



Malta Tax Law Update

EDITOR'S NOTE

Our tax system is changing fast. Two new Double Tax Treaties have been transposed. A Legal Notice has extended the application of the VAT Amnesty. A Bill proposes a number of major changes to the VAT penalty system.

In October our Courts delivered many tax judgements and I shall be discussing the salient points of the most important ones. The Administrative Review Tribunal delivered an interesting case which refers to my contribution to the MIT Manual. The CJEU delivered a judgement against Portugal which reminds me of our 26 (h) ITA.

A number of legislative changes are expected soon. In the Budget Speech the Minister of Finance has announced the following changes:

- a) A reduction in Personal Income Tax Rates;
- b) A revision of Parental Rates;
- c) Revisions to the Part-Time Rules;
- d) An enhancement of the Minimum Wage Tax Exemption;
- e) Favourable tax measures for Pensioners;
- f) Special Rate of Tax for Footballers;
- g) The introduction of a 15% withholding tax on rents;
- h) The launch of an Investment Registration Scheme;
- i) An enhancement of the deduction for Child Care Centres;
- j) An enhancement of incentives available to women returning to work;
- k) A revision of VAT rules on appropriation of payments and the setting-off of refunds against tax in dispute;
- l) Rules providing for more judicial discretion in criminal procedures against persons falling foul of tax laws;
- m) Rule of ultra duplum for interest on Late Payment of Duty Causa Mortis;
- n) Introduction of tax exemption for First-Time Buyers

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INDEX

► LEGISLATIVE DEVELOPMENTS	1
► ACTS OF PARLIAMENT.....	1.1
► LEGAL NOTICES.....	1.2
► BILLS.....	1.3
► JUDICIAL DECISIONS	2
► DECISIONS OF THE ART (INCOME TAX).....	2.1
► DECISIONS OF THE COURT OF APPEAL.....	2.2
► DECISIONS OF THE COURT OF MAGISTRATES AND THE FIRST HALL CIVIL COURT.....	2.3
► DECISIONS OF THE FIRST HALL CIVIL COURT (CONSTITUTIONAL JURISDICTION) AND THE CONSTITUTIONAL COURT.....	2.4
► DECISIONS OF THE COURT OF CRIMINAL APPEAL.....	2.5
► ECJ CASES.....	2.6

1. LEGISLATIVE DEVELOPMENTS

1.1 ACTS OF PARLIAMENT

1.1.1 AMENDMENTS TO THE ITA

None.

1.1.2 AMENDMENTS TO THE ITMA

None.

1.1.2 AMENDMENTS TO THE DDTA

None.

1.2 LEGAL NOTICES

L.N. 257 OF 2013 INCOME TAX ACT(CAP. 123)DOUBLE TAXATION RELIEF (TAXES ON INCOME) (REPUBLIC OF SINGAPORE) (AMENDMENT) ORDER, 2013IN

This L.N. adds a protocol to the Treaty with Singapore. The protocol provides for exchange of information.

L.N. 260 OF 2013 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) DUTY ON SALES AND OTHER TRANSFERS (EXEMPTION) ORDER, 2013

This L.N. provides that with effect from the 1st of January 2013, the duty otherwise chargeable in terms of article 32(1) of the Duty on Documents and Transfers Act on the purchase by persons or companies of property outside an "Urban Conservation Area" (UCA) but within specified zones identified by the Malta Environment and Planning Authority, for the purpose of restoration and development, will be reduced to the rate of two euro per one hundred euro or part thereof, subject to the conditions and parameters issued by the Malta Environment and Planning Authority. Together with the notice referred to in article 51 of the Duty on Documents and Transfers Act, there shall be submitted a certificate issued by the Malta Environment and Planning Authority establishing the conditions under which the restoration and development is permitted on the property in question.

L.N. 239 OF 2013 DOUBLE TAXATION RELIEF (TAXES ON INCOME) (THE UNITED MEXICAN STATES) ORDER

This L.N. transposes the Mexican Treaty. Clauses which caught my attention include the following:

- a) The tie-breaker provision for the purposes of determining residence of a person other than an

1. LEGISLATIVE DEVELOPMENTS

individual provides that the issue is resolved by mutual agreement procedure. Factors used in the mutual agreement procedure must include place of effective management, place of incorporation and 'any other relevant factors'.

- b) Partnerships are considered resident of a Contracting State only to the extent that the income they derive is subject to tax in that State as the income of a resident of such State, either in the hands of the partnership or in the hands of its partners.
- c) The PE article refers to the furnishing of services including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods exceeding in the aggregate 183 (one hundred and eighty three) days in any 12 (twelve) month period. The performance of professional services or other activities of an independent character by an individual create a PE only where those services or activities continue within a Contracting State for a period or periods exceeding in the aggregate 183 (one hundred and eighty three) days in any 12 (twelve) month period.
- d) The treaty contemplates a special insurance article. An insurance enterprise of a Contracting State shall, except in regard to reinsurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status.
- e) Article 7 (Business profits). Business profits attributable to sales of goods or merchandise of the same or similar kind as the goods or merchandise sold through that permanent establishment are taxable in state where the PE is located.
- f) The Treaty does not always exclude withholding tax on outbound interest payments (5% on gross bank interest, 10% on gross interest in other cases). Withholding tax on interest is excluded in special cases including when interest arises in Malta and is paid in respect of a loan for a period of not less than 3 years granted, guaranteed or insured by special financial institutions).
- g) The Treaty does not always exclude withholding tax on outbound royalty payments (10% on gross royalties in other cases).
- h) In the protocol, the Treaty contains a special definition of 'pension fund'. The definition is used in the context of the allocation of exclusive taxing rights to the source state on gains from the alienation of shares.

1. LEGISLATIVE DEVELOPMENTS

L.N. 238 OF 2013 INCOME TAX ACT (CAP. 123) DOUBLE TAXATION RELIEF (TAXES ON INCOME) (GRAND DUCHY OF LUXEMBOURG) (AMENDMENT) ORDER, 2013

This L.N. introduces an article on exchange of information.

L.N. 240 OF 2013 VALUE ADDED TAX ACT(CAP. 406) VALUE ADDED TAX (REMITTANCE OF INTEREST AND ADMINISTRATIVE PENALTIES INCURRED UNDER THE VALUE ADDED TAX ACT, 1998, THE CUSTOMS AND EXCISE TAX ACT AND THE VALUE ADDED TAX ACT, 1994) (AMENDMENT) REGULATIONS, 2013

This L.N. extends the amnesty to 30th November 2013.

L.N. 343 OF 2013 INCOME TAX ACT (CAP. 123) DOUBLE TAXATION RELIEF (TAXES ON INCOME) (THE STATE OF ISRAEL) ORDER, 2013

This L.N. transposes the Israel Treaty. Clauses which caught my attention include the following:

- a) The definition of the term 'person' includes a reference to the trust;
- b) The Residence Article incorporates an express reference to the trust. In the case of a trust which is a resident of both contracting states, the residence of the trust is determined via MAP. The protocol to the treaty incorporates a number of rules relating to the determination of residence of a trust. Factors which are taken into account in determining residence of a trust include country of residence of the trustees at the time of settlement, proper law of the trust, location of trust assets, country of residence of settlor and beneficiaries.
- c) The dividend article provides that dividends paid by an Israeli company to a Maltese resident are subject to w/t of 15% but w/t is of 0% whenever the beneficial owner of the dividends holds at least 10% of the capital of the company paying out the dividends. The dividend article incorporates a special clause on distributions by an Israeli Real Estate Investment Company; w/t is of 15% but if the beneficial owner holds at least 10% of the capital w/t is of 10%.
- d) The interest article refers to a w/t of 5%.
- e) The royalty article provides that royalties are taxable in the country of residence exclusively.
- f) The protocol incorporates a special rule relating to installations, drilling rigs and ships used for activities connected with the exploration of natural resources. They are treated as PE if the activities last more than 365 days.
- g) The protocol provides that in certain cases interest may be taxed net (elimination of double taxation by deduction).

1. LEGISLATIVE DEVELOPMENTS

- h) The capital gains article refers to exit taxation. Fair market value of the assets on the day the exit tax event occurred must be taken in consideration.

L.N. 345 OF 2013 VALUE ADDED TAX ACT (CAP. 406)VALUE ADDED TAX ACT (AMENDMENT OF FIFTH SCHEDULE) REGULATIONS, 2013

The exemption (without credit) for insurance has been changed from:

“2. The supply by persons licensed under the Insurance Business Act or the Insurance Intermediaries Act, of insurance and reinsurance services, including related transactions, in respect of which they are so licensed.”

TO:

"2.The supply by persons licensed under the Insurance Business Act or the Insurance Intermediaries Act, of insurance and reinsurance transactions, including related services, in respect of which they are so licensed, where those services are specific to and essential for the provision of insurance or re-insurance transactions

1.3 BILLS

Bill 14 of 2013, Value Added Tax (Amendment) Act, 2013 proposes a number of changes to the VAT Act. The rate of punitive interest will be reduced from 0.75% to ‘a rate which the Minister shall...prescribe’. In cases when endangered tax does not exceed EUR2,000, administrative penalties will be capped to EUR250. Magistrates will be empowered to charge daily penalties for non-compliance only in defined cases. Daily penalties will be reduced to EUR5 (presently, a EUR5-20 bracket applies). The bill incorporates a retrospective transitory provision. Rule 6 provides that when before the date of coming into force of the proposed act a person has been sentenced with a daily penalty, every amount of the fine per day ‘shall be calculated afresh according’ to the new rates. In certain cases, daily fines will be cancelled. The cancellation of fines may not result in eligibility to refunds.

2. JUDICIAL DECISIONS

2.1

DECISIONS OF THE ADMINISTRATIVE REVIEW TRIBUNAL

RIKORS NUMRU. 51/2009 EQUAL CO. LTD. VS KUMMISSARJU TAT-TAXXI INTERNI

This appeal involved an assessment to duty. The main disagreement was related to the value of a backgarden. According to taxpayer the tax authorities had ignored the fact that the backgarden was subject to third party rights. Court held that appellant had failed to produce unequivocal evidence relating to the alleged third party rights. Consequently it decided in favour of the tax authorities.

RIKORS NUMRU. 129/2011

This case involved an assessment which was raised after the lapse of the prescribed time-limit. The ART referred to a number of judgements of the Court of Appeal describing the legal characteristics of the relevant statute of limitations. The Tribunal cancelled the assessment.

RIKORS NUMRU. 4/2012 PIERRE MICALLEF V. KUMMISSARJU TAT-TAXXI INTERNI

This case involved an assessment to duty. Appellant had claimed an expense from a related party which had been contested by DGIT. The Tribunal decided in favour of DGIT doubting the veracity of the charge levied by appellant's related party.

RIKORS NUMRU. 197/2012 ANTONIO POLIDANO ET V. KUMMISSARJU TAT-TAXXI

This assessment to duty involved an assessment which had been raised after the 1 year peremptory term. Predictably, the ART cancelled the assessment.

RIKORS NUMRU. 120/2012

This was a Reference Appeal wherein a taxpayer who had already lost an appeal from an assessment requested the Tribunal to waive additional tax and punitive interest. Taxpayer argued that he was a social case and could never pay the money which was being requested from him. He argued that he had always acted in good faith and that he should not be made to pay penalties. The Tribunal rejected his appeal on the basis that it felt that appellant had not proven that he had always acted in good faith. It referred to the fact that he had lost his appeal on the merits which meant that in the eyes of the law he had pocketed VAT which should have been paid to the Government. The Tribunal agreed that appellant was in a difficult situation but it was not convinced that he was destitute.

2. JUDICIAL DECISIONS

RIKORS NUMRU. 90/2013 M.C.M ALUMINIUM LIMITED U RAYMOND BORG VS DIRETTUR GENERALI (TAXXA FUQ IL-VALUR MIZJUD)

In this case appellant sought to rescind an executive title issued by DVAT by filing an appeal to the ART. Predictably his appeal was dismissed because the ART's competence is limited to take decisions over assessments. The ART does not have the power to rescind existing executive titles.

RIKORS NUMRU. 84/2013 ALUMINIUM EXTRUSIONS LIMITED U RAYMOND BORG VS DIRETTUR GENERALI (TAXXA FUQ IL-VALUR MIZJUD)

The issues raised in this case were identical to those raised in MCM.

RIKORS NUMRU. 292/2012 BSI TRUST CORPORATION (MALTA) LIMITED VS KUMMISSARJU TAT-TAXXA FUQ IL-VALUR MIZJUD

This case involved a notification of an assessment by postal service. The ART confirmed that assessments could be validly served by hand.

2.2

DECISIONS OF THE COURT OF APPEAL

No major judgements of which I am aware of.

2.3

DECISIONS OF THE COURT OF MAGISTRATES AND THE FIRST HALL CIVIL COURT

CITAZZJONI NUMRU. 164/2013 DESMOND MIZZI U MILLENIA LIMITED V. DIRETTUR GENERALI TAT-TAXXA FUQ IL-VALUR MIZJUD

This case involved a case over an executive title. Taxpayers tried to rescind an executive title obtained under Article 59 of the VAT Act by filing a sworn application. It transpired that the executive title to which the case referred to was being contested in front of the Administrative Review Tribunal. The Court upheld the validity of the executive title leaving the matter for the ART's decision. Meanwhile, the executive title will remain pending.

CITAZZJONI NUMRU. 296/2009 STEPHEN GRECH (ID 84170M) KONTRA L-ONOREVOLI PRIM MINISTRU ET

This is the famous vehicle registration tax case which was widely reported in the press. The judgement

2. JUDICIAL DECISIONS

drew heavily from *Grech et vs Awtorita` ghat-Trasport f`Malta et* which had very similar merits.

In brief, Grech challenged the legal regime which, inter alia, provided that VAT was chargeable on vehicles imported from the UK and that the figure which was brought to tax included vehicle registration tax. Grech had already paid VAT on the vehicle in the UK. Grech argued that Malta's vehicle registration tax breached EU law, including in particular Article 90 of the Treaty and the VAT Directive.

The Court referred to a number of judgements of the ECJ including *Commission v. Denmark*, *Ministro Pubico Antonio Gomes Valente vs Fazenda Publica* and *Commission v Hellenic Republic (C-375/95)* establishing that a vehicle registration tax system which taxed vehicles imported from another EU Member State more heavily than vehicles which were not imported was not allowed.

The Court referred to the ECJ's judgement in *Maciej Brzezinski vs Dyrektor Izby Celnej w Warszawie (C-313/05)* wherein the ECJ concluded that it is settled law that a system of taxation may be considered compatible with Article 90 EC only if it is so arranged as to exclude any possibility of imported products being taxed more heavily than similar domestic products, so that it cannot in any event have discriminatory effect. Article 90 EC is to be interpreted as meaning that it precludes an excise duty, in so far as the amount of the duty imposed on second-hand vehicles over two years old acquired in a Member State other than that which introduced such a duty exceeds the residual amount of the same duty incorporated into the market value of similar vehicles already registered in the Member State which introduced that duty.

The Court held that the local vehicle registration tax regime was discriminatory and such discrimination could not be justified because it was a tool to eliminate significant distortions in competition.

The Court decided in favour of taxpayer ordering a refund of tax with interest.

CITAZZJONI NUMRU. 912/2009 L-AVUKAT DR. PETER FENECH BHALA MANDATARJU SPECJALI TA' L-ASSENTI AARON GATT FLORIDIA, (KARTA TA' L-IDENTITA` NUMRU 349468 (M)) VS DIRETTUR GENERALI TAT-TAXXA FUQ IL-VALUR MIZJUD

This judgement involved a case filed by a director to rescind an executive title issued by the DGVAT. The director sought to disclaim personal liability for his company's VAT dues on the basis that he had not been served with the demand note and that he had emigrated and was not been aware of the company's liabilities towards the VAT Department. The Court found that the VAT Department had followed the correct procedure and that plaintiff had failed to prove that he had acted in good faith. The Court found for the DGVAT.

2. JUDICIAL DECISIONS

CITAZZJONI NUMRU. 296/2009 STEPHEN GRECH (ID 84170M) KONTRA L-ONOREVOLI PRIM MINISTRU

In brief, plaintiff challenged the legal regime which, inter alia, provided that VAT was chargeable on vehicles imported from the UK and that the figure which was brought to tax included vehicle registration tax. Plaintiff had already paid VAT on the vehicle in the UK. Plaintiff argued that Malta's vehicle registration tax breached EU law, including in particular, Article 90 of the Treaty and the VAT Directive. Case involved a Ferrari and tax charged was material.

The Court referred to a number of judgements of the ECJ including *Commission v. Denmark*, *Ministro Publico Antonio Gomes Valente vs Fazenda Publica* and *Commission v Hellenic Republic* (C-375/95) establishing that a vehicle registration tax system which taxed vehicles imported from another EU Member State more heavily than vehicles which were not imported was not allowed.

The Court referred to the ECJ's judgement in *Maciej Brzezinski vs Dyrektor Izby Celnej w Warszawie* (C-313/05) wherein the ECJ concluded that it is settled law that a system of taxation may be considered compatible with Article 90 EC only if it is so arranged as to exclude any possibility of imported products being taxed more heavily than similar domestic products, so that it cannot in any event have discriminatory effect.

Article 90 EC is to be interpreted as meaning that it precludes an excise duty, in so far as the amount of the duty imposed on second-hand vehicles over two years old acquired in a Member State other than that which introduced such a duty exceeds the residual amount of the same duty incorporated into the market value of similar vehicles already registered in the Member State which introduced that duty.

The Court held that the local vehicle registration tax regime was discriminatory and such discrimination could not be justified because it was a tool to eliminate significant distortions in competition. The Court decided in favour of taxpayer ordering a refund of tax with interest.

2.4

DECISIONS OF THE FIRST HALL CIVIL COURT (CONSTITUTIONAL JURISDICTION) AND THE CONSTITUTIONAL COURTS

APPELL CIVILI NUMRU. 16/2011/1 RAYMOND CARUANA V. L-AVUKAT GENERALI

Taxpayer alleged that our draconian VAT interest and penalty system amounted to inhuman and degrading treatment. Predictably, the case was dismissed.

2. JUDICIAL DECISIONS

2.5

DECISIONS OF THE COURT OF CRIMINAL APPEAL

The Court of Criminal Appeal delivered a number of judgements which confirm legal principles discussed in judgements discussed in earlier updates.

3. DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

CASE C-282/12 - ITEL CAR – AUTOMÓVEIS DE ALUGUER LDA V FAZENDA PÚBLICA

This judgement involved Portuguese thin cap rules which provide that:

- a) Where the overall debt owed by a taxable person to an entity not resident in Portuguese territory or in another Member State of the European Union, with which that person has special relations, is excessive, the interest relating to the part regarded as excessive shall not be deductible for the purposes of determining the taxable profit.
- b) Special relations shall be deemed to exist where, in respect of the overall debt owed by the taxable person to a third party not resident in Portuguese territory or in another Member State of the European Union, an entity referred to in Article 58(4) has provided a warranty or a guarantee.
- c) The overall debt is regarded as excessive where, at any time during the tax year, the sum of the debts owed to each of the entities referred to in paragraphs 1 and 2 exceeds double the amount of that entity's holding in the taxable person's equity capital.

The CJEU held that Article 56 EC must be interpreted as meaning that, “in the case of rules of a Member State which provide that, where interest applied to the part of an overall debt categorised as excessive has been paid by a resident company to a lending company established in a non-member country with which the borrowing company has special relations, it is not deductible as an expense for the purposes of determining taxable profit, but where such interest is paid to a resident lending company with which the borrowing company has special relations, it is deductible for those purposes, those rules are precluded where, if the lending company established in a non-member country does not have a shareholding in the resident borrowing company, they nevertheless presume that the overall debt owed by the borrowing company forms part of an arrangement designed to avoid the tax normally payable or where they do not make it possible, at the outset, to determine their scope with sufficient precision.”

This judgement reminds me of 26 (h) ITA.

2. JUDICIAL DECISIONS

None that we are aware of.