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TAX ON CAPITAL
GAINS (PART 1)
CHRISTIAN VELLA

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Date: 8 February 2023



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AGENDA

- Introduction
- Transfers of capital assets
- Exemptions from tax on capital gains
- De-grouping
- Transfers of immovable property
- Case studies



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INTRODUCTION

TAX ON CAPITAL GAINS

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INCOME VS CAPITAL

INTRODUCTION

- The badges of trade are used to determine whether a particular item is to be classified as income or capital.

Income

- Taxed in terms of the provisions of article 4 of the Income Tax Act, chapter 123 of the laws of Malta (the 'ITA')
- Covered in other lectures

Capital

- Taxed in terms of the provisions of article 5 and article 5A of the ITA
- Subsidiary legislation ('S.L.') provides further guidance, such as the Capital Gains Rules, S.L. 123.27 ('CGR')



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CAPITAL TRANSACTIONS WITHIN SCOPE

INTRODUCTION

- Article 5(1)(a) of the ITA provides an exhaustive list of all items which fall within the scope of capital gains taxation under the ITA.
- Any income of a capital nature derived from the transfer of assets which are not specifically mentioned in article 5(1)(a) of the ITA is outside the scope of capital gains taxation under the ITA and, as a result, such income is not subject to Malta income tax.



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CAPITAL TRANSACTIONS WITHIN SCOPE

INTRODUCTION

- Article 5(1)(a) ITA:
- The capital gains to which the provisions of this article shall apply are:
 - i. Gains or profits arising from any transfer of the ownership or usufruct of any immovable property or the assignment or cession of any rights over such property;
 - ii. Gains or profits arising from the transfer of the ownership or usufruct of or from the assignment or cession of any rights over any securities, business, goodwill, business permits, copyright, patents, trademarks and trade-names and any other intellectual property;
 - iii. Gains or profits arising from a transfer of the beneficial interest in a trust;

For this purpose, “transfer of the beneficial interest in a trust” shall include a transfer of a full or partial beneficial interest in a trust and any alienation of such interest or as a result of a person not remaining a beneficiary of such trust



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CAPITAL TRANSACTIONS WITHIN SCOPE

INTRODUCTION

- Article 5(1)(a) ITA:
- The capital gains to which the provisions of this article shall apply are:
 - iv. Gains or profits arising from a transfer of securities as provided for in article 5(9A) ITA and from a transfer of value in securities as provided for in article 5(13)(b)(ii) ITA;
 - v. Gains or profits from the transfer of the ownership or usufruct of or from the assignment or cession of any rights over any interest in a partnership.

Article 5(9A) ITA → the de-grouping provisions

Article 5(13)(b)(ii) ITA → the value shifting provisions



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CAPITAL TRANSACTIONS WITHIN SCOPE

INTRODUCTION

- Any other items of a capital nature are **NOT** taxed under the ITA (unless earned in the context of a trade or business), including:
 - Sale of antiques and paintings
 - Sale of a second-hand car
 - Sale of jewellery
 - Sale of shares which are not classified as securities
 - Sale of bonds and government stock



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DEFINITION OF TRANSFER

INTRODUCTION

- For the purposes of article 5 of the ITA – **article 5(1)(b) ITA**:
- **“transfer”** includes:
 - Any assignment, sale, emphyteusis or sub-emphyteusis, partition, donation, settlement of property on trust, distribution and reversion of property settled on trust, sale by instalments, and
 - Any alienation under any title including any redemption, liquidation or cancellation of units or shares in a collective investment scheme, and
 - Maturity or surrender of linked long-term policies of insurance, and
 - Any occurrence that is deemed to be a transfer in accordance with the provisions of article 5(9A) ITA and 5(13)(b) ITA, and
 - Also includes any transfer of an asset by a company to its shareholders, or by a commercial partnership en nom collectif or commercial partnership en commandite the capital of which is not divided into shares to its members, in the course of winding up the company or partnership or in the course of a distribution of assets to its shareholders or partners pursuant to a scheme of distribution



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DEFINITION OF TRANSFER

INTRODUCTION

- For the purposes of article 5 of the ITA – **article 5(1)(b) ITA**:
- **“transfer”** *does not* include:
 - A transfer causa mortis, or
 - A transfer of property by the trustee of a disability trust or disability foundation to any one or more of the remaining beneficiaries of such trust or foundation or the heirs of the disabled beneficiary upon the death of the disabled beneficiary of such trust or foundation and where such remaining beneficiaries or heirs comprise only persons referred to in article 5(2)(e)(i) ITA

Persons referred to in article 5(2)(e)(i) ITA →
 spouse, descendants and ascendants in the direct line and their relative spouses, or in the absence of descendants, to his brothers or sisters and their descendants



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CONTRACTS OF EXCHANGE

INTRODUCTION

- **Article 5(2)(b) ITA:**
- Any transfer of immovable property by means of a deed of exchange shall be considered as if separate deeds of transfer were taking place between the parties to the deed



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EXAMPLE 1

INTRODUCTION

- Mr A transfers securities costing €20,000 to Mr B.
- In exchange, Mr B transfers a motor vehicle (in the context of a capital transaction), costing the same amount as the securities, to Mr A.
- In this case, the ITA requires that the exchanges are considered separately for the purposes of calculating any taxable capital gains.
- The transfer of securities is a taxable capital gain.
- The transfer of a motor vehicle does not fall within the scope of article 5 of the ITA.



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TRANSFERS OF CAPITAL ASSETS

TAX ON CAPITAL GAINS

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TRANSFERS OF BUSINESS, GOODWILL, BUSINESS PERMITS, COPYRIGHTS, PATENTS, TRADEMARKS AND TRADE NAMES AND ANY OTHER INTELLECTUAL PROPERTY

TRANSFERS OF CAPITAL ASSETS

CGR Rule 4(1):

In computing the gains or profits on the transfer of any asset to which article 5(1)(a)(ii) ITA applies, there shall be taken into account the cost of acquisition of that asset

- The general rule for transfers of capital assets is:
- **Chargeable gain / loss = Consideration received – Cost of acquisition**
- The cost of acquisition includes all costs of a capital nature incurred in relation to the asset being sold.
- The chargeable gain is added to the income of the person deriving the gain and is taxed at the normal rates.
- For married couples, the gain should be attributed to the highest income earner.



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TRANSFERS OF BUSINESS, GOODWILL, BUSINESS PERMITS, COPYRIGHTS, PATENTS, TRADEMARKS AND TRADE NAMES AND ANY OTHER INTELLECTUAL PROPERTY

TRANSFERS OF CAPITAL ASSETS

- **CGR Rule 4(2):**
- In the case of a transfer of intellectual property or intellectual property rights, the cost of acquisition shall not include any amount in respect of which a deduction has been claimed in terms of **article 14(1)(m) ITA**.

Article 14(1)(m) ITA:

For the purposes of ascertaining the total income of any person there shall be deducted all outgoings and expenses incurred by such person ... including –
Any expenditure of a capital nature on intellectual property or any intellectual property rights incurred by a person and which intellectual property or intellectual property rights are proved to the satisfaction of the Commissioner to have been used or employed in the production of the income of such person
 [various conditions find application in relation to such a deduction]



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EXEMPTIONS FROM TAX ON CAPITAL GAINS

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INTRODUCTION

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- Article 5 of the ITA includes the following exemptions from tax on capital gains, amongst others:
 - Exemption on donations
 - Intra-group exemption
 - Exemption on group restructurings (*to be discussed in Part 2*)
 - Exemption on transfer of assets forming part of the community of acquests
 - Exemption on transfer of listed shares (*to be discussed in Part 2*)



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EXEMPTION FOR DONATIONS

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- **Article 5(2)(e) ITA:**
- A donation shall be considered as a deemed sale made at the market value of **the property** at the time of transfer.
- Provided that no tax shall be payable where the donation is made by a person to:
 - i. His spouse, descendants and ascendants in the direct line and their relative spouses, or in the absence of descendants to his brothers or sisters and their descendants, or
 - ii. Philanthropic institutions approved for the purposes of article 12(1)(e) ITA.

or the **capital item** in terms of article 5(1)(a)(ii) of the ITA



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EXEMPTION FOR DONATIONS

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- **Article 5(2)(f) ITA:**
- Where the property referred to in paragraph 5(2)(e) ITA is disposed of by the donee within 5 years of the donation, the donee shall be charged on the gain ascertained in accordance with the provisions of article 5 ITA by taking into account the cost of acquisition of the property at the time it was acquired by the donor.
- Where the property is sold by the donee after the lapse of 5 years the cost of acquisition shall be deemed to be the value of the property as declared in the deed of donation.



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INTRA-GROUP EXEMPTION

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- **Article 5(9)(i) ITA:**
- Where an asset is transferred from **one company to another company** and such companies are:
 - Deemed to be a group of companies for the purposes of article 16 ITA, or
 - Controlled and beneficially owned directly or indirectly to the extent of more than 50% by the same shareholders,
- It shall be deemed that no loss or gain has arisen from the transfer.
- In ascertaining the income, whether chargeable under article 5 ITA or under article 4(1)(a) ITA, where such an asset is subsequently transferred by a company to another company which does not fall within the provisions of the above paragraphs, or to another person, as the case may be, the **base cost and the date of acquisition of the asset that would be considered** shall be the **original cost and the date when it was acquired before the transfer from the first company, being the company within the group, took place.**



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GROUP OF COMPANIES

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- **Article 16 ITA:**
- Two companies resident in Malta but neither of which is resident for tax purposes in any other country shall be deemed to be members of a group of companies if one is the 51% subsidiary of the other or both are 51% subsidiaries of a third company resident in Malta.
- A company shall be deemed to be a 51% subsidiary of another company (the “parent company”):
 - If and so long as more than 50% of its ordinary share capital and more than 50% of its voting rights are owned directly or indirectly by the parent company; and
 - The parent company is beneficially entitled either directly or indirectly to more than 50% of any profits available for distribution to the ordinary shareholders of the subsidiary company; and
 - The parent company would be beneficially entitled either directly or indirectly to more than 50% of any assets of the subsidiary company available for distribution to its ordinary shareholders on a winding up.



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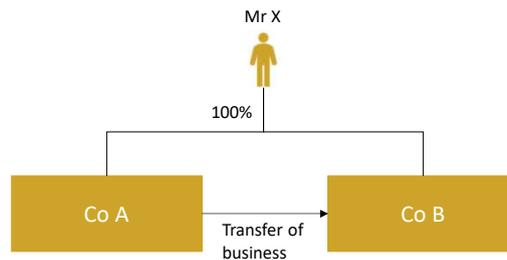
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EXAMPLE 2

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- Mr X is the sole owner of Co A and Co B.
- Co A is affecting a transfer of business to Co B.
- Does the transfer of business fall within the scope of the intra-group exemption?



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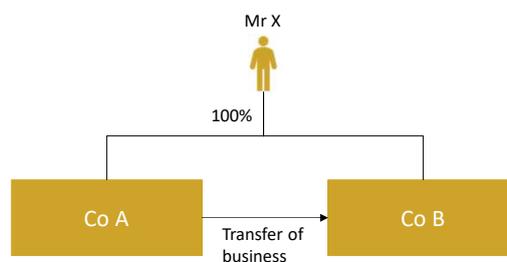
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EXAMPLE 2

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- The transfer of business from Co A to Co B falls within the scope of the intra-group exemption.
- Therefore, no loss or gain is deemed to have arisen from the transfer.



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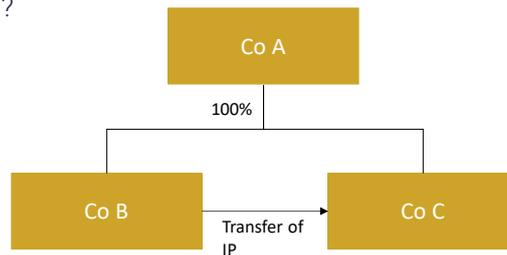
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EXAMPLE 3

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- Co A is the sole owner of Co B and Co C.
- Co B acquired intellectual property from a third party 5 years ago, at a total cost of €500.
- Co B is now transferring the intellectual property to Co C, at a total cost of €750.
- Does the transfer of intellectual property from Co B to Co C fall within the scope of the intra-group exemption?



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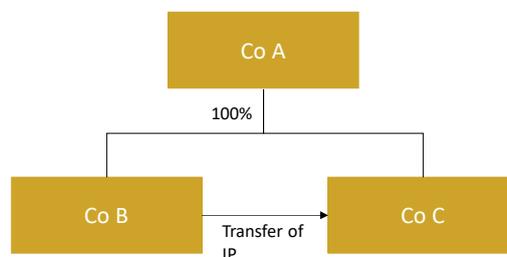
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EXAMPLE 3

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- The transfer of intellectual property from Co B to Co C falls within the scope of the intra-group exemption.
- Therefore, no loss or gain is deemed to have arisen from the transfer.



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EXAMPLE 3

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- 3 years after Co C acquired the intellectual property from Co B, it transfers that intellectual property to Co D (an unrelated party), at a total cost of €1,000.
- Mr X is the sole owner of Co D.
- Does the transfer of intellectual property from Co C to Co D fall within the scope of the intra-group exemption?



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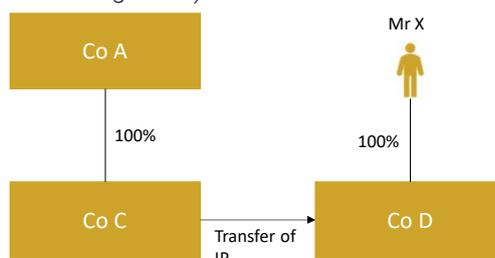
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EXAMPLE 3

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- The transfer of intellectual property from Co C to Co D does **NOT** fall within the scope of the intra-group exemption.
- Additionally, the taxable capital gain made by Co C would be determined by reference to the date of acquisition and cost of acquisition of the intellectual property by Co B (i.e. all intra-group exempt transfers are ignored).



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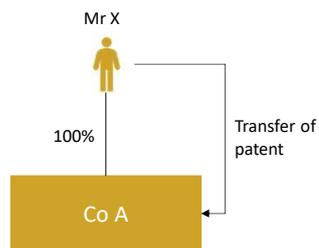
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EXAMPLE 4

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- Mr X is the sole owner of Co A.
- Mr X is transferring a patent to Co A.
- Does the transfer of the patent from Mr X to Co A fall within the scope of the intra-group exemption?



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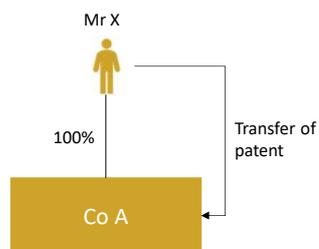
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EXAMPLE 4

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- The transfer of the patent from Mr X to Co A is **NOT** within the scope of the intra-group exemption since it is not a transfer between two companies.



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INTRA-GROUP EXEMPTION – IMMOVABLE PROPERTY AND PROPERTY COMPANIES

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- Additional conditions must be satisfied in order for the intra-group exemption to find application when the asset to be transferred consists of immovable property situated in Malta or real rights thereon or shares in a property company.

Article 2(1) ITA:

“property company” shall mean a company which owns immovable property situated in Malta or any real rights thereon or a company which holds, directly or indirectly, shares or other interests in any entity or person which owns immovable property situated in Malta or any real rights thereon where 5% or more of the total value of the said shares or other interests so held is attributable to such immovable property or rights

The proviso to this definition does not apply for the purposes of the intra-group exemption



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INTRA-GROUP EXEMPTION – IMMOVABLE PROPERTY AND PROPERTY COMPANIES

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- Article 5(9)(iii) ITA:
- Where the asset being transferred consists of immovable property situated in Malta or shares in a property company, the intra-group exemption shall only apply where the individual direct or indirect beneficial owners of the transferor and transferee are the same and each such individual holds, directly or indirectly, substantially the same percentage interest in the nominal share capital and voting rights in each of the said companies.
- Provided that for the purposes of the above, an individual is deemed to hold substantially the same percentage interest in the nominal share capital and voting rights in each of the said companies where the difference between the percentage interest held in each company does not exceed 20%.



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INTRA-GROUP EXEMPTION – IMMOVABLE PROPERTY AND PROPERTY COMPANIES

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- Article 5(9)(iii) ITA:
- Provided further that where an individual holds directly or indirectly, less than 20% of the nominal share capital and voting rights in only one of the said companies, such individual shall, for the purposes of this paragraph, not be taken into account in determining whether the individual direct or indirect beneficial owners of the said companies are the same.
- Provided also that if more than one individual holds, directly or indirectly, less than 20% of the nominal share capital and voting rights in only one of the said companies, the above proviso shall not apply where together such individuals hold, directly or indirectly, 20% or more of the nominal share capital and voting rights in that company.



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INTRA-GROUP EXEMPTION – IMMOVABLE PROPERTY AND PROPERTY COMPANIES

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- Article 5(9)(iii) ITA:
- Provided also that such further conditions shall not apply, where the transferor and transferee are directly or indirectly owned as to 80% or more by a company whose securities are listed on a stock exchange recognised by the Commissioner for the purpose of this provision.

Guidance Note on Recognised Stock Exchanges

Published by the Commissioner in November 2022

The stock exchanges that are recognised by the Commissioner for the purposes of the Income Tax Acts and the Duty on Documents and Transfers Act are:

- Stock exchanges that are members of the World Federation of Stock Exchanges
- The New York Stock Exchange
- Stock exchanges that are included in the register of regulated markets within the European Economic Area maintained by the European Securities and Markets Authority (ESMA)



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INTRA-GROUP EXEMPTION – IMMOVABLE PROPERTY AND PROPERTY COMPANIES EXEMPTIONS FROM TAX ON CAPITAL GAINS

- In summary, for the intra-group exemption to apply upon the transfer of immovable property situated in Malta or real rights thereon or shares in a property company:

The transferor and transferee must be controlled and beneficially owned, directly or indirectly, to the extent of more than 50% by the same shareholders

The individual beneficial owners of the transferor and transferee must be the same

Each such individual holds substantially the same percentage interest in the nominal share capital and voting rights in each of the said companies

Where an individual holds less than 20% in only one of the companies, such individual shall not be taken into account in determining whether the individual direct or indirect beneficial owners of the companies are the same

A 20% disparity allowance applies

If more than one individual holds less than 20% in only one of the companies, the exemption shall not apply where together such individuals hold 20% or more in that company



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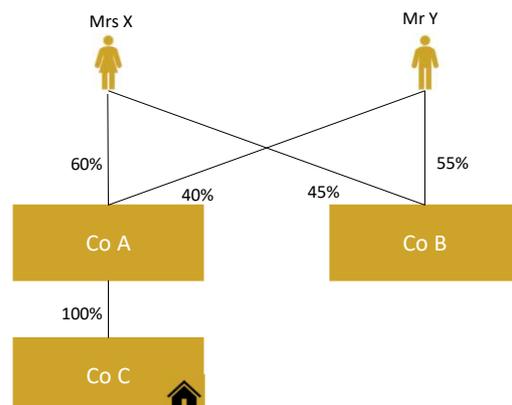
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EXAMPLE 5 EXEMPTIONS FROM TAX ON CAPITAL GAINS

- Mrs X owns 60% of Co A and 45% of Co B.
- Mr Y owns 40% of Co A and 55% of Co B.
- Co A is the sole owner of Co C.
- Co C is a property company.
- Co A is transferring 100% of the shares of Co C to Co B.
- Does the transfer of Co C from Co A to Co B fall within the scope of the intra-group exemption?



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EXAMPLE 5

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- The transfer of securities in Co C from Co A to Co B falls within the scope of the intra-group exemption.
- Therefore, no loss or gain is deemed to have arisen from the transfer.

Shareholder	Co A	Co B	Disparity
Mrs X	60%	45%	(15%)
Mr Y	40%	55%	15%



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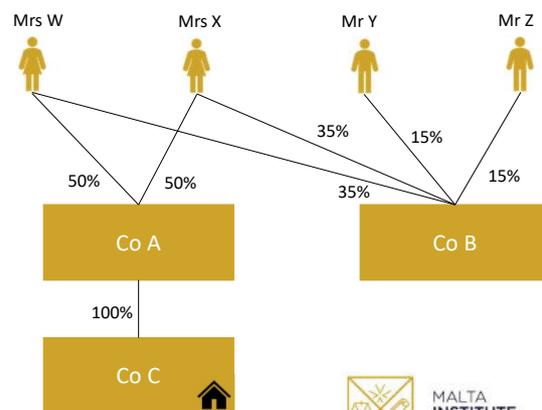
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EXAMPLE 6

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- Mrs W owns 50% of Co A and 35% of Co B.
- Mrs X owns 50% of Co A and 35% of Co B.
- Mr Y owns 15% of Co B.
- Mr Z owns 15% of Co B.
- Co A is the sole owner of Co C.
- Co C is a property company.
- Co A is transferring 100% of the shares of Co C to Co B.
- Does the transfer of Co C from Co A to Co B fall within the scope of the intra-group exemption?



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EXAMPLE 6

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- Prima facie, the transfer of securities in Co C from Co A to Co B falls within the scope of the intra-group exemption.
- Therefore, no loss or gain is deemed to have arisen from the transfer.

Shareholder	Co A	Co B	Disparity
Mrs W	50%	35%	(15%)
Mrs X	50%	35%	(15%)
Mr Y	-	15%	15%
Mr Z	-	15%	15%



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EXAMPLE 6

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- **HOWEVER:** Where an individual holds less than 20% in only one of the companies, such individual shall not be taken into account in determining whether the individual direct or indirect beneficial owners of the companies are the same.
- If more than one individual holds less than 20% in only one of the companies, the exemption shall not apply where together such individuals hold 20% or more in that company.
- Therefore, since Mr Y and Mr Z do not hold any shares in Co A, they are aggregated together for the purposes of calculating the disparity.
- The intra-group exemption will therefore not apply, since the combined disparity for Mr Y and Mr Z exceeds 20%.



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EXEMPTION ON TRANSFER OF ASSETS FORMING PART OF THE COMMUNITY OF ACQUESTS

EXEMPTIONS FROM TAX ON CAPITAL GAINS

Article 5(5)(e) ITA:

Where the property is assigned between spouses consequent to a judicial or consensual separation or divorce

Article 5(5)(f) ITA:

Where the property formed part of the community of acquests between the spouses or was otherwise owned in common between them and is assigned to one of the spouses on the dissolution of the community or is partitioned between the spouses, or the surviving spouse and the heirs of the deceased spouse



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ROLL-OVER RELIEF

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- **Article 5(8) ITA:**
- Where a capital asset falling within scope of article 5 of the ITA and used in a business for a period of at least 3 years is transferred and replaced within 1 year by an asset used solely for a similar purpose in the business, any capital gains realised on the transfer shall not be taxed but the cost of acquisition of the new asset shall be reduced by the said gain.
- When the asset is disposed of without replacement, the income, whether chargeable under article 5 ITA or under article 4(1)(a) ITA, shall take into account the transfer price and the cost of acquisition reduced as above.
- Provided further that if the capital gain exceeds the cost of acquisition of the replacement property, any excess is to be taxable in the year in which the replacement property was acquired and the cost of acquisition of the replacement property to be taken into account on a subsequent transfer will be zero.



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TRANSFER OF A BUSINESS

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- **Article 5(15) ITA:**
- Where a business or a partnership *en nom collectif* as a going concern is incorporated into a limited liability company, which is beneficially owned to the extent of not less than 75% by the same person who owned the business or the partnership *en nom collectif* and there is a transfer of assets **it shall be deemed that no loss or gain has arisen from the transfer.**
- Where such assets are subsequently transferred by the company, the base cost and date of acquisition of the assets that would be considered, whether chargeable under article 5 ITA or under article 4(1)(a) ITA, shall be the original cost and the date when it was acquired before the first transfer took place.



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TRANSFER OF A BUSINESS

EXEMPTIONS FROM TAX ON CAPITAL GAINS

- **Article 5(15) ITA:**
- This exemption shall apply only where an individual or a partnership *en nom collectif* transfers to a company a business as a going concern, together with the whole assets of the business, or together with the whole of those assets other than cash, and the business is so transferred wholly in exchange for shares issued by the company to the person transferring the business.
- For the purpose of computing any chargeable gain accruing on the disposal of the said shares, the cost of acquisition taken into account shall be reduced by any chargeable gain that would have resulted on the transfer of the said business had article 5 ITA and article 5A ITA not been applied.



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DE-GROUPING

TAX ON CAPITAL GAINS

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DE-GROUPING

TAX ON CAPITAL GAINS

- The de-grouping provisions, included in articles 5(9A) and 5A(12A) of the ITA, were introduced as an anti-abuse provision in relation to intra-group transfers of immovable property and property companies.
- The de-grouping charge should typically be equivalent to the tax that was originally exempted on the intra-group exempt transfer.



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DE-GROUPING

TAX ON CAPITAL GAINS

- Article 5(9A)(a) ITA:
- If a company ("the chargeable company") holds shares in a company which had been acquired from another company, and such acquisition was exempt from tax in terms of the intra-group exemption, the de-grouping provisions shall apply if the chargeable company ceases to be a member of the original group before the lapse of six years from the date of the said acquisition.
- References to a company ceasing to be a member of a group of companies do not apply to cases where a company ceases to be a member of the original group by being wound up or dissolved or in consequence of another member of the group being wound up or dissolved.
- Provided that where a company ceases to be a member of the original group by being wound up or dissolved, for the purposes of determining whether the chargeable company ceases to be a member of the original group, such company shall be deemed to have remained in existence.

Article 5A(12A) ITA:
owns property



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DE-GROUPING

TAX ON CAPITAL GAINS

- Article 5(9A)(h) ITA:
- For the purposes of the above, the term "shares in a company" shall mean shares in a company which, on the date of the acquisition referred to above, owned, directly or indirectly, any immovable property situated in Malta or any real rights thereon and the said property or any part thereof is still, directly or indirectly, owned by such company on the date it ceases to be a member of the original group.
- For this purpose, a company is treated as indirectly owning immovable property if it holds, directly or indirectly, shares or other interests in any entity or person, which owns immovable property situated in Malta or any real rights thereon where 5% or more of the total value of the said shares or other interests so held is attributable to such immovable property or rights.



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DE-GROUPING

TAX ON CAPITAL GAINS

- **Article 5(9A)(b) ITA:**
- The chargeable company shall cease to be a member of the original group if such company and the company from which it had acquired the shares referred to above, no longer satisfy the provisions of the intra-group exemption and such determination shall be made by reference to the same individuals referred to for the purposes of such provisions, taken into account in determining whether the transferor and transferee satisfied the provisions of the intra-group exemption on the date of the acquisition of the relevant asset.

Relevant provisions of the intra-group exemption:
Same beneficial owners, each holding substantially the same percentage



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DE-GROUPING

TAX ON CAPITAL GAINS

- **Article 5(9A)(b) ITA:**
- Provided further that where the chargeable company ceases to be a member of the original group, solely as a result of a change in the direct or indirect individual shareholders of the company from which it had acquired the shares referred to above, the chargeable company shall, for the purpose of the de-grouping provisions, not be treated as ceasing to be a member of the original group as a result of such change, so however that for the purpose of determining whether the chargeable company ceases to be a member of the original group, it shall be deemed that such change had not taken place and such determination shall be made by reference to the same individuals referred to in the provisions of the intra-group exemption, taken into account in determining whether the chargeable company and the company from which it had acquired the shares satisfied the provisions of the intra-group exemption on the date of the acquisition of the relevant asset.



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DE-GROUPING TAX ON CAPITAL GAINS

Article 5(9A)(d) ITA:

Where the chargeable company ceases to be a member of the group, it shall be treated for all purposes of article 5 ITA as if, immediately after its acquisition of the shares referred to above, it had transferred and immediately re-acquired the shares at that time

Article 5(9A)(e) ITA:

The base cost and the date of acquisition of the shares that is taken into account for the purpose of determining any gain or loss shall be the original cost and the date when the shares had previously last been acquired by a company by means of a transfer that did not qualify for the intra-group exemption or by means of an allotment, whichever is the later

Article 5(9A)(g) ITA:

Any gain or loss on the transfer referred to in the de-grouping provisions shall be treated as accruing to the chargeable company immediately before the company ceases to be a member of the group



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DE-GROUPING TAX ON CAPITAL GAINS

- A de-grouping charge is not triggered in the events as stated in article 5(9A)(c) ITA:
- The term "original group" shall mean the transferor and the transferee, and the individual direct or indirect beneficial owners of the said companies who were taken into account in determining whether the provisions of the intra-group exemption had been satisfied on the date of the acquisition of the relevant asset.
- Where the transferor and the transferee are directly or indirectly owned as to 80% or more by a company whose securities are listed on a stock exchange recognised by the Commissioner for such purpose, the term "original group" shall mean the transferor and the transferee and the company whose securities are listed on the said stock exchange as existing on the date of the acquisition of the relevant asset.



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DE-GROUPING

TAX ON CAPITAL GAINS

- Where an individual acquires shares in terms of a donation exempt from tax under the provisions of article 5(2)(e) ITA, or a transfer causa mortis, such individual shall be deemed for all the purposes of the de-grouping provisions to have held such shares from the date such shares were previously acquired in an acquisition preceding the date of the donation or the transfer causa mortis.

In summary, a de-grouping charge is not triggered in the event that:

Transferor Co and Transferee Co are directly or indirectly owned as to 80% or more by a company whose securities are listed on a stock exchange recognised by the Commissioner for such purpose

Shareholder changes at the level of Transferee Co are the result of a transfer causa mortis or the result of a donation exempt from tax under article 5(2)(e) ITA



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DE-GROUPING

TAX ON CAPITAL GAINS

- Article 5(9A)(i) ITA:
- Where the chargeable company is treated as having transferred and immediately reacquired the shares, and a chargeable gain or a capital loss accrues to the chargeable company on the deemed transfer, the chargeable gain or capital loss accruing on the deemed transfer shall be treated as accruing not to the chargeable company but to a related company ("company A") if –
 - At the time of accrual, company A was incorporated in Malta; and
 - A joint election is made by the chargeable company and company A to treat the chargeable gain or capital loss as accruing to company A; and



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DE-GROUPING

TAX ON CAPITAL GAINS

- **Article 5(9A)(i) ITA:**
 - iii. Such joint election is made by notice given to the Commissioner not later than 12 months after the end of the accounting period of the chargeable company or company A (whichever is the earlier) in which the time of accrual fell; and
 - iv. The applicable provisional tax is paid by company A at a rate of 35% of the market value of the shares deemed transferred within the period prescribed.
- For the purposes of the above, company A is related to the chargeable company if both companies form a group for the purposes of the intra-group exemption at the time of accrual and "time of accrual" means the time at which the gain or loss is treated as accruing to the chargeable company.



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EXAMPLE 7

DE-GROUPING

- Original structure



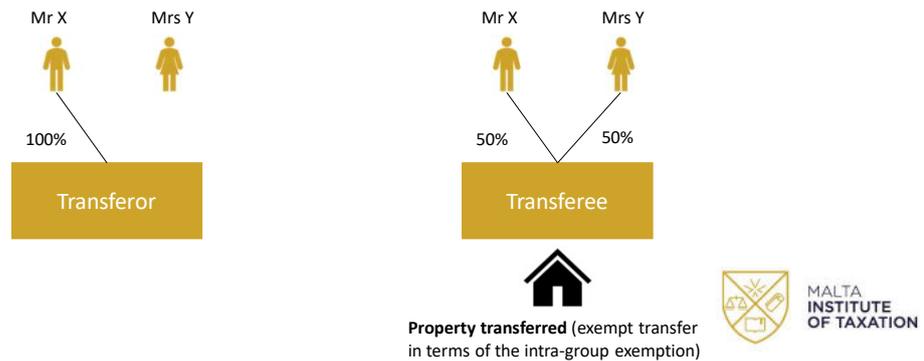
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EXAMPLE 7 DE-GROUPING

- Change in ownership of Transferor
- De-grouping charge is **NOT** triggered due to change in the shareholding of Transferor Co

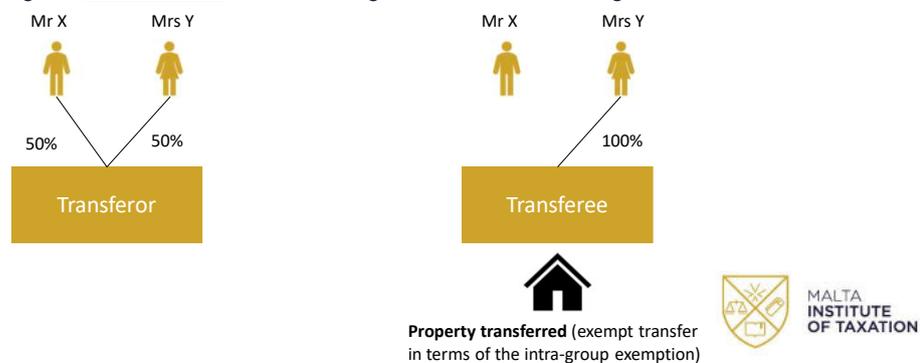


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EXAMPLE 7 DE-GROUPING

- Change in ownership of Transferee
- De-grouping charge is **TRIGGERED** due to change in the shareholding of Transferee Co



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TRANSFERS OF IMMOVABLE PROPERTY

TAX ON CAPITAL GAINS

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INTRODUCTION

TRANSFERS OF IMMOVABLE PROPERTY

- The following articles regulate the tax on transfers of immovable property:

“Final Tax” Regime in terms of article 5A ITA

- Applies for transfers of immovable property in Malta, except for special “opt-out” cases
- Tax on transfer value rather than on capital gains

“Capital Gains” Regime in terms of article 5 ITA

- Applies for transfers of immovable property outside Malta and for transfers in Malta if the persons decides to “opt-out”
- Tax on capital gains realised through the transfer



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“FINAL TAX” REGIME

TRANSFERS OF IMMOVABLE PROPERTY

- The rates mentioned hereunder are applicable for all transfers taking place after 1 January 2015.
- Any transfer of immovable property situated in Malta is subject to tax in terms of article 5A of the ITA, unless the transferor may “opt-out” in terms of article 5A(3) of the ITA.
- Unlike article 5 ITA, which provides for a tax on any capital gain made upon a transfer, the final tax (in terms of article 5A ITA) is generally a percentage of the higher of consideration or market value.
- The only deduction available is brokerage fees paid by the transferor.



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“FINAL TAX” REGIME

TRANSFERS OF IMMOVABLE PROPERTY

- Article 5A(6)(a) ITA:
- The transfer value of property is the higher of the market value of that property and the consideration paid or payable for the transfer.
- In a contract of emphyteusis and in any transfer of property where the consideration consists of or includes periodical payments which are classified as: (i) any pension, charge, annuity or annual payment; or (ii) rents, royalties, premiums and any other profits arising from property, and falling within scope of article 4 ITA, the ground rent or any such other periodical payment payable shall be chargeable as income in accordance with the provisions of article 4 ITA and shall not be included in the transfer value of a transfer to which this article applies.



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“FINAL TAX” REGIME

TRANSFERS OF IMMOVABLE PROPERTY

- **Article 5A(10)(a) ITA:**
- Tax payable on a transfer to which article 5A ITA applies shall be final and shall be separate and distinct from that paid or payable under any other provisions of the ITA or of the Income Tax Management Act, chapter 372 of the laws of Malta (the ‘ITMA’).
- It shall not be available as a credit against the tax liability of any person or taken into account for the purpose of determining the amount of any refund payable under the ITA or the ITMA.
- No provisional tax shall be payable in respect of any transfer to which article 5A ITA applies.

Tax charged is final and is not subject to any reduction or refund



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“FINAL TAX” REGIME

TRANSFERS OF IMMOVABLE PROPERTY

- **Article 5A(10)(d) ITA:**
- Every company resident in Malta shall allocate the distributable profits derived from transfers to which article 5A ITA applies, and on which tax is payable in accordance with article 5A ITA to the **Final Tax Account**.
- The said distributable profits shall be determined in such manner as may be prescribed.

In case of companies, any profits made are allocated to the company's Final Tax Account.



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“FINAL TAX” REGIME

TRANSFERS OF IMMOVABLE PROPERTY

- Article 5A(11) ITA:
- Tax chargeable under article 5A ITA shall be due by the transferor and shall be remitted to the Commissioner within 15 working days of the relative transfer.
- Except where the Commissioner orders otherwise, either in a general manner or in respect of particular cases, this payment is to be made by the notary who publishes the transfer deed by means of a bank draft or a cheque drawn on that notary’s personal bank account, payable to the Commissioner.

All tax is payable within 15 working days of the transfer and the amount is generally held by the notary, who effects the payment to the Commissioner.



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“OPT-OUTS”

TRANSFERS OF IMMOVABLE PROPERTY

- A person may decide not to apply the final tax in very limited cases.
- There are also other conditions which may need to be satisfied for the opt-outs discussed on the following slides to apply.



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“OPT-OUTS”

TRANSFERS OF IMMOVABLE PROPERTY

- Article 5A(3)(h) ITA:
- A transfer of property by a person who is not resident in Malta and who is resident for tax purposes in another country if that person produces to the notary who publishes the deed of transfer a statement signed by the tax authorities of the country of that person’s residence that confirms that person’s residence in that country and that certifies that that person is subject to tax in that country on gains or profits derived from the transfer of immovable property situated in Malta.
- The notary shall attach that statement to the deed and shall deliver an authenticated copy thereof to the Commissioner in such manner as may be prescribed.
- Provisional tax relating to the transfer of such property shall not be available for refund.



“OPT-OUTS”

TRANSFERS OF IMMOVABLE PROPERTY

- Article 5A(3)(j) ITA:
- A transfer of property forming part of a project made by a company which has issued debt securities to the public and such debt securities are listed on a stock exchange recognised by the Commissioner for the purpose of this provision, and if the transferor elects, by means of a declaration made to the notary at the time of the publication of the deed of the transfer and recorded in the said deed, to exclude that transfer from the scope of this article.
- Certain other considerations find application in relation to this “opt-out”.



EXEMPTIONS

TRANSFERS OF IMMOVABLE PROPERTY

Article 5A(4)(a) ITA:

a donation made by a person:

- To his spouse, to his descendant or ascendant in the direct line, or to the spouse of any such descendant or ascendant, or, in the absence of any descendants in the direct line, to his brother or sister or to a descendant of his brother or sister
- To a philanthropic institution approved for the purposes of article 12(1)(e) ITA

Article 5A(4)(c) ITA:

a transfer of property not forming part of a project, consisting of a dwelling house, that has been owned and occupied by the transferor as his own residence for a period of at least 3 consecutive years immediately preceding the date of transfer and provided that the property is disposed of within 12 months of vacating the premises or such other period or condition as may be prescribed and provided that such property is declared by the transferor to be his main residence through an election made to the Commissioner in such manner and subject to such rules as may be prescribed



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EXEMPTIONS

TRANSFERS OF IMMOVABLE PROPERTY

Article 5A(4)(d) ITA:

the assignment of property between spouses consequent to a judicial or consensual separation or a divorce

Article 5A(4)(e) ITA:

the assignment of property that formed part of the community of acquests between the spouses or was otherwise owned in common between them, to one of the spouses on the dissolution of the community, or the partition of such property between the spouses or the surviving spouse and the heirs of the deceased spouse

Article 5A(4)(f) ITA:

a transfer of property from one company to another which would qualify for tax relief in terms of the intra-group exemption but for the provisions of article 5A ITA



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EXEMPTIONS

TRANSFERS OF IMMOVABLE PROPERTY

- **Article 5A(4)(g) ITA:**
- The transfer of property upon the incorporation of a business or a partnership *en nom collectif* as a going concern into a limited liability company that satisfies the conditions laid down in article 5(15) ITA.
- This paragraph shall not apply, and accordingly article 5(15) ITA is not applicable, if the business is disposed of or ceases to exist, within a period of 2 years starting from the date the business is transferred to the said company or such shorter period as the Commissioner may determine.



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EXEMPTIONS

TRANSFERS OF IMMOVABLE PROPERTY

- **Article 5A(4)(j) ITA:**
- A transfer of property by a company to its shareholder or to an individual related to its shareholder in the course of winding up or in the course of a distribution of assets pursuant to a scheme of distribution, where the said shareholder is an individual or his spouse, who owns or own, directly or indirectly, not less than 95% of the share capital and voting rights of the said company transferring the property as aforesaid.
- Provided that this exemption shall only apply where all the following conditions have been satisfied:
 - The said shareholder held, directly or indirectly, not less than 95% of the share capital and voting rights of the company transferring the property for a period exceeding 5 years immediately preceding the date of the transfer of the property as aforesaid;
 - ...



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EXEMPTIONS

TRANSFERS OF IMMOVABLE PROPERTY

- **Article 5A(4)(j) ITA:**
 - ...
 - The said property consists of any immovable property, including land;
 - The said property is held as a capital asset by the company and has been so held for a period exceeding 5 years immediately preceding the date of the transfer of the property as aforesaid.
- Provided also that every company resident in Malta shall allocate the distributable profits derived from a transfer to which this exemption applies, and on which no tax is payable in accordance with this exemption, to the Final Tax Account.



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EXEMPTIONS

TRANSFERS OF IMMOVABLE PROPERTY

- **Article 5A(5)(i) ITA:**
- A transfer that is made on or after 1 January 2022 that had been leased for a period of 10 years ending on the date of transfer, and during the whole period of 10 years the tenant was entitled to a benefit in respect of that lease under the Private Rent Housing Benefit Scheme administered by the Housing Authority, and that transfer is made to the tenant of that property, no tax is chargeable on the first €200,000 of the transfer value.
- Tax on the excess, if any, is chargeable at the **normal rates**, i.e. the rate that would have otherwise applied in terms of article 5A ITA.

The above exemption shall apply (with effect from year of assessment 2023) at the option of the taxpayer



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IMPORTANT DEFINITIONS

TRANSFERS OF IMMOVABLE PROPERTY

- **“project”** means property that has been developed by the owner into more than one transferable unit or divided for transfer into more than one transferable portion.
- It shall not include land acquired by the owner and divided for transfer into more than one transferable portion, where the land is transferred by the owner in the same state as when acquired (i.e. no excavation or any other works whatsoever have been carried out on the property) and no permit has been issued by the Planning Authority during the period of ownership by the owner sanctioning the development of the land into more than one transferable unit.



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IMPORTANT DEFINITIONS

TRANSFERS OF IMMOVABLE PROPERTY

- **“transfer”** has the meaning assigned to it in article 5(1)(b) ITA and includes any assignment or cession of any rights over property, and any occurrence that is deemed to be a transfer in terms of the de-grouping provisions included in article 5(9A) ITA and article 5A(12A) ITA.
- It shall not include a partition of property where no owelty is due.
- When property is transferred by means of a deed of exchange the parties shall be deemed to have made two separate deeds of transfer.

“property” means any immovable property situated in Malta and any right over such property



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FINAL TAX RATES

TRANSFERS OF IMMOVABLE PROPERTY

- **General rules:**
- 8% rate for transfers of immovable property acquired on or after 1 January 2004
- 10% rate for transfers of immovable property acquired before 1 January 2004
- The date of acquisition shall be the original acquisition by the group (in cases of an intra-group exempt transfer)



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FINAL TAX RATES

TRANSFERS OF IMMOVABLE PROPERTY

- **Article 5A(5)(a) ITA:**
- Provided that in the case of transfers of property made on or after 1 January 2015, other than property forming part of a project and property situated within a special designated area in respect of which a notice of a promise of sale or transfer relating to the said property forming part of a project or situated within a special designated area has been given to the Commissioner in accordance with the relevant provisions of the Duty on Documents and Transfers Act (the 'DDTA') or of rules made under the DDTA before the 17 November 2014, the tax on a transfer to which article 5A ITA applies shall be chargeable at **the rate of 8% of the transfer value.**



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FINAL TAX RATES

TRANSFERS OF IMMOVABLE PROPERTY

- Article 5A(5)(f) ITA:
- When a transfer to which article 5A applies, made on or after 1 January 2015 is a transfer of property that was acquired by the transferor before the 1 January 2004 and in respect of which a notice of a promise of sale or transfer relating to that property has not been given to the Commissioner in accordance with the relevant provisions of the DDTA or of rules made under the DDTA before the 17 November 2014, the tax on a transfer to which article 5A ITA applies shall be chargeable at the rate of 10% of the transfer value.



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FINAL TAX RATES

TRANSFERS OF IMMOVABLE PROPERTY

For transfers of property which were acquired by means of a transmission causa mortis:

Before 25 November 1992

7% rate on transfer value

After 25 November 1992, if transferred through a judicial sale by auction

7% rate on transfer value

After 25 November 1992

12% rate on the difference between the transfer value and the acquisition value
(subject to proviso on next slide)



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FINAL TAX RATES

TRANSFERS OF IMMOVABLE PROPERTY

- For transfers of property which were acquired by donation more than 5 years before the transfer date, 12% rate on the difference between the transfer value and its acquisition value, provided that the property did not form part of a project (possible opt-out).

Provided that the rate of 12% on the difference between the transfer value and its acquisition value (whether applying to a transfer causa mortis or a donation) shall not find application where the property transferred consists of a transfer of a property forming part of a project. For this purpose, "project" means property that was acquired by the transferor in specific circumstances and which has been developed by the transferor into more than one transferable property. These rates shall not find application if the transferor so elects by means of a declaration made to the notary at the time of the publication of the deed of the transfer and recorded in the said deed.



FINAL TAX RATES

TRANSFERS OF IMMOVABLE PROPERTY

- Article 5A(5)(e) ITA:
- When a transfer to which article 5A ITA applies, made on or after the 1 January 2015 is a transfer of property not forming part of a project that is made not later than 5 years after the date of the acquisition thereof, the **tax thereon shall be chargeable at the rate of 5% of the transfer value.**
- Provided that, for the purposes of determining whether the property has been transferred not later than 5 years from the date of its acquisition, where the transferor is a company that had acquired the property by means of a transfer that qualified for the intra-group exemption, **it shall be deemed to have acquired the property on the date on which the property had previously last been acquired by a company by means of a transfer that did not qualify for the intra-group exemption.**
- Certain other considerations find application in relation to such final tax rate.



FINAL TAX RATES

TRANSFERS OF IMMOVABLE PROPERTY

- Article 5A(5)(d) ITA:
- When a transfer to which this article applies is a transfer of property in the circumstances referred to in article 31C(1) ITA, the tax thereon shall be chargeable at the rate of 10% of the transfer value.

Article 31C ITA relates to the taxation of rental income from restored property



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FINAL TAX RATES

TRANSFERS OF IMMOVABLE PROPERTY

- Article 5A(5)(h) ITA:
- When a transfer to which article 5A ITA applies is a transfer of property situated in an urban conservation area or scheduled by the Malta Environment and Planning Authority ('MEPA') and the transferor declares to the notary receiving the deed of the transfer that he has carried out works on that property in compliance with a permit issued by MEPA providing for the restoration and, or rehabilitation of the property upon an application for that purpose that was filed with MEPA on or after 1 January 2015, the tax on the transfer shall be chargeable at the rate of 5% of the transfer value if the conditions on the following slide are satisfied.



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FINAL TAX RATES

TRANSFERS OF IMMOVABLE PROPERTY

(i) The transfer is made on or after the 1 January 2016

(ii) This final tax rate or a similar rate granted under similar circumstances were not applied in respect of any previous transfer of the same property

(iii) The restoration and, or rehabilitation works have been certified by MEPA as having been completed in compliance with the relative permit

(iv) The certificate referred to in point (iii) is produced to the notary who receives the deed of the transfer and the notary produces a certified copy of the certificate to the Commissioner together with the relevant notice required in terms of the DDTA

(v) The person who transfers the property submits any forms and documentation that the Commissioner may require in connection with the said works and with the transfer



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FINAL TAX RATES

TRANSFERS OF IMMOVABLE PROPERTY

- **Article 5A(5)(g) ITA:**
- When a transfer to which article 5A of the ITA applies, made on or after 1 January 2015 is a transfer of property that was immediately before the transfer owned by an individual or co-owned by two individuals, who had for the purposes of the relevant provisions of the DDTA declared in the deed of the acquisition of that property that the said property had been acquired for the purposes of establishing therein or constructing thereon his or their sole ordinary residence, and the transfer is made not later than 3 years after the date of acquisition thereof, the tax thereon shall be **chargeable at the rate of 2% of the transfer value.**
- Such a rate finds application where the said individual does not own any other residential property at the time of the transfer.



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TAX ON PROPERTY TRANSFERS RULES (S.L. 123.92)

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 9 S.L. 123.92:**
- When a person transfers property which he had acquired by means of separate acquisitions and any of those acquisitions was an acquisition of an undivided share of the property transferred, that undivided part shall be deemed to be transferred separately, and its transfer value shall be a proportionate part of the whole transfer value.



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TAX ON PROPERTY TRANSFERS RULES (S.L. 123.92)

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 12 S.L. 123.92:**
- When a person transfers property which he had acquired by means of separate acquisitions and the transfer value of property is not apportioned, then:
 - Any acquisition causa mortis shall be deemed to be acquisitions causa mortis that took place after the 24 November 1992: provided that this rule shall not apply if all the acquisitions were acquisitions causa mortis that took place on or before that date
 - Any onerous acquisitions inter vivos shall be deemed to have taken place before 1 January 2004: provided that this rule shall not apply if all the acquisitions were onerous acquisitions inter vivos that took place on or after 1 January 2004



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EXEMPTION FROM TAX ON CERTAIN PROPERTY TRANSFERS RULES (S.L. 123.199)

TRANSFERS OF IMMOVABLE PROPERTY

- With effect from 9 June 2020, LN 241 of 2020 shall apply with respect to any transfer of property that satisfies all of the conditions on the following slide (as stipulated in rule 3(b) of the relevant legal notice).
- These rules apply to any transfer of property that were it not for the provisions of these rules, would be subject to tax in terms of article 5A ITA at 8% or 10% of the transfer value and that satisfies all of the conditions as noted on the following slide.



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EXEMPTION FROM TAX ON CERTAIN PROPERTY TRANSFERS RULES (S.L. 123.199)

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 3(b) S.L. 123.199:**
- The transfer is made on or after 9 June 2022 but by not later than 30 June 2023; and
- The transfer is made in terms of **a promise of sale or transfer notice** of which would have been given in accordance with the relevant provisions of the DDTA **by not later than the 31 December 2021**; and
- The notice of the transfer that is required to be given in terms of the relevant rule of the Tax on **Property Transfers Rules is delivered to the Commissioner by not later than 31 July 2023**.



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EXEMPTION FROM TAX ON CERTAIN PROPERTY TRANSFERS RULES (S.L. 123.199)

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 4 S.L. 123.199:**
- A person who makes a transfer to which these rules apply shall be exempt from the tax otherwise chargeable on that transfer in terms of article 5A ITA to the extent that it exceeds the tax calculated for the purpose of these rules on condition that the tax so calculated is paid in accordance with the relevant provisions of article 5A ITA.



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EXEMPTION FROM TAX ON CERTAIN PROPERTY TRANSFERS RULES (S.L. 123.199)

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 5 S.L. 123.199:**
- For the purpose of these rules, in the case of a transfer to which these rules apply, the tax on the first €400,000 of the transfer value shall be calculated at the rate of 5% and the tax on the remainder of the transfer value shall be calculated at the rate of 8% or 10% according to the applicable provisions of article 5A ITA.
- Provided that in the case of a transfer of an undivided share of property, the rate of 5% shall apply only to such portion of €400,000 as corresponds pro rata to the share that is transferred.



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RELIEF FROM INCOME TAX AND FROM DUTY ON DOCUMENTS AND TRANSFERS ON CERTAIN PROPERTY TRANSFERS RULES (S.L. 123.203)

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 3(1) S.L. 123.203:**
- No income tax shall be payable on the first €750,000 of the transfer value of any transfer to which the below rules apply that is made on or after 12 October 2021 but not later than 31 December 2024.
- Provided that no relief from income tax shall be allowed in terms of this rule where the transfer is made to a person who requires a permit by the Minister for the purposes of the Immovable Property (Acquisition by Non-Residents) Act or who would have required such permit had the property acquired not been situated in a special designated area.



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RELIEF FROM INCOME TAX AND FROM DUTY ON DOCUMENTS AND TRANSFERS ON CERTAIN PROPERTY TRANSFERS RULES (S.L. 123.203)

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 3(3) S.L. 123.203:**
- When the transfer value of a transfer referred to above exceeds €750,000, the income tax on the excess shall be chargeable at the rates that apply in terms of the relevant provisions of the ITA, and for the purpose of determining the said rates that portion of the transfer value that is relieved from tax on income in terms of these rules shall be deemed to constitute the first part of the transfer value.



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RELIEF FROM INCOME TAX AND FROM DUTY ON DOCUMENTS AND TRANSFERS ON CERTAIN PROPERTY TRANSFERS RULES (S.L. 123.203)

TRANSFERS OF IMMOVABLE PROPERTY

Rule 4(1) S.L. 123.203:

Subject to other conditions being satisfied, this rule applies to any transfer of property that satisfies the below two conditions:

- The property transferred is a building and its construction was completed at least 20 years before the date of the transfer;
- The property transferred is vacant on the date of the transfer and has been vacant for a period of at least 7 continuous years immediately preceding that date.

Rule 4(2) S.L. 123.203:

When there is a transfer to which this rule applies, and the owner subsequently transfers a divided part of the property in question, the latter transfer shall not be treated as a transfer to which this rule applies.



RELIEF FROM INCOME TAX AND FROM DUTY ON DOCUMENTS AND TRANSFERS ON CERTAIN PROPERTY TRANSFERS RULES (S.L. 123.203)

TRANSFERS OF IMMOVABLE PROPERTY

Rule 5(1) S.L. 123.203:

Subject to other conditions being satisfied, this rule applies to any transfer of property that satisfies the below condition:

- The property transferred is situated, at the time of the transfer, within an urban conservation area.

Rule 5(2) S.L. 123.203:

When there is a transfer to which this rule applies, and the owner subsequently transfers a divided part of the property in question, the latter transfer shall not be treated as a transfer to which this rule applies.



RELIEF FROM INCOME TAX AND FROM DUTY ON DOCUMENTS AND TRANSFERS ON CERTAIN PROPERTY TRANSFERS RULES (S.L. 123.203)

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 6(1) S.L. 123.203:**
- The relief from income tax mentioned above shall be subject to the condition that, at any date after the transfer, but not after the date when the property is transferred again inter vivos or causa mortis:
 - The property is not demolished; and
 - The property is not subjected to structural alterations or additions as a result of which it is divided into more transferable units than the number of transferable units that comprised the property at the time of the transfer; and
 - No permit is issued by the Planning Authority, upon an application made by the owner who benefited from the said relief, for the demolition of the property or for works described in the point above; and
 - No transfer is made of any divided part of that property.



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RELIEF FROM INCOME TAX AND FROM DUTY ON DOCUMENTS AND TRANSFERS ON CERTAIN PROPERTY TRANSFERS RULES (S.L. 123.203)

TRANSFERS OF IMMOVABLE PROPERTY

Rule 6(2) S.L. 123.203:

If the conditions mentioned on the previous slide are in any way breached, the relief from income tax granted by these rules on the said transfer shall be forfeited and the total of the amount of such income tax that was so relieved shall become payable to the Commissioner forthwith.

Rule 6(3) S.L. 123.203:

The person who acquired the property at the time that the relief from income tax was allowed shall be liable for the payment of the amount mentioned in the previous point.



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RELIEF FROM INCOME TAX AND FROM DUTY ON DOCUMENTS AND TRANSFERS ON CERTAIN PROPERTY TRANSFERS RULES (S.L. 123.203)

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 14 S.L. 123.203:**
- Where a transfer of property falling within scope of these rules is made to a company, and that company then transfers the property to another company by means of a transfer that is relieved from income tax in terms of the intra-group exemption, the anti-abuse conditions mentioned above shall continue to apply as if the latter transfer has not taken place, and in the event of a breach in any way of any applicable condition, the two companies shall be jointly and severally liable for the payment of the amount mentioned above.



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PARTITIONS

TRANSFERS OF IMMOVABLE PROPERTY

- The tax treatment of a partition of immovable property will depend on whether or not an owelty is due as part of the partition.
- If no owelty is due, then it shall be deemed that no transfer has taken place.

Article 5A(7) ITA:

In a partition of property where an owelty is paid –

- Any person to whom an owelty is due shall be deemed to have sold part of the property assigned to him. That sale shall be deemed to be made on the date of the partition for a consideration equivalent to the owelty; and
- Any person by whom an owelty is due shall be deemed to have bought part of the property assigned to him. That purchase shall be deemed to be made on the date of the partition for a consideration equivalent to the owelty.



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“CAPITAL GAINS” REGIME

TRANSFERS OF IMMOVABLE PROPERTY

- For transfers of immovable property outside Malta, or in cases where a person is eligible and elects to opt out of the final tax in terms of article 5A(3) of the ITA:
 - The gain on the transfer is added to the person’s taxable income.
 - The gain is calculated as follows:
 - **Higher of consideration / market value – Cost of acquisition (adjusted for inflation and maintenance)**
- Profits derived from the transfer of immovable property subject to income tax in terms of article 5 ITA are allocated to the Immovable Property Account in the event that the property is situated in Malta and to the Foreign Income Account in the event that the property is situated outside Malta.



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“CAPITAL GAINS” REGIME

TRANSFERS OF IMMOVABLE PROPERTY

- **Article 43(1)(b) ITMA:**
- In any other case, and irrespective of whether the gains or profits, if any, derived from such a transfer are chargeable under the provisions of article 5 ITA or under any other provision of the ITA, remit to the Commissioner within 15 days of the relative transfer a provisional tax payment equivalent to 7% or, where applicable, at the rate provided for in the relevant articles of the ITA, of the consideration relating to the transfer of the property or of the value of the donation.



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COST OF ACQUISITION

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 2(1) CGR:**
- In computing the gains or profits on the transfer of immovable property (in terms of Article 5 ITA) the following shall be taken into consideration:
 - The cost of acquisition which shall include:
 - The cost of property transferred declared in a deed of purchase and any expenses directly related to such deed including duty under the Stamp Duties Ordinance, the Duty on Documents Act, the Duty on Documents and Transfers Act, and agents', legal and notarial fees proved to the satisfaction of the Commissioner;
 - Where the immovable property in question was acquired causa mortis or by means of a donation, its value at the time of its acquisition, determined in accordance with the relevant rules;
 - Any expenditure proved to the satisfaction of the Commissioner to have been wholly and exclusively incurred in developing the property transferred;
 - ...



COST OF ACQUISITION

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 2(1) CGR:**
- In computing the gains or profits on the transfer of immovable property (in terms of Article 5 ITA) the following shall be taken into consideration:
 - The cost of acquisition which shall include:
 - ...
 - Duty paid in terms of the Duty on Documents and Transfers Act on the transfer causa mortis of the immovable property in question, including duty paid on a deed of adjustment relating to that property made in terms of the Adjustments to Declared Value of Immovable Property Rules;
 - Duty paid on the donation to the transferor of the immovable property in question and in terms of the Duty on Documents and Transfers Act, the Death and Donation Duty Act or any law replaced by any of those acts;
 - The increase in inflation determined in accordance with rule 8 CGR (discussed in the following slides);



COST OF ACQUISITION

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 2(1) CGR:**
- In computing the gains or profits on the transfer of immovable property (in terms of Article 5 ITA) the following shall be taken into consideration:
 - Improvements to immovable property after acquisition if these are proved to the satisfaction of the Commissioner – the inflation allowance shall also apply mutatis mutandis with respect to such improvements;
 - A maintenance allowance calculated at 0.4% of the value of the building, cost price or cost of completion for every year between the year of acquisition or completion and disposal;
 - Other expenses duly received and directly related to the transfer and not exceeding 5% of the sale price.



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INFLATION ALLOWANCE

TRANSFERS OF IMMOVABLE PROPERTY

- **Rule 8(1) CGR:**
- The increase for inflation of the value of immovable property is to be determined by using the index of inflation established in terms of article 13 of the Housing (Decontrol) Ordinance and applying the following formula:

$$\frac{\text{Cost of acquisition / improvements}}{1} \times \frac{\text{index}^{y^d} - \text{index}^{y^a}}{\text{index}^{y^a}}$$

Cost of acquisition / improvements is the cost as computed in accordance with the applicable rules but excluding any expenses related to the deed or any duty or fees

Index^{y^d} is the index for the year immediately preceding that in which the transfer is made

Index^{y^a} is the index for the year immediately preceding that in which the property in question had been acquired or completed, whichever is the later, or, when it relates to improvements, for the year immediately preceding that in which the cost for carrying out the improvements was incurred



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EXAMPLE 8

TRANSFERS OF IMMOVABLE PROPERTY

- Mr Alpha transfers a property he owns which is situated in Malta, which he had purchased in 1998, for a consideration of €270,000.
- The market value of the property at the time of the transfer was €350,000.
- Mr Alpha incurred brokerage fees of €25,000, which were duly recorded in the final deed at the time of the contract.
- Calculate Mr Alpha's tax liability.



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EXAMPLE 8

TRANSFERS OF IMMOVABLE PROPERTY

- Tax is charged at the rate of 10% since the property was purchased before 1 January 2004, on the higher of the consideration or market value – in this case, €350,000.
- Mr Alpha is allowed a deduction for brokerage fees.
- Therefore, tax is: $(€350,000 - €25,000) \times 10\% = €32,500$



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EXAMPLE 9

TRANSFERS OF IMMOVABLE PROPERTY

- Mrs Y transfers a plot of land in Malta for a consideration of €900,000 (equal to market value). The property was acquired as follows:
 - 33.33% was inherited by Mrs Y following the death of her father in 1990. The value declared in the causa mortis was €30,000.
 - 16.67% was inherited by Mrs Y following the death of her mother in 2010. The value declared in the causa mortis was €100,000.
 - 50% was acquired by Mrs Y from her sister in 2015, for a value of €300,000.
- Calculate the tax due on the transfer.



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EXAMPLE 9

TRANSFERS OF IMMOVABLE PROPERTY

- Although it is one single transfer, we need to consider the different modes in which the property was acquired.
 - The 33.33% (€300,000 of transfer value) was inherited in 1990. Therefore, tax on the transfer value is equal to 7% of transfer value, i.e. $€300,000 \times 7\% = €21,000$
 - The 16.67% (€150,000 of transfer value) was inherited in 2010 with causa mortis value of €100,000. The tax is equal to 12% on the uplift between the causa mortis value and transfer value, i.e. $(€150,000 - €100,000) \times 12\% = €6,000$
 - The 50% (€450,000 of transfer value) was acquired inter vivos in 2015. Therefore, an 8% tax rate applies on the transfer value, i.e. $€450,000 \times 8\% = €36,000$
- Total tax = $€21,000 + €6,000 + €36,000 = €63,000$



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CASE STUDIES

TAX ON CAPITAL GAINS

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CASE 1

TAX ON CAPITAL GAINS

- Mr A acquired a property situated in Malta (but not situated in an urban conservation area) at a cost of €800,000 on 15 April 2020. The market value of the property on that date was equivalent to the cost.
- On 3 February 2023, Mr A sold the property to a third party for a consideration of €1,000,000. On that date, the market value of the property was €1,100,000.
- The property did not form part of a project.
- Advise Mr A on the Malta income tax implications arising upon the sale of the property on 3 February 2023.



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CASE 1

TAX ON CAPITAL GAINS

- The transfer of property is being made after the 1 January 2015, does not form part of a project and is being made not later than 5 years after the date of acquisition thereof. Therefore, the tax due is calculated at 5% of the transfer value.

	€
Market value	1,100,000
Consideration	1,000,000
Transfer value (higher of market value and consideration)	1,100,000
Property transfer tax at 5%	55,000



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CASE 2

TAX ON CAPITAL GAINS

- On the 23 January 2015, Mr X inherited a property upon the death of his father, which property had a market value of €400,000 on that date.
- On 30 January 2023, Mr X sold the property to a third party for €840,000. The property had a market value of €800,000 on that date and did not form part of a project.
- Advise Mr X on the Malta income tax implications arising upon the sale of the property on 30 January 2023.



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CASE 2

TAX ON CAPITAL GAINS

- The property being transferred was acquired *causa mortis* by the transferor after the 24 November 1992. Therefore, the tax due is calculated at 12% of the excess of the transfer value over the acquisition value.

	€
Market value	800,000
Consideration	840,000
Transfer value (higher of market value and consideration)	840,000
Acquisition value	400,000
Taxable value (transfer value less acquisition value)	440,000
Property transfer tax at 12% of the taxable value	52,800



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CASE 3

TAX ON CAPITAL GAINS

- On 27 December 2022, Mr B inherited a property ('Property 1') upon the death of his mother.
- On 5 February 2023, Mr B sold a property that he had acquired as a rental investment ('Property 2') to a third party for a consideration of €500,000. The market value of the property at the time of the sale was €550,000.
- Mr B had originally acquired Property 2 in 2002 for €200,000, which cost was equivalent to the market value of the property at that time.
- Advise Mr B on the Malta income tax implications arising upon:
 - The inheritance of Property 1; and
 - The sale of Property 2 to a third party on 5 February 2023.



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CASE 3

TAX ON CAPITAL GAINS

- Property 1
- The property is being transferred *causa mortis*. Such a transfer does not fall within the definition of a transfer for the purposes of article 5 ITA / article 5A ITA and accordingly no Malta capital gains tax considerations should arise upon the inheritance of the property.



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CASE 3

TAX ON CAPITAL GAINS

- Property 2
- The property being transferred was acquired prior to 1 January 2004. Therefore, the tax due is calculated at 10% of the transfer value.

	€
Market value	550,000
Consideration	500,000
Transfer value (higher of market value and consideration)	550,000
Property transfer tax at 10%	55,000



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