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### **Tax Compliance in Times of Transparency**

Malta remains a jurisdiction of choice. Its EU-compliant regulatory framework coupled with a highly skilled work force and a competitive tax regime makes the island an interesting option for foreign direct investment. This holds also true for German investment with its long standing tradition which dates back to the 1960s. Whereas, in the past Germans mainly opened production sites in Malta using benefits under the various government schemes attracting foreign direct investment, today Germans chose Malta namely for its innovative regulatory framework, for example in the field of financial services or iGaming. Moreover, Malta has a lot to offer to private individuals who have chosen Malta as their domicile under the High Net Worth Individuals Rules or acquire property to rent in Malta, or Malta registered assets such as yachts or planes.

At the same time, Malta's current EU presidency has raised attention to the jurisdiction. Due to the ever growing competition between the various Member States to attract foreign direct investment, the arguments put forward get chillier. To safeguard Malta's reputation as a jurisdiction, advisors therefore have to pay full attention to offer a compliant structure to their foreign clients.

Indeed, in the case of German foreign direct investment, the growing transparency requirements vis-à-vis the fiscal authorities and recent developments in the pertaining case law of the German Federal Fiscal Court (Bundesfinanzhof) gain importance in this regard.

Germany champions transparency at a global level and invited leading jurisdictions in 2014 on the occasion of the Global Forum on Transparency and Exchange of Information for Tax Purposes in Berlin to comply with the pertaining OECD standards on the automatic exchange of information between the participating tax authorities. At the European level, EU Council Directive 2014/107/EU (commonly known as 'DAC2') was adopted to facilitate such automatic exchange of information within the EU. This extension effectively incorporated the OECD Common Reporting Standard (commonly known as 'CRS') into EU Council Directive 2011/16/EU in respect of administrative co-operation.

Malta as an "early adopter" of the above standards has committed to implement the CRS following an ambitious timetable leading to the first automatic information exchanges in 2017. Hence, it is crucial for Germans having interests in Malta to bring their investment in line the pertaining tax rules and for their advisors to act accordingly.

For example, German individuals owning property for personal use, e.g. real estate, yachts or planes, should take recent decisions by the Bundesfinanzhof into account: The court held that – under certain circumstances – the use of such property by their ultimate owners without paying rent based on its value may trigger German tax in cases where the property is held by a corporate structure. The highest court for tax matters in Germany argued that the non-payment of rent was to be qualified as a hidden profit distribution to the shareholders which would be taxable. The ownership of property in Malta through such corporate structures is however often used to establish a genuine link to the country of registration or – prior to the EU Succession Regulation coming into force as of 17 August 2015 – to avoid the application of Maltese succession law to Malta-based real estate in spite of the German nationality of the deceased.

In light of this new case law, corporate structures chosen in the past should be revisited to assess whether German taxes have been triggered and if so, whether the Maltese assets have been declared to the German tax authorities. If that is not the case, it is crucial to act expeditiously given the growing transparency described above. Under certain circumstances, German tax payers may avoid punishment under German

law on fiscal offences provided that the tax payer has notified such offences prior to the discovery by the German tax administration. Clients should therefore be advised to seek further assistance from legal experts conversant with international tax law as applied by the German tax administration. Indeed, practical experience in drafting such notifications is fundamental to successfully mitigate criminal prosecution as the extensive experience of our colleague Joachim Greuner from the multidisciplinary practice of Wülfing Zeuner Rechel gained in numerous cases of German individuals having undeclared assets in Switzerland or Dubai has shown.

As the above example indicates, Maltese advisors should include German counsel at an early stage when structuring certain investments in Malta. Nevertheless, we have seen cases in our practice where this basic principle was not followed. For example, we were instructed in a German-Maltese case where German VAT was triggered due to the wrongful choice of the appropriate corporate structure: The Maltese-German group went ultimately insolvent and the German CEO to jail. Of course, this had major repercussions on the Maltese consultants facing personal liability for ill-advice. We are sure however that with the help of comprehensive advice on both Maltese and German (tax) law the success story of Germans investing in Malta will continue in the future.

Link: <https://www.timesofmalta.com/articles/view/20170514/business-news/Tax-compliance-in-times-of-transparency.647934>

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