

Highly Qualified Expatriates



Highly Qualified Expatriates working in the Financial Services and Gaming Sectors may benefit from a 15% flat tax rate.

Since EU accession and within the past years, even amidst the financial crisis, a steady number of renowned international players in the financial services sector have chosen Malta as their place to do business. The ingredients for such continued growth have been a combination of Malta's sound regulatory framework, competent workforce and favourable corporate tax system. Malta is also at the forefront of the remote gaming industry and home to some of the world's largest and most profitable online gaming companies. The regulatory framework and fiscal environment have made Malta a domicile of choice within the industry and in fact, Malta hosts approximately 10% of the world's online gaming operators. The highly qualified expatriate regime is yet another consideration which will contribute to make Malta one of the most attractive and competitive financial services and gaming jurisdictions. This incentive therefore underpins Malta's strategy in attracting more regulated gaming business to its shores and in achieving Government's aim to raise the financial services sector's contribution to the country's GDP from 12% to 25% in 2015.

In terms of Article 56(21) of the Income Tax Act (ITA), where certain conditions are satisfied, an individual is taxed at the rate of 15% on his employment income derived from a qualifying employment. Article 56(21) does not do much except set the scene. Detailed conditions in terms of which an individual may benefit from the 15% beneficial rate of tax have been published by Legal Notice 106 of 2011 entitled the Highly Qualified Persons Rules, 2011, ("Rules").

Eligible Office

With effect from year of assessment 2011 (that is, calendar year 2010), the 15% flat rate of tax may be availed of by individuals employed in the financial services and gaming sectors. In order to accede to this beneficial tax rate, the individual must be employed by a company licensed and / or recognised by the Malta Financial Services Authority ("MFSA") or the Lotteries and Gaming Authority ("LGA") and must hold an eligible office. Companies licensed or recognised by the MFSA include credit institutions, financial institutions, insurance companies, PCCs, insurance intermediaries (including brokers, agents, managers), investment services licence holders (including fund managers and fund administrators), funds, pension schemes (including pensions scheme administrators). Companies licensed and regulated by the LGA include companies engaged in remote gaming, casino gaming and sports betting.

An eligible office is an employment in one of the following posts:

- Chief Executive Officer, Chief Risk Officer (including Fraud and Investigations Officer), Chief Financial Officer, Chief Operations Officer, Chief Technology Officer, Chief Commercial Officer;
- Portfolio Manager, Chief Investment Officer, Senior Trader or Trader, Senior Analyst (including Structuring Professional), Actuarial Professional, Chief Underwriting Officer, Chief Insurance Technical Officer; Odds Compiler Specialist, Head of Research and Development (including Search Engine Optimisation and Systems Architecture);
- Head of Marketing (including Head of Distribution Channels), Head of Investor Relations.

"15% flat rate of tax for Highly Qualified Expatriates"

Thus, as the name of the Rules clearly indicates, the benefit is targeted at the most senior individuals within an area of expertise. We believe that the Rules should be interpreted such that one need not necessarily be designated as such but must hold a position within the organisation which is equivalent to it.

Qualifying Income

The 15% reduced rate of tax is applicable in respect of emoluments payable under a contract of employment if the employment activity contemplated therein is an eligible office. The minimum annual amount which may be taxable at 15% is €75,000 which amount is subject to an annual adjustment in line with the Retail Price Index. Furthermore any qualifying income above €5,000,000 is not subject to tax in Malta.

Any non-qualifying income is taxable at 35%.

The 15% rate of tax is a final tax and cannot be reduced by means of relief for double taxation, credit or set-off of any kind.

Conditions

In order to be eligible for the reduced rate of 15% an expatriate must satisfy the following conditions:

1. Minimum employment income of €75,000 (excluding the value of fringe benefits) in respect of the holding of an eligible office.
2. The employment contract must be in terms of Maltese law and must relate to the exercise of genuine and effective work for the employer to the satisfaction of the MFSA/LGA.
3. Possession of professional qualifications proven to the satisfaction of the MFSA/LGA.
4. MFSA/LGA must be satisfied that the individual performs activities of an eligible office.
5. Furthermore, MFSA/LGA must be satisfied that the expatriate:
 - a. Is in receipt of stable and regular resources which are sufficient to maintain themselves and their family without recourse to the social assistance system in Malta;
 - b. Resides in accommodation regarded as normal for a comparable family in Malta and which meets the general health and safety standards in force in Malta;
 - c. Is in possession of a valid travel document;
 - d. Is in possession of sickness insurance in respect of all risks normally covered for Maltese nationals for themselves and their family;
 - e. Is not domiciled in Malta.

Furthermore, in order to be eligible to this benefit, besides declaring for tax purposes all income received from the employer in respect of the eligible office, an applicant is required to declare as chargeable to tax in Malta, all income received from a party related to his employer even where such income is not subject to Maltese tax in accordance with the ITA. Clearly this condition should be restricted only to income taxable in Malta so as not to capture income unrelated to the eligible office such as directors' fees for holding the post of director in foreign companies.

The flat rate will not apply if the employer, or a related entity received any form of benefit provided in terms of the Malta Enterprise Act and the Business Promotion Act. The Rules therefore bar an applicant from eligibility even if the business incentive was availed of by a related entity of the employer, irrespective of when such benefit was availed of.

Furthermore, where the expatriate benefitted from the Investment Services or Insurance Expatriate benefits under Article 6 of the ITA, he is restricted from applying the 15% tax benefit. While it is reasonable for the legislation to deny the simultaneous application of the Investment Services or Insurance Expatriate benefits and the 15% benefit, the ineligibility to the 15% benefit in circumstances where the applicant had claimed the Investment Services or Insurance Expatriate benefit in prior years of assessment appears to be unreasonable. Clearly, if such an expatriate knew that such a condition would be introduced he/she may not have applied the Article 6 benefit especially if that benefit may have been minimal.

It appears to us as unreasonable that fringe benefits are excluded from the minimum amount of income since a benefit in kind is nevertheless subject to Maltese tax. This will only have the effect that, where required, the estimated value of any fringe benefits would be included in the salary, with the expatriate paying for expenses that the employer would have paid for.

Period of application

The benefit is available as from year of assessment 2011 (which taxes income earned in 2010) for a period of five years in the case of EEA and Swiss Nationals and four years in case of third country nationals. In both cases, the year commences from the year in which the expatriate takes up residence in Malta and derives income which is subject to tax in Malta. However the rules provide that:

- Expatriates who were employed in Malta for a period of between one and two years immediately prior to 1st January 2010, can only benefit from the reduced tax rate for a maximum period of three years if European Economic Area (EEA) or Swiss nationals, or two years for third-country nationals;

- Expatriates who were employed in Malta for a period of not more than one year prior to 1st January 2010, can only benefit from the reduced rate of tax for a period of four years if EEA or Swiss nationals, or three years for third-country nationals.

Therefore, the full five- / four-year period can only be availed of by those who commence employment in Malta in 2010 and subsequent years.

Furthermore, expatriates who have been employed to work in Malta for more than two years preceding 1st January 2010, cannot benefit from these rules.

Rules for the claw-back of the benefit

The Rules provide for the immediate withdrawal of the benefit where the grant thereof and the expatriate's presence in Malta is not in the public interest.

Furthermore, in the case of third country nationals, the benefit is deemed to be automatically relinquished with retrospective effect if the expatriate physically stays in Malta in the aggregate for more than 1,460 days (4 years) or if he directly or indirectly acquires real rights (thereby excluding personal rights such as leasing rights) over immovable property situated in Malta or directly or indirectly holds a beneficial interest therein.

Procedure

The Rules lay down that the 15% option to tax shall be exercised by means of a declaration signed by the expatriate and endorsed by the MFSA/LGA. The said declaration must be submitted together with the tax return for the relative year of assessment by not later than the relative tax return date, that is 30th June following the calendar year in which the income was earned. Late filings of declarations are deemed not to constitute a valid exercise of the option to be taxed at 15%, unless the CIR is satisfied that the delay was due to a reasonable excuse.

As regards the conditions for eligibility required to be proved to the satisfaction of the MFSA/LGA, an application may be made to the applicable authority for a formal determination that the relevant conditions are satisfied.

Request for information

The Rules grant the power to the CIR and the MFSA/LGA to request further information and documents from the applicant, including certificates and declarations of the applicant's employer, to enable them to ascertain the applicant's eligibility to the 15% regime.

Anti-abuse provisions

The Rules contain an anti-abuse provision which nullifies the 15% benefit obtained in circumstances where an applicant makes use of artificial arrangements (including the payment of non-taxable income by a related party to the expatriate) in order to secure the said benefit. In such a situation penalties would be applicable. Considering however that all applications must be vetted and approved by the MFSA/LGA a priori it would appear to be difficult that such situations could arise.



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