Question 1

Part 1

Gozo Ltd is a Maltese registered company which is managed and controlled in Malta, thereby meaning that it subject to tax on a worldwide basis.

The income from the rental of immovable property situated in Italy is passive in nature and allocated to the Foreign Income Account. Given that it is passive in nature, it means that it relates to long term periods. Given this, the company may claim a 20% special deduction against the rental income known as the Maintenance Allowance. Also, FRFTC can be claimed on such income.

	FIA (€)
Income	300,000
20% allowance	60,000
	240,000
FRFTC 0.4234	101,616
Income	300,000
FRFTC	101,616
Grossed up	401,616
Expenses	60,000
	341,616
Malta Tax	119,565
FRFTC relief	101,616
Malta tax paid	17,949

The dividend received from its Italian subsidiary will be allocated to the Foreign Income Account and the unilateral relief will be claimed in order to obtain relief of the WHT paid in Italy.

	FIA (€)
Gross Dividend	111,111
WHT	10,000
Net Dividend	100,000
Malta Tax	38,889
Relief	10,000
Malta Tax paid	29,889

Even though Cayman Islands is not incorporated in the EU and is not subject to foreign tax of at least 15%, the company does not have more than 50% of its income derived from passive interests or royalties. The company resident in the Cayman Islands falls under the definition of a participating holding, i.e. Gozo Ltd holds 10% of the equity shares in the Cayman Islands. Given such conditions, the participation exemption can apply, however the company may opt for the full refund in the hands of the non-Maltese resident company.

	FTA (€)
Dividend	200,000

The Malta source bank interest of Euro 1000 net of FWT (15% already deducted) falls to under the Investment Income provisions and thus allocated to the Final Tax Account.

	FTA (€)
Interest	1,000

The distribution business in Kuwait falls under the definition of a permanent establishment. Such income will fall under the exemption of 12 1 u 2 of the ITA and therefore allocated to the Final Tax Account.

	FTA (€)
Business Profits	100,000

In addition, given that Gozo Ltd owns and uses an immovable property situated in Gozo, the company needs to allocate 130 square metres x €250 to its Immovable property account = €32,500. Given that the company has sufficient profits in its Foreign Income Account, such account will be reduced by €32,500 and such figure will be allocated to the Foreign Income Account.

Distributions

Final Tax Account – No further tax upon distribution to its shareholders.

Immovable Property Account – Distributions are subject to the Full Imputation System.

Foreign Income Account – The company paid tax at 35% but the tax paid had been relieved by FRFTC and unilateral relief. The shareholders will thus be refunded in terms of the refundable tax credit system equal to 2/3rds of the Malta tax paid.

Untaxed Account (20% maintenance allowance) – Given that the shareholders do not fall under the definition of a recipient, the company will not withhold 15% and thus no further tax is charged upon distribution.

Part 2

In the case of a person carrying on general business, other than a person carrying on long term business, total income ascertained by taking for the year immediately preceding the year of assessment.

i) Technical provisions at the commencement of the year;

ii) The equalisation reserve at the commencement of the year;

iii) Gross premiums written;

iv) Reinsurance recoveries received;

v) Income from investments received and receivable and interest income earned (accruals concept);

vi) Profits or gains from the sale or disposal of investments;

vii) Capital gains subject to tax under the provisions of this Act;

viii) Realised differences on exchange;

ix) Other technical income including commissions, allowances and fees received and receivable;

x) Profits or gains not falling under any of the foregoing sub-paragraphs, and deducting from the aggregate of the above the aggregate of the following:

xi) Technical provisions at the end of the year;

xii) The equalisation reserve at the end of the year; and

xiii) The deductions allowed under Article 14ITA are claims paid, reinsurance premiums paid, and losses from the sale or disposal of investments.

Question 3

Part 1

Barranija Ltd is a company that was incorporated in the Netherlands in 2012 and therefore is not domiciled in Malta. In 2013, the board of directors began to hold meetings in Malta, bought office premises in Malta, its CEO and CFO moved to Malta with their staff, and also established bank accounts in Malta, thereby meaning that there are sufficient grounds of shifting its management and control to Malta. Given that its office premises were registered as a fixed place of business, it is considered an Oversea Company. It is subject to tax on a remittance basis, i.e. subject to tax on all his income which is derived in Malta and any foreign income which is brought into Malta (excluding capital gains).

The royalties relating to the license agreements with the German client and received and kept in its Swiss bank account and not subject to tax in Malta given that they are not received in Malta.

The royalties received from BL's Dutch client which are received in Malta and taxable in Malta and allocated to the its Foreign Income Account. I understand that no tax was paid on such Royalties. The FRFTC may claimed on such income given that it is specifically empowered in its M&A to do so and in respect of which documentary evidence is available that such income or gains, as the case may be, fall to be allocated to the Foreign Income Account (certificate issued by a certified public account).

Upon distribution to its shareholders, the shareholders are eligible to claim relief of two thirds of the effective Malta tax paid. The shareholders would need to be registered by the ITU in order to claim relief.

BL is technically not trading and the only income it received relate to royalties, which are passive in nature. Having said this, given that the BL's running expenses have been financed by a loan from its shareholder, such expenses will be added back for tax purposes (company is not trading). Shareholders loan will be shown as a liability in its Balance Sheet and not part of equity. In the future the company may decide to capitalise such shareholders loan by means of an increase in share capital and shown as part of equity. However, this will have no effect to the Income Statement of the company.

Part 2

Fixed establishment is an important concept in VAT law relating to the place of supply of services. Fixed establishment may be defined as a fixed place where business is carried out.

The place of supply to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment, the place of supply of services shall be where the taxable person received such services has his permanent address or usually resides.

The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be placed where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of service shall be the place where the supplier has his permanent address or usually resides.

Question 4

Part 1

Beneficial Owner – The anti-avoidance provision in the proviso to Article 12 1 c ITA refers to the concept of beneficial ownership. The ITA uses the concept and term many times (Articles 5 (9) (3) ITA, 5 (9) (c) ITA, 5 (13) (b) (ii) ITA, 5 (25) ITA, 5(12A) ITA and other articles) but the ITA does not define the term. In the absence of such definition, the definition used under the OECD Model Convention is thus referred.

Like the ITA, the OECD model used the term to prevent fiscal avoidance and evasion. The commentary gives examples of persons who cannot be treated as beneficial owners, these include: agents, nominees, conduits, fiduciaries, and administrators acting on account of other persons. In other words, the concept of beneficial ownership is about substance and not form. Case in point, Philip Baker's report discussed the issue of the term in international tax law and explained its meaning with reference to international tax jurisprudence. He pointed out that the precise meaning remains unclear and that several fundamental issues remain unresolved about the interpretation of the beneficial ownership concept. Undoubtedly, the concept tends to give rise to litigation. Baker refers to the six known cases on the meaning of the term. One of which related to Dutch Hoge Raad of 6th April 1994. The Dutch judgement involved a holding of shares which contemplated the right to receive dividends but not the formal legal title to the shares. The Dutch court found that the holder of the dividend rights was a beneficial owner.

In November 2012, the OECD released revised discussion drafts on the commentary to the OECD model concerning definitions of beneficial owner and permanent establishment. The discussion draft suggests that trustees of a discretionary trust do not distribute dividends earned while they were acting as such could still be treated as dividends. The draft explains the concept of a constrained right to use or enjoyment which excludes beneficial ownership. Beneficial ownership is the right to use any enjoy income unconstrained by a contractual or legal ownership to pass on the payment received to another person.

Permanent establishment – The exemption relating to 12 1 c i of the ITA does not apply if non-resident is not engaged in trade or business through a PE and relevant income is not effectively connected with such PE. The ITA does not contain a definition of the term PE. Trying to use the definitions contained in the treaties would pose a challenge because the definitions of PE contained in our treaties are not aligned and treaties contemplate different timelines for project PEs with some treaties referring to supervisory, stock and consultancy PE.

However, the definition contained Article 5 of the OECD is defined as a fixed place of business through which the business of an enterprise is wholly or partly carried on. The term includes especially a place of management, a branch, an office a factory, a workshop, and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

It is important to note that a building site or construction or installation project constitutes a PE only if it lasts more than 12 months. In addition, if a person is dependent on an enterprise or an enterprise depends on a person for the purpose of a business, it may arise that a PE is located therein. To the contrary, if a person is independent, there will be no PE. Also if an enterprise is controlled by another enterprise and one has a PE in a state, there will be no PE in that other enterprise by virtue of such controlling.

Part 2

Mr Francois was born in France and is therefore domiciled in France. Given that he has been visiting Malta for almost 20 years and owns a house in Sliema and spends more than 6 months in Malta per each calendar year, Mr Francois is deemed to be ordinary resident of Malta. Thereby meaning that he will be subject to tax on all his income which is derived in Malta and any foreign income which is brought into Malta (excluding capital gains). Given that he is a permanent resident, the income derived from Malta and chargeable to tax under Article 4 and 5 shall be deemed to constitute chargeable income to be taxed separately at progressive rates starting at the rate of 15%. Thus, permanent residents who derive employment and trading income from Malta would be taxable at progressive resident rates starting from 15% rising up to 35%.

By acquiring a Maltese passport, all the above will change given that he will be subject to income tax on a worldwide basis and become a national of Malta as well.

Question 5

Part 1

Income Tax Act – The term management and control is applied in respect of companies incorporated outside Malta. A company which has been incorporated abroad is considered resident of Malta if it is managed and controlled in Malta.

The common law rule relating to management and control was developed outside of the world of tax cases. The British courts had to establish an element of threshold presence to justify a claim of jurisdiction over a foreign company. Victorian precedents took the view that a company dwelt or carried on business was where the actual business was carried on, namely the branch rather than the head office, if it were a difference place. There are particular instances that help determine the management and control of a company:

i) Where the company holds its board meetings and where day to day decisions are taken;
ii) Where the company has a fixed establishment located in that country;
iii) Whether the company has established bank accounts; and
iv) Residency of its directors, etc.

The first proper company tax residence case was Attorney General v Alexander where it was decided at that time when 'the understanding of the nature of company was that the shareholders in general meeting were the company' and the directors were merely considered to be agents of the company. The company's capital was raised in London and Paris but the company had equally divided place of management. The company was managed by a committee composed of Englishmen and Frenchmen who met in London and in Paris. The court held that the company was resident in Constantinople, the place of incorporation and seat of business. The decision in Alexander was reversed in subsequent case law.

VAT Act – The term management and control is not specifically used in the VAT act. However, the Act refers to taxable person and economic activity. It is vital that a person who carries on an economic activity, whatever the purpose or result of that company, is registered in terms of Article 10, 11 and/or 12.

Part 2

Mr English is an individual who is not domiciled but ordinary resident in Malta; thereby taxable on a remittance basis in Malta. He is subject to tax on all his income which is derived in Malta and any foreign income which is brought into Malta (excluding capital gains).

Sale of the house in Vittoriosa

Income Tax (Mr English as transferor) – Assuming that he has owned and occupied the property for not more than 12 years, Mr English can elect to either be taxed under Article 5A or 5 of the Income Tax Act. If he elects to be taxed under Article 5A, the default rule is that tax is levied at 12% of transfer value. If he opts to be taxed under Article 5, he will be taxed at a flat rate of 35% after deducting certain allowable expenses.

Duty (unknown transferee) – Likely to be subject to duty at a rate of Euro 5 for every Euro 100 or part thereof on consideration.

VAT – Not applicable.

Donation of the chalet in Switzerland

Income Tax (Mr English) – He will not be subject to tax in Malta given that the capital gain did not arise in Malta. Having said this, if he remits the foreign capital gain to Malta, he will not be subject to tax either.

Duty – Likely not to be subject to any duty if his friend is not resident of Malta.

VAT – Not applicable.

Sale of the coin collection

Income Tax & Duty – Out of scope.

VAT – Not applicable.

Sale of the securities

Income Tax (Mr English) – I shall assume that the Dutch registered family company shifted its management and control to Malta and is not a company as defined in the Income Tax Act. Mr English will be selling his securities and not donating them to his nephew and thus is not exempt under 12 1 e of the ITA. He will thus have to declare such gain in his personal tax return and subject to tax at progressive rates. Upon submission of the relevant schedule to the Revenue Authorities, Mr English needs to pay 7% provisional tax on the higher of market value and consideration.

Duty – Given that his nephew is neither ordinary resident nor domiciled in Malta and the company is not a property company and all its business interests are outside Malta, his nephew will be exempt from paying any duty in Malta.

VAT – Not applicable.

Note: I did not take into consideration the new capital gains system which was introduced during the most recent 2015 Budget. The above relates to the old regime.