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Basis of Taxation for Individuals

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This Technical Paper sets out the MIT's analysis and views on the basis of taxation for individuals, examing the notion of 'residence' of indivduals for tax purposes and with a particular focus on employment income.

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In terms of Maltese tax law, the extent of an individual's chargeable income relies on whether the particular taxpayer is considered to be ordinarily resident and/or domiciled in Malta or otherwise, and the source and nature of the particular income.

An individual who is both ordinarily resident and domiciled in Malta is subject to Maltese income tax on all his/her chargeable income and capital gains, whether arising in Malta or elsewhere, at the applicable resident tax rates. Double taxation relief should be available, either via the operation of an in-force double tax treaty or in line with domestic rules, in certain cases where the foreign tax may have been charged or withheld.

An individual who is ordinarily resident/ resident but not domiciled in Malta (and whose spouse is not ordinarily resident and domiciled in Malta) is taxable on his/her chargeable income and capital gains arising in Malta and on his/her income (excluding capital gains) arising outside Malta which is received in/ remitted to Malta. The applicable resident tax rates should apply (subject to any double tax treaty restrictions).

An individual who is domiciled in Malta but is not ordinarily resident or resident in Malta should[1] be taxable only on income and capital gains arising in Malta, at the applicable non-resident tax rates (or broadly at the resident tax rates if the individual in question is an EU/EEA national who derives 90% of their income from Malta). Again, double tax treaty restrictions may apply.

Summary of chargeable income

Domicile	Resident	Ordinarily Resident	Taxable
✓	✓	✓	Worldwide basis
✓	X	✓	Worldwide basis
✓	X	X	Source
X	✓	✓	Source & remittance
X	X	✓	Source & remittance
X	X	X	Source

[1] At a technical level, the language in article 4 of the Income Tax Act would assert a jurisdiction to tax taxpayers falling within this classification on a source and remittance basis. It is through the interaction of article 4 and article 13 of the Income Tax Act that the basis of taxation becomes limited to a source basis of taxation excluding from the scope of taxation in Malta foreign source income remitted to, or received in, Malta.

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Tax residence for individuals

There are very few specific rules on residence in terms of Maltese income tax legislation. The definition of the term resident is also vague and refers to *"an individual who resides in Malta except for such temporary absences as to the Commissioner may seem reasonable and not inconsistent with the claim of such individual to be resident in Malta"*. There is no statutory definition of 'ordinary residence'. In terms of Article 2(2) of the Income Tax Act "*Words and expressions used in this Act which are not known to the law of Malta but are known to the English Law, shall, so far as may be necessary to give effect to this Act and consistently with the provisions thereof, have the meaning assigned to them in the English Law and be construed accordingly.*" Therefore reference is often made to UK jurisprudence in order to determine the meaning of these terms, insofar as UK law is aligned with Maltese law.

An individual who stays in Malta for at least a period equal to 6 months (in whole) in a calendar year is prima facie considered tax resident in Malta for Maltese income tax purposes for that year, subject to any double tax treaty restrictions. The 6-month threshold is not statutorily determined, but has become accepted practice in Malta by reference to the negative test found in Article 13 of the Income Tax Act.

An individual who stays in Malta for less than a period equal to 6 months (in whole) in a calendar year can also be considered as tax resident in Malta (or ordinarily resident in Malta) provided that the person's intention is to reside in Malta, and has the adequate links with the territory. One would need to look beyond mere physical presence for a definite period of time and instead determine whether the individual's presence in a country is part of the regular order of his life, depending on facts and circumstances. On this basis, an individual may not necessarily spend the majority of his time, nor have his principle residence in Malta in order to be considered ordinarily resident, provided that absences from Malta are considered to be an exception or a temporary break in such individual's ordinary mode of life.

The individual would need to establish a number of links with Malta and have the intention to reside in Malta, thereby proving that he or she has a "habitual physical presence" in Malta. Merely having a property in Malta available to the individual (without any other ties to Malta) will not typically cause the individual to be considered tax resident in Malta.

One would therefore have to examine what the particular individual's intentions are and to consider the individual's specific circumstances to determine whether he or she are considered as "resident" and/or "ordinary resident" in Malta for Maltese income tax purposes.

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An individual continues to be considered tax resident in Malta according to the above, even if that individual is also tax resident elsewhere, and even if a double tax treaty dual-resident tie-breaker deems him or her to be so for the purposes of the double tax treaty in question. This may be contrary to the position in other jurisdictions, wherein it is statutorily determined that where the tie-breaker of a double tax treaty determines that an individual is not resident in that jurisdiction but is resident in the other Contracting State, the said individual will not be deemed tax resident in that jurisdiction even in terms of domestic law.

Specific comments as regards employment income

In terms of Maltese tax law, the source of employment income (excluding directors' fees in the form of remuneration for acting on the board of directors of a company) is considered to be in the territory in which the employment is physically exercised.

As such, employment income for employment activities physically carried on in Malta are prima facie considered to arise in Malta and chargeable to Maltese income tax (subject to any double tax treaty restriction).

For an individual who is both resident (or ordinarily resident) and domiciled in Malta, the determination of the locality of the source of income becomes somewhat irrelevant as such an individual is subject to tax on a worldwide basis (bar any treaty restriction or relief). On the other hand, an individual who is neither resident (or ordinarily resident) nor domiciled in Malta or who is not resident (nor ordinary resident) but domiciled in Malta, the determination of the locality of the source of employment income becomes important – as it determines whether that employment income should be charged to tax in Malta, and if so, on the quantum. For an individual who is resident (and/or ordinary resident) but not domiciled in Malta, the determination of the locality of the source of employment income also becomes of particular relevance as such individual is charged to tax in Malta on a source and remittance basis. Therefore, if an individual's entire salary is considered to arise in Malta, then such income is taxable in Malta in its entirety. On the other hand, if the individual's salary is consider to arise abroad (in whole or in part), then such salary (or part thereof) would only be taxable in Malta if it is remitted to (received in) Malta. An exercise in counting the number of days physically spent working in Malta may be required for an adequate apportionment. A case-by-case analysis is required in similar circumstances.

The fact that employment income is paid or borne by a Maltese tax resident employer should not alter the above conclusions and should not impact on the deductibility or otherwise of the employment expense for the employer.

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With respect to deductibility of employment expense, if employment income is paid or borne by a Maltese resident employer to a person that is not resident (and/or ordinarily resident) in Malta and such income is not deemed to arise in Malta, such income will not be taxable in Malta and will therefore not need to be reported in the Payee Statement of Earnings and the Payer 's Annual Reconciliation Statement prepared in terms of the FSS Rules as it does not qualify as income chargeable to tax in Malta. Additionally, employment income and employment benefits take multiple additional forms (e.g. stock options, fringe benefits etc.). The above principles should nevertheless apply to the many available forms. An in-depth paper on this should follow in due course.

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