of the refundable tax credit system, and the company must distribute a dividend from the MTA or FIA in order for Prof. Bronx to be eligible for such a tax refund.

As stated above, the treaty for double taxation relief between Malta and the United Kingdom establishes tax residence of a company in the country in which the place of effective management is situated. The fact that the company has a Maltese resident director indicates that the company's place of management is in Malta. The term 'effective' implies that one is required to look beyond the official titles of the persons involved, but rather consider the actual duties and responsibilities that the persons involved have. In this case, the Maltese director effectively manages and controls the company from Malta and therefore, in terms of the double taxation treaty between Malta and the UK, the company is tax resident in Malta only. Accordingly, the UK has no right to tax CL on the basis of residence.

Switzerland

In the case where the company receives investment income from the Swiss bank deposit account, Switzerland may claim a right to tax on the basis of territory. On the other hand, the company is a tax resident of Malta, for domestic purposes, and Malta has a right to tax the company's worldwide income. This scenario therefore is an example of a Residence-Source (R-S) conflict which could give rise to double taxation suffered by the company on the same income.

Article 11 of the OECD Model treaty establishes rules for the taxation of interest in the case of a R-S conflict. Generally, both the Resident State and the Source State have a right to tax the interest income, however, the Source State can only levy tax of ten per cent on the gross income. Furthermore, since CL is investing its cash in a Swiss bank deposit account, any interest income it receives does not meet the criteria established in Article 11(3) of the relevant treaty. The income will therefore be taxed in both Malta and Switzerland, but the tax in Switzerland is capped at ten per cent of the gross income. CL may subsequently claim double tax relief in terms of Article 22 of the treaty, i.e. the Swiss tax levied on Swiss-soured income shall be allowed as a credit against the relative Malta tax payable on such income. The relief may not exceed the Malta tax paid on the income.

Italy

The employee's physical presence and activity in Italy may give rise to a permanent establishment of CL in Italy, and hence Italy may claim a right to tax the profits attributed to that permanent establishment by reason of source.

Article 5 of the double tax convention between Malta and Italy stipulate that a permanent establishment "means a fixed place of business in which the business of the enterprise is wholly or partly carried on". Moreover Article 5(2) of the treaty specifically includes "the furnishing of services, including consultancy services, by an enterprise through employees or other personnel, where activities of this nature continue (for the same or a connected project) within the country for a period or periods aggregating more than twelve months within any two-year period". Therefore, since CL has an employee that is carrying out the company's business in Italy for over 200 days within a year could give rise to a permanent establishment in Italy, if that employee continues to work for CL in Italy during the following year, and his working days in Italy exceed a total of twelve months.

The list provided in Article 5(2) is not exhaustive, and therefore, even if the employee does not exceed twelve months within the two year period, CL may still establish a permanent establishment in Italy, through having a fixed place of business – for instance, a long-term access to client's premises in Italy, in which the business of the enterprise is wholly or partly carried on by the employee.

Italy will have the right to tax the profits attributed to the permanent establishment. On the other hand, the profits so attributed are exempt from Malta tax in terms of Article 12(1)(u) of the Income Tax Act.

It is worth noting that an Agency permanent establishment is not relevant in this scenario, since the employee is not vested with any legal representation of CL.

Belgium

The lawyer’s engagement in Belgium could give rise to an agency permanent establishment of CL in Belgium, in which case Belgium would have the right to tax CL on profits attributed to that permanent establishment by reason of source. The fact that the lawyer can act on behalf of CL and can execute agreements on behalf of CL implies that the lawyer is a person acting in Belgium on behalf of CL, thus potentially implying an agency permanent establishment.

Further conditions must be met, however, to establish the agency PE – namely that the lawyer habitually exercises in Belgium his power to conclude contracts and enter into binding agreements on behalf of CL, and that the lawyer is not doing this independently in the course of his ordinary business. It is also imperative to consider the activities of the lawyer, and to ascertain whether these are of a merely preparatory nature, and therefore, through which business is not actually carried on.

Since the lawyer is not involved in the provision of CL’s services, but merely in submitting tenders and attending preparatory meetings, the lawyer’s presence and activity in Belgium does not necessarily result in a permanent establishment in Belgium, even if the lawyer concludes contracts or enters into agreements on behalf of CL, as it appears that the lawyer is engaged in preparatory activities. Signing the final letter of engagement on behalf of CL is not a preparatory activity, however, as the lawyer is entering into a contract for CL to provide services. This notwithstanding, it would appear that this is not done habitually or frequently. On the basis that the lawyer’s activities in Belgium qualify as being merely preparatory, CL will not be establishing a permanent establishment, and hence the lawyer’s activity in Belgium will not provide Belgium with any right to tax CL.

Saudi Arabia

The physical presence of the employees in Saudi Arabia will not give rise to a physical permanent establishment – as CL did not establish an independent office in Saudi Arabia, and neither will the company establish an agency permanent establishment as the employees do not have any power to execute contracts on behalf of CL.

However, the employees’ presence and activity in Saudi Arabia will give rise to a services permanent establishment – a type of establishment typically catered for in double tax conventions with developing countries that follow the United Nations Model Tax Convention. Indeed, the double tax convention between Malta and Saudi Arabia stipulates that a permanent establishment includes “the furnishing of services, including consultancy services, by an enterprise through… but only where activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than 6 months within any 12-month period”. Since the employees have been assigned to work in Saudi Arabia for a five-year period, CL has established a services permanent establishment, and is therefore taxable in Saudi Arabia on profits attributed to that establishment.

On the other hand, the profits attributed to the permanent establishment are exempt from Malta tax, in terms of Article 12(1)(u) of the Income Tax Act.

Germany

Through the set up and use of the branch office in Germany, CL has established a permanent establishment in Germany. For the purposes of determining whether CL will be liable to pay taxes in Germany, it is irrelevant where the branch’s clients are situated.

CL is carrying on business through a fixed place of establishment, the branch office, and therefore Germany can tax CL on its profits attributed to the office in Germany. On the other hand, the profits attributed to the permanent establishment are exempt from Malta tax, in terms of Article 12(1)(u) of the Income Tax Act.

Question 4

Article 4(1)(b) of the Income Tax Act provides for the taxation of income from employment or office, including any benefit provided by reason of the employment or office, thus implying that the value of fringe benefits, computed in line with the Fringe Benefit rules, is also taxable in the same way as income from employment or office. Certain exemptions are, however, applicable.

Relocation allowance

The cost reimbursed or paid for the re-location of non-domiciled employees who are required to re-locate to Malta for employment purposes does not constitute a taxable fringe benefit, insofar as the new employment or posting lasts, or is expected to last, for at least 12 months. Relocation costs includes the cost the journey of the employee and his spouse and dependent children, as well as the cost of transportation of furniture and personal effects. The costs covered by the exemption include both the costs of relocation to the country where the employee takes up his employment or posting and the costs of resettlement in the employee's country of residence. Accommodation costs are not covered by this exemption.

Immigration and tax law advice

The provision of professional advice to employees as part of their employment package falls under Category 3 – Other Benefits of the fringe benefit rules and are a taxable fringe benefit. The benefit's value is computed by following the general rule for valuing Category 3 benefits. This is equal to the cost or the market value, whichever is the higher. The market value is the price which the services would fetch if provided in the open market.

Apartment

The provision of accommodation to employees falls under Category 2 fringe benefits, which generally covers the employees' private use of assets, other than motor vehicles, which are owned or leased by the employer. In the case of immovable property, the benefit is deemed to be provided on the date of the first occupation by the beneficiary and continues for as long as the asset is available to the beneficiary. The value of the fringe benefit in this case is equal to the annual value that is paid by the employer for the lease of that property from an unrelated third party.

Personal development coach, psychologist and doctor

Unless the services are provided to mitigate, or in relation to, work-related health risks, and are provided as part of a programme available generally to employees exposed to the said risks, the benefit is a taxable fringe benefit. The value of the benefit is equal to the cost or the market value of the services provided, whichever is the higher. The market value is the price which the services would fetch if provided in the open market.

Share option scheme

A taxable fringe benefit arises once the employees are allotted shares in the company. The value of the benefit is the excess, if any, of the market value of the shares at the time when the shares are transferred over the price paid for those shares by the employee. In this case, therefore, since there is no indication that the employees are paying anything for the shares, the value is equal to the market value of the non-voting shares on the fifth anniversary of the employees' employment date. This value is charged at a special flat rate of 15%.

For the purpose of the taxation of this fringe benefit, the taxable value is treated as income that is separate and distinct from the beneficiary's other income. The benefit is treated as income derived at the time when the employee acquires the shares and as arising in the country where the employee is performing his duties at that time.

Beneficial loan arrangement

The provision of a loan to an employee constitutes a fringe benefit, and the value of the benefit is the excess, if any, of the interest that would have been payable if the beneficiary had been required to pay interest on the loan at the benchmark rate, currently at 6.5%, over the amount of interest that he actually pays, if any, for the period in question. However, the employer in this case is an entity that is licensed by the MFSA as a financial institution. A special valuation rule applies in such cases, whereby the benchmark interest rate is the rate on the main refinancing operations as applied by the Central Bank of Malta (a different valuation methodology however applies where the loan is for the purchase of a residential home).

Moreover, the value of the fringe benefit in this case qualifies for the in-house benefit reduction. This reduction amounts to the lower of €700 and the value of the benefit before the reduction. The in-house benefit reduction is only applicable to employees who are not in a controlling position.

Compensation for business travel

The reimbursement of costs associated with business travel is not a fringe benefit. However, any additional costs that are not necessary for the purpose of the business trip (for example, a member of family joining, or a longer trip that extends beyond the business element of the trip) are not considered to be business travel. Such costs constitute taxable fringe benefits.

Per diem allowance

Per diem allowance is considered to be part of business travel costs, and is hence a non-taxable fringe benefit as long as it does not exceed the value of €140 per day. In the example provided, the per diem allowance is €100 per day, and therefore no taxable fringe benefit arises.

Free meal

The provision of a meal to all the staff in general and consumed in a staff canteen is not taxable.

Use of cars

Since the employees have the company car available to them during non-working hours, the employees benefit from the personal use of a company car, which constitutes a taxable fringe benefit. The value of the benefit is equal to the private use value and depends on the car value, the car use value, the maintenance value and the fuel value. As the employees pay for the vehicle's maintenance and fuel, no value is attributed to the maintenance and fuel value, and reference will only be made to the value of the vehicle and to the car use value.

The car value is, in the case of cars that are purchased new by the employer, the actual cost as shown in the purchase documents. The cost also includes value added tax, customs duty, registration tax and any other taxes, the costs of any extras, whether fitted before or after delivery, and delivery charges. The cost is net of any discount that may have been granted as long as it was available to the general public, but excludes discounts that the employer may have obtained on a personal basis or under special arrangements.

In the case of cars that were purchased by the employer as second hand, or that are leased by the employer, the car value is the price of that car when it was new, including taxes and costs of extras and of delivery as stated above. When not otherwise available, this price may be determined by reference to information obtainable from the Transport Malta authority or on the basis of a written opinion of an independent car surveyor.

In the case of classic cars the value would be the price that the vehicle would fetch if sold on the open market on the date when the benefit is first provided.

The car use value is equal to 17% of the car value. For cars which are older than 6 years (since the date of first registration for road use) the car use value is 10%.

The private use value is a percentage of the total of the car use value, maintenance value and fuel value and represents the value of the private use of the car. The applicable percentage depends on the value of the car when new.

In finding the fringe benefit relating to the private use of the car, any amount that will be paid by the employee to purchase the same vehicle will not be taken into account.

Upon acquisition of the car by the employee for €500, the taxable fringe benefit is calculated as the cost of the car, less the consideration payable by the employee (€500), and less the total value of the fringe benefit which was charged to the employee for the private use of that car.

PART C

Question 5

Supply of medical care

The supply of medical care by employees of MHL who are regulated by the Health Care Professions Act is an exempt without credit supply in terms of item 11 of Part Two of the Fifth Schedule of the VAT Act. MHL should not charge any VAT to its patients on this supply, and on the other hand, MHL cannot claim input VAT attributable to those supplies.

Supply of mental healthcare

The supply of medical care by employees of MHL who are regulated by the Psychology Act is also an exempt without credit supply as it also falls under item 11(1) of Part Two of the Fifth Schedule of the VAT Act. Similar to (i) above, MHL should not charge any VAT to its patients on this supply, and on the other hand, MHL cannot claim input VAT attributable to those supplies.

Cosmetic surgery by regulated MHL employees

Cosmetic surgery (being a surgical treatment carried out by employees in a licensed institution) having the purpose of restoring the patient's health qualifies as medical care and is therefore an exempt without credit supply as it falls within item 11(2) of Part Two of the Fifth Schedule of the VAT Act. Similar to (i) and (ii) above, MHL should not charge any VAT to its patients on this supply, and on the other hand, MHL cannot claim input VAT attributable to those supplies.

Cosmetic surgery by unregulated MHL employees

Cosmetic treatments carried out by employees of MHL who are not regulated by the Health Care Professions Act is a taxable supply. MHL shall charge the standard VAT rate of 18% on this supply. MHL may then claim any input VAT that is attributed to this supply.

Provision of food

The supply of food for human consumption, excluding food supplied in the course of catering, is an exempt with credit supply. MHL is providing food in the course of catering, and therefore this is a taxable supply. MHL shall charge VAT at the standard rate of eighteen per cent (18%) on this supply. MHL may then claim any input VAT that is attributed to this supply.

Pharmaceutical goods

The provision of pharmaceutical goods is an exempt with credit supply. MHL should not charge any VAT to its customers when selling pharmaceutical goods, and MHL may also claim any input VAT that is attributed to the provision of such goods.

Accommodation

Accommodation of MHL can be considered to fall within the meaning of letting of immovable property as referred to in item 1(1) of Part Two of the Fifth Schedule. The letting of immovable property is, as a general rule, an exempt with credit supply, although a number of exclusions apply. An exclusion to this rule is the letting of immovable property for not more than thirty days by a taxable person in the course of an economic activity.

Since the hospital is a taxable person, and since it is providing accommodation in the course of its economic activity, where such accommodation does not exceed thirty days, that supply is VATable at 18%. On the other hand, in cases where the accommodation provided exceeds thirty days, the provision is an exempt with credit supply. A reduced rate of seven percent (7%) would apply in the event that this service qualifies as tourist accommodation.

General administrative services

The provision of standard administrative services is a taxable supply. MHL shall charge its customers VAT at 18% on this supply of service.

Question 6

The Income Tax Act (ITA) and Income Tax Management Act (ITMA) include several provisions which render officers of a limited company personally responsible for the company's obligations under the Income Tax Acts.

Article 7(1) of the ITMA clearly indicates that the officers of a limited liability company "shall be answerable for doing all such acts, matters and things as are required to be done by virtue of the Income Tax Acts for the assessment of such body and payment of the tax". Article 7(2) also says that principal officers shall be jointly and severally liable for payment of the company's tax, where they had possession or control over any assets of the company which could have been used to pay the tax then due. Article 7(3) also extends this responsibility to the liquidator, in cases where the company is being wound up. Assets of the company shall only be distributed to the shareholders once it has been ascertained that the tax due has been paid or is sufficiently provided for. In default, the liquidator is personally, and jointly and severally with any other person responsible therefor, liable for payment of the tax due.

Article 7 of the ITMA is further supported by the rule contained in Article 9 of the same Act which provides for the indemnification of such representatives who are liable for the payment of tax on behalf of another person.

The personal duties of directors of companies which employ individuals are even more burdensome. For the purposes of establishing the responsibility for FSS obligations, the Income Tax Acts tend to look through companies and hold directors personally liable for the company's FSS obligations. This stems out of Article 21 of the ITMA. Article 21(1) identifies the income tax obligations of an "employer" to submit a return containing the relevant details of the individuals employed, and the payments and allowances made to those persons. Article 21(2) then stipulates that the meaning of "employer", where the employer is a body or persons, shall be deemed to the manager or other principal officer, for the purposes of the Article.

Article 59(8) of the ITA disregards the notion of corporate responsibility, and considers the officers of the company as the persons responsible for the furnishing of any certificate or account under the article. Similarly, Article 30 of the FSS rules holds the officers or the liquidator, as the case may be, as the persons who are "personally answerable for all matters required to be done under [the FSS Rules] by or on behalf of the body of persons".

The Value Added Tax Act in Article 82(1) prescribes that in cases of omissions or wrongdoing done by a body of persons, Part 10 of the Act (which discusses Offences and Penalties applicable), shall apply as if such omission or wrongdoing was done by every director, manager or other principal officer of that body of persons. That officer/s may claim to not be guilty if he can show that he was unaware and could not with reasonable diligence be aware of such act or omission and that he did everything within his power to prevent that act or omission.

Finally, other than the Income Tax Acts, the Interpretation Act also contains a rule that makes the directors and officers of a limited company personally liable for an offence, including a tax offence. Article 13 of the Act stipulates that where a limited liability company commits an offence, the officers are presumed to be guilty, unless they can show that they had no knowledge of such an offence and exercised all due diligence to prevent the incident.

Question 7

Rental income allocated to the Final Tax account

Article 68(1)(c) of the Income Tax Act stipulates that no person may claim a refund in respect of any tax directly or indirectly paid on profits allocated to the Final Tax Account. Moreover, Article 48(4) and (4A) of the Income Tax Management Act provide for a refund of the tax paid on the profits distributed, when these are distributed out of the Maltese Tax Account or Foreign Income Account. Therefore, no refund may be claimed out of profits distributed out of the Final Tax Account.

On the other hand, any dividends paid out of profits allocated to the final tax account shall not be charged to further tax and shall not form part of the chargeable income of any person, according to Article 68(1)(c) of the Income Tax Act. The shareholder will not suffer any Maltese income tax on receipt of the dividend.

Rental income allocated to the Immovable Property Account

Article 68(1)(a) of the Income Tax Act stipulates that: "Any person who is not resident in Malta or any individual who is resident in Malta and who is in receipt of a dividend paid out of profits allocated to any of the taxed accounts other than the final tax account shall not be obliged to disclose the existence of such dividend in any return made pursuant to the provisions of the Income Tax Acts". Therefore, upon a distribution of the dividend, the shareholder will not be assessed for any Maltese tax. Furthermore, the shareholder will not be able to claim any refund in terms of the refundable tax credit system on these profits, being profits distributed out of the Immovable Property Account.

Passive interest and royalty income allocated to the FIA

Similarly, the shareholder will not be subject to any Malta tax on the dividend received. Moreover, the shareholder may claim a refund under the refundable tax credit system. Assuming that the interest and royalty income was not subject to any double tax relief, including FRFTC, the refund available is equal to five-sevenths of the Advanced Company Income Tax paid (i.e. five-sevenths of the income tax paid by the company before deducting tax credits which such company may deduct from its tax otherwise payable other than FRFTC).

Dividends from a participating holding (which does not satisfy the anti-abuse conditions) allocated to the FIA

The shareholder will not be charged any tax upon the receipt of the dividend.

Such income constitutes dividend income which does not satisfy the conditions referred to in the proviso to Article12(1)(u) of the Income Tax Act. Therefore, for the purposes of the refund that could be claimed under the refundable tax credit system, the shareholder may claim a refund of five-sevenths of the Advance Company Income Tax.

Dividends from a PH (which satisfy the anti-abuse conditions) allocated to the FIA

The shareholder will not be charged any Malta tax on the receipt of the dividend. Moreover, a claim may be made for a refund of all of the Malta tax paid in respect of those profits, since the dividend from the participating holding satisfied the anti-abuse conditions and was allocated to the FIA (presumably because the participation exemption has not been availed of), and therefore the refund which may be claimed falls within the purview of Article 48(4)(b) of the ITMA.

Trading income allocated to the MTA

The shareholder will be eligible to claim a refund of six-sevenths of the Malta tax paid on such profits, in terms of article 48(4A) of the ITMA.

Dividend income relieved by the PE allocated to the UTA

In contrast with 5) above, since the dividend was subject to the participation exemption and allocated to the UTA, no refund can be claimed on these profits. Moreover, the shareholder, being a non-resident company, will not be subject to any further Malta tax on receipt of the dividend.

Question 8

Case 27/18VG involved the tax treatment of a cabin crew member of Ryanair.

Appellant, a Maltese citizen, argued that he was not taxable in Malta at all but that he was taxable in Ireland, exclusively. The Tribunal referred to the relevant article in the Tax Treaty concluding that the applicable Tax Treaty did not allocate jurisdiction to tax over dependent personal services to Ireland, exclusively. Having established that Maltese tax jurisdiction was not excluded by the Treaty, the Tribunal went on to examine domestic tax rules. Given that income arose outside Malta, the Tribunal had to determine whether appellant was ordinarily resident and domiciled in Malta. There was no question relating to appellant's domicile. Both parties had conceded that appellant was a Maltese domiciliary. The contestation related to appellant's ordinary residence. Appellant contended that he was not ordinarily resident in Malta.

The Tribunal held that the ITA does not incorporate a definition of the term 'ordinary resident'. It does incorporate a definition of the term resident but the terms 'residence' and 'ordinary residence' were held not to be synonymous terms. A person can be a resident of Malta without being ordinarily resident in Malta. Ordinary residence requires more than mere residence; it connotes residence in a place with some degree of continuity. Ordinary residence means residence which is normally part of a person's everyday life. Whereas case law has interpreted the test to establish residence as being a test which is driven by a physical presence test, a legalistic facts and circumstances test is applied for the purposes of determining ordinary residence.

Ordinary residence is contrasted with occasional or temporary residence. It is necessary to take into account the duration of an individual's presence in a country, the regularity and frequency of his visits to a country, his family and business ties and nature of a person's visits to a country, to determine whether a person is an ordinary resident of that country. In brief, the constitutive elements of ordinary residence have been held to consist of:

- A regular physical presence in a country, residence which is part of the regular order of a person's life;
- Residence with a degree of continuity, notwithstanding occasional temporary absences; and
- Residence taken up voluntarily.

The Tribunal concluded that appellant was ordinarily resident in Malta and taxable on a worldwide basis because a distinction had to be drawn between the residence of an employer and that of employees.

Although the employer was Irish requiring the performance of its employees' duties partly in Ireland and wholly outside Malta, it was clear that the employee remained personally connected to Malta. Although he did not own property in Malta, Malta remained employee's home to the extent that he retained a Maltese VAT registered business in Malta. Furthermore, in his tax returns, appellant had declared himself to be a Maltese tax resident. Consequently, the appellant's appeal was dismissed.