

GETTING THE
DEAL THROUGH 

Tax Controversy 2019

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Slaughter and May

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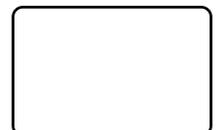
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Preface

Tax Controversy 2019

Sixth edition

Getting the Deal Through is delighted to publish the sixth edition of *Tax Controversy*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, Korea and Malta.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Richard Jeens of Slaughter and May, for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
August 2018

Malta

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Overview

1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The relevant legislation governing tax administration and controversies is contained in the Income Tax Act (Chapter 123 of the Laws of Malta) (ITA); the Income Tax Management Act (Chapter 372) (ITMA); the Value Added Tax Act (Chapter 406) (VAT Act); the Duty on Documents and Transfers Act (Chapter 364; and various subsidiary legislation). In addition, Malta has concluded more than 70 double tax treaties which may also bind taxpayers and the Maltese tax authorities.

The Inland Revenue Department (IRD) has, over time, issued guidance relating to this subject area. Although non-binding, such guidelines are meant to assist taxpayers on the interpretation and application of the law. One example in the context of resolving cross-border international tax disputes is the Guidelines on the Application of the Mutual Agreement Procedure.

2 What is the relevant tax authority and how is it organised?

In 2012, the Commissioner for Revenue Act (Chapter 517) was introduced, establishing the office of the Commissioner for Revenue (the Commissioner) with the aim of merging revenue departments – such as the inland revenue, VAT and customs – into one department. The Commissioner is responsible for supervising inter alia the self-assessment system, the collection of taxes and raising assessments.

The following offices form part of the internal structure of tax authorities: the Director of Administration and the Director Operations & Strategy; the Director General Operations; the Director General Legal and International; the Director General Compliance and Investigations; and the Director General Customs Department.

Enforcement

3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

Malta operates a self-assessment system of tax where a taxpayer calculates his or her own tax liability. The ITMA requires that every taxpayer file an annual income tax return. Every return is to be accompanied by a computation that is to include:

- the chargeable income of the person for that year of assessment on the basis of the information provided in the return;
- the tax charge; and
- the tax payable or refundable for that year of assessment.

In order to verify information contained therein, the Commissioner may request an array of documentation including books, documents, accounts and returns from a taxpayer and may also request the taxpayer to attend personally (or via a representative) to examine such information.

In order to ensure the timely payment of taxes, the law prescribes tax payment deadlines for both natural and legal persons. Generally, tax is to be settled on the same day that the return is filed. However, there are certain specific circumstances – such as under the Final

Settlement System – where tax is withheld at source (rather than settled upon filing a return) from all salaries paid out by an employer to an employee.

Where a taxpayer fails to submit his or her return, the Commissioner determines the amount of tax payable by that person for the year of assessment on the basis of an estimate. If after an estimate, the taxpayer still does not deliver the required return, the Commissioner may make an assessment without having to notify the taxpayer that an inquiry is being conducted into his or her tax declarations and liability. Moreover, as a deterrent from not respecting the tax payment deadlines, the ITMA provides for the imposition of additional tax as well as interest for the late payment of tax.

There is no statutory deadline by which a review of a taxpayer's affairs has to be concluded.

4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

Individuals and bodies of persons have different reporting periods. The Income Tax (Statutory Dates) Rules (Subsidiary Legislation (SL) 372.16) provide that individuals are to submit their return to the Commissioner by 30 June of the year of assessment and companies are to file their return by the end of the ninth month after their accounting date, or by 31 March of the calendar year following the accounting date, whichever is later.

The format of the return also differs between individuals, companies, clubs and associations and partnerships. Together with the return, a body of persons is also required to file audited financial statements covering the basis period corresponding to the year of assessment for which the return has been filed.

For VAT purposes, the time period within which VAT is to be settled as well as the form of the VAT return depends on the type of VAT registration. An Article 10 registrant generally files a return on a quarterly basis. An Article 11 registrant is required to submit a declaration instead of a return – it is due on a yearly basis, by 15 February of the following year. An Article 12 registrant files a particular return on a monthly basis as well as an annual summary.

The Commissioner's ability to assess a taxpayer for tax applies to both individuals and companies.

5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

The ITMA vests the Commissioner with wide formal powers to request an array of information and documentation from taxpayers. Besides books, documents, accounts and returns (including bank statements), the Commissioner may require a taxpayer to furnish a statement containing details of:

- all property held and wherever situated, including property transferred or delivered or held by designated persons (this includes, inter alia, a mandatory, nominee, trustee, agent, depository or custodian);
- all income derived from such property; and
- all facts bearing upon the taxpayer's liability to tax which he or she has, or has been, liable for.

It is pertinent to note that 'property' is widely defined to include property of any kind or description, whether movable or immovable, personal or real and, in relation to rights and interests whether vested, contingent, voidable or future, and including any money, investments, and amounts in savings, loan and other bank accounts, whatever the nature of the account. The taxpayer is to be given a time frame of at least 30 days to furnish the relevant information.

Specific to cross-border situations, the ITMA also provides that the Commissioner may be required to collect additional information to be provided to foreign tax authorities, if arrangements for the purpose of the exchange of information have been made between Malta and another jurisdiction. In such situations, the Commissioner is vested with the power to require any person to:

- appear before it when it has reason to believe the person is able to give additional information;
- produce for examination any books, documents, accounts (including bank statements, passbooks and other bank documents) and any other document which the Commissioner may require a copy or extract thereof; and
- give information by means of written statements.

The Commissioner may also visit the premises of a taxpayer for tax information purposes, where the Commissioner is vested with the power of full and free access for the inspection of any books, documents, accounts, returns and electronic data, and can observe and record the nature and importance of any professional activity carried out there.

Although the power to interview employees is indirectly referred to in the context of collecting information for cross-border exchange, this power is likely applied in domestic disputes. The Commissioner should respect the restrictions set out at law, such as giving 30 days' notice.

6 What actions may the agencies take if the taxpayer does not provide the required information?

Where a taxpayer fails to provide the required information, the taxpayer may be subjected to a penalty.

7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

Requesting and inspecting books is subject to the protection of any information that falls with the definition of a professional secret in terms of the Professional Secrecy Act (Chapter 377).

8 What limitation period applies to the review of tax returns?

An assessment may not be raised by the Commissioner earlier than the time prescribed for the submission of a return (see question 4) and not later than five years from the end of the year in which such a return was filed. That said, the five-year limitation period does not apply when a person:

- has not made a full disclosure in a return of all material facts relevant to the determination of income and allowable deductions; or
- for the purpose of avoiding tax, or through gross or wilful neglect, has furnished an incorrect or misleading return, in any material respect. In such a case, an assessment may be raised at any time.

For VAT purposes, where the Commissioner has reason to believe that a return filed by a VAT-registered person does not contain all the necessary information, it may make a provisional assessment and serve that assessment on the relevant person by not later than six years from the end of the tax period in question.

9 Describe any alternative dispute resolution (ADR) or settlement options available?

The Maltese tax authorities are generally amenable to settling a dispute with a taxpayer prior to a dispute escalating to court. In certain situations, such settlement discussions may also be held while court proceedings are held in parallel. The intention is to hasten the litigation process and to settle the dispute as soon as is practicably possible.

The Mutual Agreement Procedure (MAP) is available in respect of cross-border matters if provided for in the relevant tax treaty.

10 How may the tax authority collect overdue tax payments following a tax review?

For the purposes of ensuring the collection of tax, the ITMA prescribes the notices sent by the Commissioner, such as a final assessment, including interest and penalties, that are to constitute an executive title. Executive titles are deemed to be equivalent to a judgment and may be enforced without the need for any court judgment. Where a payment is enforceable against a body of persons in virtue of an executive title, the Commissioner may, without the need of any other act, proceed with such enforcement against every officer thereof. The Commissioner may proceed for the enforcement of the payment of tax within two days from the lapse of 15 days allowed for the settlement of tax due. The Commissioner is thereafter entitled to register in the public registry or land registry (as the case may be) a note of privilege for the amount demanded in the judicial act.

11 In what circumstances may the tax authority impose penalties?

The ITMA imposes penalties in the form of additional tax and interest charges for the late submission of a return. Additional tax is a fixed amount based on the number of months that the return remains unsettled.

	Individual €	Company €
Within 6 months	10	50
6 months to 12 months	50	200
12 months to 18 months	100	400
18 months to 24 months	150	600
24 months to 36 months	200	800
36 months to 48 months	300	1,000
36 months to 48 months	400	1,200
Later than 60 months	500	1,500

Penalties may be imposed either generally or with respect to specific offences. The ITMA provides that any person that contravenes or fails to abide by any provision of the ITA or ITMA is to be found guilty of an offence and will be subjected to a fine of not less than €23 and not exceeding €116. More specifically, penalties are provided in various situations, including:

- failing to comply with the requirements of a notice, intimation, request or demand note given or made to the taxpayer or served upon him or her, without sufficient cause – a fine of not less than €23 and not exceeding €10,000 and a further fine not exceeding €200 per day during which the default continues; or
- fraud, such as making any false statement or falsifying books – a fine ranging between €700 and €10,000 dependent on the nature of the fraud and an additional fine equivalent to treble the amount of evaded tax, or to imprisonment for a maximum term of six months, or both a fine and imprisonment.

12 How are penalties calculated?

Penalties as described in question 11 are calculated within the fixed limits prescribed by law.

13 What defences are available if penalties are imposed?

A taxpayer should not be subjected to a penalty where the taxpayer has a reasonable excuse. What constitutes a reasonable excuse is not explicitly defined in the ITMA. The VAT Act provides that an insufficiency of funds or when reliance is placed on any other person to perform any task, do not constitute a reasonable excuse.

14 In what circumstances may the tax authority collect interest and how is it calculated?

At present, if a taxpayer fails to pay tax by the tax settlement date, the ITMA provides that interest at the rate of 0.75 per cent a month or part thereof, will also be chargeable, for any period beginning on or after 1 January 2009. The interest can never exceed the amount of the said tax. Moreover, no interest runs on additional tax.

Update and trends

In the current context where tax transparency is in the spotlight and there is a clampdown on tax avoidance, there is an increase in enforcement activity from the tax authorities, which are more proactive in delving deeper into taxpayers' affairs. Current concerns of authorities and taxpayers relate to the timeliness of tax decisions. There is also more awareness and drive for court processes to be quickened for the benefit of taxpayers and for there to be the proper administration of justice.

15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?

As stated in our response to question 11, a person that wilfully and with an intent to evade or assist any other person to evade tax has committed a crime and may face a trial in a magistrates' court. If found guilty, the person will face a fine (including an additional fine), a period of imprisonment or a combination of both. Fraudulent acts or omissions prescribed by law include inter alia:

- omissions from a return or any document or statement made, prepared or furnished in terms of income tax legislation; or
- false statements or entries in a return or any other document and false answers to any question or request for information.

The ITMA does not differentiate between different types of taxpayers committing the aforementioned offences. Thus, legal persons and natural persons are on an equal footing. That said, for legal persons, the ITMA expressly provides that managers, directors or other principal officers of a body of persons are to be answerable in law for complying with the provisions of tax legislation.

16 What is the recent enforcement record of the authorities?

There are no recent official statistics as to the enforcement record of the authorities.

Third parties and other authorities

17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?

The Commissioner's power to involve or investigate third parties as part of the review of the taxpayer's return is wide.

18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?

Yes, insofar as local cooperation is concerned, the tax authority necessarily cooperates with the Malta Police Force such as when the Commissioner needs access to the premises of the taxpayer. In 2016, the Joint Enforcement Task Force (JET) was established in order to support the efforts of the tax authorities and detect, investigate and prosecute offences related to unfair business competition and the avoidance and evasion of tax. The JET is not a statutorily established body and is a pooling of resources of the various departments of the tax authorities.

Insofar as foreign cooperation is concerned, Malta has concluded several Tax Information Exchange Agreements on the basis of which Malta exchanges fiscal information with its non-EU treaty partners. A few examples include the Cayman Islands and Gibraltar. Moreover, Malta has implemented FATCA and also adheres to the Common Reporting Standard. Within the EU, Malta cooperates with other EU member states in various instances, via the EU Mutual Assistance Directive for the Recovery of Taxes as well as the Automatic Exchange of Information on Tax Rulings.

Special procedures

19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

Legal aid is available upon application by a taxpayer who cannot afford an attorney. There are certain conditions that need to be met before a person can successfully apply for legal aid. Although there is no formal framework, it may be possible to agree on scheduled payments;

however, this is fully dependent on any settlement agreements reached with the tax authorities.

20 Are there any voluntary disclosure or amnesty programmes?

Malta has a general programme of voluntary disclosure. A taxpayer who has omitted from a return may approach the tax authorities and rectify the omission by delivering a further return. Additional tax chargeable will be reduced by either:

- 90 per cent where the omission is in respect of employment income, investment income or gains from the disposal of immovable property; or
- 50 per cent, generally where an omission is not due to fraud or gross or wilful neglect and provided certain conditions exist.

The Commissioner may impose any conditions.

It is pertinent to note that a special programme, the Reduced Penalties Scheme, allowed taxpayers to regularise their outstanding income tax debts and their unfurnished returns to be settled. Taxpayers with pending tax balances until the year of assessment of 1998 could qualify for a 25 per cent reduction of the amount that would have been payable. This programme is no longer open.

With respect to VAT, by virtue of the Remission of Interest and Administrative Penalties Rules (SL 406.20), the Commissioner may remit any interest or administrative penalties that have been incurred by a taxpayer by virtue of late payment of VAT, if the Commissioner is satisfied that the VAT due was not paid due to a reasonable excuse.

Rights of taxpayers

21 What rules are in place to protect taxpayers?

There is no official taxpayer 'bill of rights' or guidelines on taxpayer's rights issued by the tax authorities. That said, the general principles of good administrative behaviour apply in situations where a taxpayer has decided to enter an appeal to the ART. Thus, a taxpayer has the right to have his or her case decided on by the ART within a reasonable amount of time. A case must be decided on by an independent judge who has no interest in that particular case and all parties need to be heard before the ART can make a judgment.

22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?

It is possible for taxpayers to obtain information from the tax authority via the Data Protection Act (Chapter 586) and the Freedom of Information Act (Chapter 496).

Insofar as data protection is concerned, the taxpayer would have the right to obtain from the tax authorities confirmation as to whether or not personal data concerning him or her is being processed and, where that is the case:

- the purposes of the processing;
- the categories of personal data concerned;
- the recipients or categories of recipient to whom the personal data has been or will be disclosed; and
- where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period.

The Freedom of Information Act also establishes a general right for citizens to obtain information held by public authorities to promote added transparency and accountability.

23 Is the tax authority subject to non-judicial oversight?

Yes, the tax authority is ultimately accountable to the Ministry of Finance. Moreover, the tax authority is in principle subject to the general oversight of the Ombudsman of Malta. The Ombudsman performs an independent function in the investigation and resolving of disputes between government bodies and individuals.

Court actions

24 Which courts have jurisdiction to hear tax disputes?

The domestic dispute resolution process in the Maltese courts is initiated by way of an appeal to the Administrative Review Tribunal (ART) when a person feels aggrieved about a tax assessment after having his

or her objection refuted. There is also the possibility of recourse to the Court of Appeal on questions of law – that is, on the legal interpretation of provisions of Maltese income tax legislation. Should the taxpayer not be satisfied with the ART's decision. An appeal has to be filed within 20 days from the ART's decision.

Where the total amount of tax, additional tax, fines and interest in dispute at the time when the appeal was lodged before the ART is less than €1.16 million, appeals are heard before the Court of Appeal in its Inferior Jurisdiction. If the tax, additional tax, fines and interest is of €1.16 million or more, the appeal is heard before the Court of Appeal in its Superior Jurisdiction.

The final domestic outlet for taxpayers is the Constitutional Court.

25 How can tax disputes be brought before the courts?

Where the Commissioner has carried out an assessment, and the taxpayer does not agree with the findings of that assessment, the taxpayer may resort to the courts. Disputes are brought before the court through the filing of a written application by an advocate, indicating the court in which the action is being brought, the particulars of the parties, and the merits of the application being filed. The defendant will then be notified with the application, and will be given 20 days to file his or her statement of defence. It is either upon the statement of defence being filed, or upon the expiration of the 20-day period, that oral proceedings will start in court.

The ART may hear appeals by aggrieved taxpayers about a tax assessment carried out by the Commissioner within 30 days after having been served notice by which the Commissioner has refused to amend the assessment. The ART will reject appeals brought before it unless prima facie proof is brought by the appellant that he or she has filed his or her return for the said year of assessment. With respect to assessments raised by the Commissioner, the ART does not consider evidence as sufficient to warrant any change in the assessment if the taxpayer appealing against the Commissioner's decision has failed to provide the records, documents, accounts and electronic data previously requested by the Commissioner without any reasonable excuse.

The ITMA further provides that a taxpayer may appeal from the decision of the ART to the Court of Appeal within 20 days from the decision. Appeals are only possible on questions of law – that is, on the legal interpretation of provisions of Maltese income tax legislation. It is also an avenue of appeal for the Commissioner.

The Constitutional Court has appellate jurisdiction in a number of circumstances that may be of relevance from a tax dispute perspective. Recourse to the Constitutional Court is dependent on the claims being made. It hears appeals from decisions of the Civil Court (Superior Jurisdiction) on matters of human rights and fundamental freedoms as protected under Chapter IV of the Constitution of Malta. It also hears appeals as to the validity of laws other than those falling under article 46 of the Constitution that deals with human rights. This is the final outlet that taxpayers have domestically – a measure of last resort.

26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

There is no rule prohibiting tax claims affecting multiple returns from being brought together. That said, in practice, it is unusual for taxpayers to bring an action against a tax claim together. It would also ultimately be dependent as to how the Commissioner has made an assessment.

27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

Where a notice of objection or appeal against an assessment has been given, the Commissioner may, using discretion, delay the collection of not less than 90 per cent of the part of the tax assessed that is in dispute. Moreover, the ITMA provides that for the appeal to be formally valid, the tax that is not in dispute must be paid in court. This requirement has, however, been deemed to be unconstitutional.

28 To what extent can the costs of a dispute be recovered?

The respective court that decides a case will determine the costs that are to be settled by the tax authorities and the taxpayer. The court may apportion costs between the parties; having a judgment handed down in favour of either party does not necessarily mean that the said party will not have to settle any fees. Generally, the winning party may recover the filing and related court expenses as well as legal fees and legal procurator fees, according to a tariff established by law.

29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

There are no such restrictions under tax law.

30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

The ART consists of a chairperson, who is appointed for a period of four years by the President of Malta (acting on advice of the Prime Minister), supplemented by two assistants. The Court of Appeal may consist of one or more chambers. Where the composition is of one or two chambers, each chamber is to consist of the Chief Justice and two other judges. Where the composition is of three or more chambers, the third and other chambers are to be presided by a judge that is nominated on the Chief Justice's advice. Trials by jury are not available in tax disputes.

31 What are the usual time frames for tax trials?

There is no specified time period within which a tax trial must be decided. It is not possible to state with accuracy the amount of time such a trial may take as it depends on the facts and the litigation process relating to each particular case.

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32 What are the requirements concerning disclosure or a duty to present information for trial?

The ART is empowered to summon any person to give evidence or produce books or other documents before it. The parties to a case can submit documents to support their arguments. The said documents are generally accessible to the other party.

33 What evidence is permitted in a tax trial?

Parties to a suit are competent to give evidence, either at their own request or at the request of any of the other parties to the suit, or at the request of the court ex officio. In this regard, taxpayers themselves are permitted to testify. Oral and documentary evidence are both permitted in a tax trial. Court experts are permitted under Maltese law. Such a person will issue a report stating the enquiries made and his or her findings, together with the grounds for such findings.

It is pertinent to note that the default language of civil proceedings is Maltese, although certain proceedings may be heard in English. Where any party does not understand the language in which the oral proceedings are conducted, such proceedings must be interpreted to him or her either by the court or by an interpreter, who has been sworn in.

Any evidence that is submitted by an affidavit must be drawn up in the language normally used by the person taking such an affidavit. The affidavit, when not in Maltese, is to be filed together with a translation in Maltese, which is to be confirmed under oath by the translator.

34 Who can represent taxpayers in a tax trial? Who represents the tax authority?

Parties can appear before the ART in person or can be represented through an advocate, a legal procurator or another person.

35 Are tax trial proceedings public?

Proceedings before the ART are to be conducted in public. The Code of Organization and Civil Procedure (Chapter 12) also states that cases held before the civil courts of Malta are to be held in public, although the court may order that a case be heard behind closed doors for the purposes of decency or good morals, or if both parties have requested it.

36 Who has the burden of proof in a tax trial?

The burden of proof is generally on the taxpayer, based on the fact that assessment made by the Commissioner is considered to be correct. Case law has, however, provided that the burden of proof can be shifted to the tax authorities if the assessment is made ex officio, and the taxpayer succeeds in convincing the court that the assessment made by the Commissioner was prima facie unreasonable.

37 Describe the case management process for a tax trial.

See question 25.

38 Can a court decision be appealed? If so, on what basis?

Yes. See questions 24 and 25.

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