



MALTA TAX LAW UPDATE

UPDATE 12

EDITOR'S NOTE

Keeping abreast of changes is turning out to be a challenge. Our tax laws are changing fast and this quarter has seen some major amendments to our tax laws and over ten new 'tax' legal notices. The First Hall Civil Court's Judgement in the Pulizija v. Muscat case could have some very far-reaching consequences but I doubt whether, in the foreseeable, its impact will be fully appreciated.

Some of the changes introduced by the Budget Act could pass unnoticed. The time-limit within which to appeal from an Income Tax judgement of the ART has been shortened from 30 days to 20 days. A new legal procedure and a five-year deadline to contest certain 'statements' (or should we be calling them assessments?) has been introduced. We'll have to see how this procedure will impact on the right to contest 'tax bills' of sorts.

The VAT situation with penalties and interest has been improved significantly. A new tax system on rental income has been introduced. Interestingly, in 1798, Napoleon had introduced a very similar tax. Tax withheld under the Investment Income Provisions is back to being non-refundable. New rules relating to the tax treatment of dividends have been introduced. Certain distributions have become tax exempt but the exemption is subject to a 'relevant threshold'. The new system has been introduced to contain tax leakage created by the introduction of the 29%/32% rate of tax.

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25/05/14

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1. LEGISLATIVE DEVELOPMENTS

1.1 ACTS OF PARLIAMENT

1.1.1 AMENDMENTS TO THE ITA

Act XII of 2014, the Budget Act introduces a number of major changes that include especially:

- a) For capital gains purposes, a reference to 'intellectual property' has been added to the list of chargeable assets in article 5 ITA. Unlike the Budget Bill, the Budget Act does not refer to 'debt-claims'. In the Budget Act, references to 'debt-claims' have been removed and debt-claims will not be on the list of chargeable assets.
- b) Concerns relating to tax leakage resulting in the combined effect of the full imputation system and the recently introduced 29% and 32% rates of tax have been addressed via amendments to Article 12. A dividend exemption applicable to MTA and FIA distributions has been introduced but the exemption is capped to a 'relevant threshold' (in essence, income subject to the 25% rate of tax). A series of provisos restrict eligibility to refunds payable in terms of the full imputation system.
- c) The commutation of pension exemption has been restricted to 30% of the total pension.
- d) The financial assistance exemption has been clarified.
- e) A tax exemption with respect to employment income (excluding director's remuneration) of married women returning at age 40+ has been introduced. The exemption is capped to the initial EUR9,150.
- f) With respect to personal deductions:
 - i) Rules governing the deduction for alimony deduction has been clarified;
 - ii) The deduction cap for child care fees has been increased from EUR1,300 to EUR2,000;
 - iii) Rules governing the deduction for sports fees and cultural courses fees paid to entities outside Malta have been passed;
- g) Article 31D containing rules relating to the taxation of rental income has been added. Salient features of this new regime include:
 - i) Certain landlords have a right to pay tax on certain rental income at 15%;
 - ii) The 15% tax is, at the option of the landlord, a final tax on gross rental income without set-off or refund;
 - iii) Article 31D applies to leases of residential properties to individuals. It does not apply to commercial tenements and tenements required to be licensed by virtue of the Malta Travel and Tourism Services act;

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- iv) Persons who do not declare their rental income will become liable to pay tax at 35% on their gross rental income, in addition to additional tax and interest.
- h) Tax withheld under the Investment Income Provisions has been converted into a final and non-refundable tax.
- i) New progressive rates of tax (incorporating a 29% rate) have been introduced.
- j) EU/EEA Nationals who are not residents of Malta and whose worldwide income consists as to 90% or more in Malta source income have been made eligible to apply resident rates.
- k) Paragraph 26 has been added to article 56. It provides for a special rate of 7.5% on a genre of income defined as 'football income' (full-time/part-time employment income derived of a duly registered footballer registered with a registered football club).
- l) Additional tax will no longer be calculated on tax chargeable before taking into account additional tax itself.

1.1.2 AMENDMENTS TO THE ITMA

Act XII of 2014, the Budget Act introduces the following changes:

- a) Provisions on mutual exchange of information between the IRD and the VAT Department;
- b) The method to contest certain determinations is by filing an Adjustment Form within years from notification. Interest on late payment of refunds due by the Commissioner becomes payable if paid later than one year from the filing of the adjustment form.
- c) The Commissioner is no longer bound to notify interested taxpayers of judgements delivered by the Tribunal.
- d) More importantly, the time-limit within which to appeal from a judgement of the ART has been shortened from 30 days to 20 days. The ITMA has been aligned to the Administrative Justice Act. I am sure that this change will be overlooked by many resulting in the filing of late appeals.
- e) Major policy amendments to Article 49 ITMA have been introduced. The rule that used to provide for mandatory imprisonment for recidivism has been removed. Magistrates have been given the discretion to impose a fine in lieu of imprisonment.

1.1.3 AMENDMENTS TO THE DDTA

Act XII of 2014, the Budget Act introduces the following major changes:

- a) The Revenue's right to seize a Notarial public deed has been restricted;

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- b) The 3.5% favourable rate of tax for 'first-time buyers' has been extended to emphyteutical and subemphyteutical grants too.
- c) Interest on late payment of duty cannot exceed duty due.
- d) New rules relating to the computation of duty on emphyteutical concessions have been introduced.
- e) Persons benefitting from the special concessions granted in 32 (4) (a) (transfers to first time buyers) and 32C (donations to close relatives) who acquire a second residence transferring the tenement subject to the concession within one year from the date of acquisition of their second residence are entitled to a refund of duty paid in excess of the duty properly chargeable.

1.1.4 AMENDMENTS TO THE VATA

Act XII of 2014, the Budget Act introduces the following changes:

- a) A tax return is deemed to have been furnished if it is full and complete in all material respects. In 27 (1), interestingly, references to payment of tax have been deleted.
- b) The Administrative penalty for default in the payment of tax declared has been removed.
- c) Demand notes can be served by publication in the Government Gazette and in one or more daily newspapers.

1.2 LEGAL NOTICES

L.N. 52 OF 2014 VALUE ADDED TAX ACT(CAP. 406)

This L.N. prescribes that interest applicable in terms of article 21(4) of the Value Added Tax Act shall be at the rate of zero point five four percent (0.54%).

L.N. 56 OF 2014 INCOME TAX ACT (CAP. 123) EXCHANGE OF INFORMATION (TAX MATTERS) (CAYMAN ISLANDS) ORDER, 2014

This L.N. provides for exchange of information with the Cayman Islands.

L.N. 57 OF 2014 INCOME TAX ACT (CAP. 123)DOUBLE TAXATION RELIEF (TAXES ON INCOME) (THE STATE OF ISRAEL) ORDER, 2013(L.N 343 OF 2013)

This L.N. brings into force the tax treaty with Israel.

1. LEGISLATIVE DEVELOPMENTS

L.N. 65 OF 2014 INCOME TAX ACT (CAP. 123) DOUBLE TAXATION RELIEF (TAXES ON INCOME) (THE PRINCIPALITY OF LIECHTENSTEIN) ORDER, 2014

This L.N. transposes the new Treaty with Liechtenstein. Clauses which caught my attention include the following:

- a) The Treaty covers Liechtenstein wealth tax and coupon tax and taxes on total capital;
- b) The definition of 'person' refers to investment funds, pension funds, trusts and partnerships;
- c) The treaty contains detailed definitions of the terms 'investment fund' and 'pension fund';
- d) A building site constitutes a PE if it lasts for more than 12 months;
- e) The general rule provides dividends are taxable in the shareholder's residence state but the general rule applies only if the holding of shares is not effectively connected with a Permanent Establishment the shareholder establishes in the source state;
- f) The general rule provides that interest is taxable in the state of residence of the person receiving such interest;
- g) The general rule provides that royalties are taxable in the state of residence of the person receiving such royalties;
- h) Strangely, the article on directors' fees speaks of trusts. Directors' fees are taxable in the State of source.
- i) The Protocol incorporates rules governing a Liechtenstein dormant inheritance and trusts.

L.N. 67 OF 2014 INCOME TAX ACT (CAP. 123) DOUBLE TAXATION RELIEF (TAXES ON INCOME) (REPUBLIC OF INDIA) ORDER, 2014(L.N. 448 OF 2013)

This L.N. brings into force the new tax treaty with India.

L.N. 78 OF 2014 INCOME TAX ACT (CAP. 123) EXCHANGE OF INFORMATION (UNITED STATES OF AMERICA) (FATCA) ORDER, 2014

This L.N. transposes an agreement between the Governments of the Republic of Malta and the Government of the United States of America to Improve International Tax Compliance and to Implement the Foreign Account Tax Compliance Act. FATCA introduces a reporting regime for financial institutions with respect to certain accounts. FATCA binds Malta to obtain and exchange information with respect to reportable accounts providing for time and manner for exchange of information. Reporting Malta Financial Institution are bound by obligations too. FATCA also provides for a mutual commitment to continue to enhance the effectiveness of information exchange and transparency.

1. LEGISLATIVE DEVELOPMENTS

L.N. 107 OF 2014 VALUE ADDED TAX ACT (CAP. 406) REMISSION OF INTEREST RULES, 2014

This L.N. vests the Commissioner with the discretion to remit wholly or in part, any interest incurred under the provisions of article 21(4) of the Value Added Tax Act.

The Commissioner may only remit such interest if he is satisfied that the tax due was not paid within the prescribed period due to a reasonable cause but reliance placed on any other person to perform any task shall not constitute a reasonable excuse.

The Commissioner may impose any condition that he may consider appropriate for any remission including the requirement that the person concerned shall not make a default or omission within such period as the Commissioner may establish or that the said person shall make a payment of tax in such amount and within such time as the Commissioner may determine.

Interest chargeable on late payment of VAT under a payment plan not exceeding two years shall cease to be incurred from the date a person enters into such payment plan. If the remission is not effected due to noncompliance then the interest will be charged as if it had never ceased.

Where a person has benefitted from a remission of interest under these rules, the Commissioner may deduct the equivalent amount of such remitted interest from any interest on any refund of tax which may become due to that person within six years from the date the remission of interest under these rules had taken place.

L.N. 142 OF 2014 INCOME TAX ACT (CAP. 123) DOUBLE TAXATION RELIEF (TAXES ON INCOME) (BARBADOS) (AMENDMENT) ORDER, 2014 (L.N. 447 OF 2013)

This L.N. brings the arrangement with Barbados into force.

L.N. 143 OF 2014 INCOME TAX ACT (CAP. 123) EXCHANGE OF INFORMATION (TAX MATTERS) (CAYMAN ISLANDS) ORDER, 2014 (L.N. 56 OF 2014)

This L.N. brings the arrangement with the Cayman into force.

L.N. 144 OF 2014 INCOME TAX ACT (CAP. 123) DEDUCTION (INCOME FROM EMPLOYMENT) (AMENDMENT) RULES, 2014

This LN grants pensioners whose pension does not exceed €9,150 per annum; for a notional deduction of €8,500.

1. LEGISLATIVE DEVELOPMENTS

L.N. 150 OF 2014 INCOME TAX ACT (CAP. 123) DOUBLE TAXATION RELIEF (TAXES ON INCOME) (RUSSIAN FEDERATION) ORDER, 2013 (L.N. 159 OF 2013)

This LN brings the Russian Treaty into force.

L.N. 151 OF 2014 INCOME TAX ACT (CAP. 123) DOUBLE TAXATION RELIEF (TAXES ON INCOME) (THE REPUBLIC OF MOLDOVA) ORDER, 2014

This L.N. transposes the new Treaty with Moldova. Clauses which caught my attention include the following:

- a) The Project PE article provides that a Project PE exists if it lasts for more than 9 months in any 12 month period;
- b) The Shipping and Air Transport article provides that, for the purposes of the Treaty, profits from the rental of ships and aircraft on a bareboat charter basis fall under the remit of the article. Even profits from the use, maintenance or rental of containers are considered to be profits from the operation of ships and aircraft.
- c) Dividends, interest and royalties are taxable both in the source state and the recipient's residence state but a 5% withholding tax cap is imposed on the source state. The capping applies when a beneficial ownership test is met.

1.3 BILLS

BILL 46 OF 2014 - COMMISSIONER FOR REVENUE (AMENDMENT) ACT, 2014

The Bill proposes the establishment of a Board to be known as the Remission of Interest Board for the purpose of making recommendations to the Commissioner with regard to any application for the remission of interest payable in terms of the ITA and the VATA.

The Remission of Interest Board will consist of a Chairperson and a number of members not being less than two or more than six. The Minister appoints members to the Board.

2. JUDICIAL DECISIONS

2.1

DECISIONS OF THE ADMINISTRATIVE REVIEW TRIBUNAL

RIKORS NUMRU. 74/2012 XXX VS KUMMISSARJU TAT-TAXXA FUQ IL-VALUR MIZJUD

Appellant appealed to the Tribunal to cancel administrative penalties and interest amounting to EUR342. Punitive measures had been imposed because of late filing of VAT returns. Appellant held that his delay in filing the return was wholly attributable to a psychological illness (a reasonable excuse) that caused his financial ruin. The Tribunal decided for appellant.

RIKORS NUMRU 48/09 (GIA APPELL NUMRU 12/03) KENNETH VASSALLO VS DIRETTUR GENERALI (TAXXI INTERNI)

RIKORS NUMRU 220/2011 NAZZARENO VASSALLO GHAN-NOM U IN RAPPRESENTANZA TAS-SOCJETA VASSALLO BUILDERS GROUP LIMITED VS IL-KUMMISSARJU TAT-TAXXI INTERNI

Both appeals involved duty on documents assessments. In both cases, the Tribunal decided in favour of taxpayer because the tribunal's own architect had come up with a valuation that was in line with the value declared in the contract of transfer. The tribunal's judgement can be interpreted as meaning that the check-list valuation process that has been used by the Department should be revisited.

2.2

DECISIONS OF THE COURT OF APPEAL

None have been published.

2.3

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

RIKORS NUMRU. 789/2013 DIRETTUR GENERALI (TAXXI INTERNI) VS GIL MARC SCHNABELIN (DETENTUR TA' L-KARTA TA' L-IDENTITA` NUMRU 35533 (A))

This case involved an executive title issued by DVAT pursuant to the Mutual Assistance Directive. DVAT filed an application to obtain an executive title with respect of tax vaunted by the German authorities. The claim was unopposed and the executive title was issued.

2. JUDICIAL DECISIONS

RIKORS NUMRU. 1137/2012 KUMMISSARJU TAT-TAXXA FUQ IL-VALUR MIZJUD VS EMANUEL SIVE NOEL PALMIER F'ISMU PERSONALI U GHAN-NOM U IN RAPPRESENTANZA TAS-SOCJETA PFB COMPANY LIMITED

This case involved an attempt to rescind an executive title obtained by DVAT in terms of Article 59 VATA. The Court held that the executive title obtained against the company was valid because the company had not used the appeal process to contest the executive title's underlying assessment. However, the Court held that the executive title against the directors was null and void because the directors had not been served with a demand note, personally.

2.4

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

QORTI CIVILI PRIM' AWLA (GURISDIZZJONI KOSTITUZZJONALI)

REFERENZA KOSTITUZZJONALI NUMRU. 58/2012 IL-PULIZIJA VS GODWIN MUSCAT

This is a very interesting judgement. Muscat was accused, qua director of a company, for some failures to abide by FSS rules. The company Muscat had served in had been assessed to administrative penalties too. Muscat argued that he was being charged twice for the same offence. Referring to John Geranzi v. PM, he submitted that in reality administrative penalties were a criminal charge and accordingly he could not be prosecuted twice for the same offence. The Court agreed with him but found that there had not been a violation of Muscat's fundamental human rights because the Court found that the assessment to administrative penalties had been raised against the company and not against Muscat, personally. An extract from the judgement follows:

'Gialadarba jidher li t-taxxa addizzjonali hi ntiza sabiex isservi bhala deterrent u hi wkoll mizura punittiva, allura l-qorti tikkonkludi li tikkwalifika bhala 'a criminal penalty'5.

Ghal dak li jikkoncerna l-ilment taht l-Artikolu 39(9) il-principju ta' ne bis in idem japplika fejn persuna tkun ghaddiet minn proceduri "quddiem qorti kompetenti". Billi t-taxxa addizzjonali tigi mposta mid-Direttur Generali tat-Taxxi, dan il-provvediment ma japplikax fil-kaz in ezami.

Il-qorti tinnota wkoll li l-imposizzjoni ta' taxxa addizzjonali ma twassalx ghall-ksur tal-Artikolu 4 tas-Sebgha Protokoll tal-Konvenzjoni meqjus li skond l-Artikolu 23(8) tal-Kap. Kap. 372: "Il-Kummissarju jista' fid-diskrezzjoni tieghu jaghti lura kollha kemm hi jew f'xi parti minnha xi taxxa addizzjonali imposta taht id-disposizzjoni ta' dan l-artikolu."

Mela l-imposizzjoni ta' taxxa addizzjonali m'hijiex definitiva, kuntrarjament ghal dak li jigri fejn tinghata sentenza li ssir gudikat.

F'kull kaz mill-provi ma rrizultax li sal-lum id-Direttur Generali Taxxi hareg xi avviz kontra Dr Muscat Azzopardi li biha mpona taxxa addizzjonali, f'liema eventwalita' jkollu kull dritt li jikkontesta l-istess ai termini tal-Artikolu 23(6) tal-Kap. 372. Fil-fatt l-avvizi li nhargu huma fil-konfront tal-kumpannija Zimmermann House Projects Limited u Dr Patrick Spiteri...

2. JUDICIAL DECISIONS

Kif diga' gie osservat m'hemm prova li nhareg avviz kontra Dr Muscat Azzopardi personalment. Dan ifisser li

ghadha miftuha l-opportunita' li jekk johrog avviz ta' nuqqas kontra Dr Muscat Azzopardi skond l-Artikolu 23(6) tal-Kap. 372, jikkontesta l-istess quddiem id-Direttur Generali tat-Taxxi. Jekk it-talba tieghu tigi rifjutata, ikun jista' jappella d-decizjoni tad-Direttur Generali quddiem qorti fi zmien hmistax-il jum mid-data tan-notifika tal-avviz tat-talba (ara proviso ghall-Artikolu 23(7) tal-Kap. 372).

Dan ifisser li sal-lum ghad m'hemm decizjoni finali u ghad hemm rimedji miftuhin.'

In brief, the Court said that an administrative penalty is a criminal charge and a person cannot be charged both with an administrative penalty (additional tax) and a criminal penalty in terms of the penal law provisions contained in the ITMA. In this specific case, the Court held that Muscat's fundamental human rights had not been infringed because he had not yet been served with an assessment to additional tax and he had not yet undergone the procedures to contest additional tax

2.5

DECISIONS OF THE MAGISTRATES COURT (CRIMINAL JUDICATURE) AND COURT OF CRIMINAL APPEAL

APPELL KRIMINALI NUMRU. 295/2013 IL-PULIZIJA KONTRA JESSICA BRIFFA

This judgement confirms that the requirement to maintain a fiscal cash register in an outlet applies even when such outlet is not open to the public.

3.

DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

C-82/12 TRANSPORTES JORDI BESORA SL V GENERALITAT DE CATALUNYA

This case involved a challenge to a Spanish excise tax. The CJEU held that Article 3(2) of Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products must be interpreted as precluding national legislation that establishes a tax on the retail sale of mineral oils such as the tax on retail sales of certain hydrocarbons (Impuesto sobre las Ventas Minoristas de Determinados Hidrocarburos) at issue in the main proceedings, for such a tax cannot be regarded as pursuing a specific purpose within the meaning of that provision where that tax, intended to finance the exercise by the regional or local authorities concerned of their powers in the fields of health and the environment, is not itself directed at protecting health and the environment.

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

C-164/12 DMC BETEILIGUNGSGESELLSCHAFT MBH V FINANZAMT HAMBURG-MITTE

This is the CJEU's latest judgement on exit taxation. The CJEU held that Article 63 TFEU must be interpreted as meaning that the objective of preserving the balanced allocation of the power to impose taxes between Member States may justify the legislation of a Member State which requires assets in a limited partnership contributed to the capital of a capital company with its registered office in the territory of that Member State to be assessed at their value as part of a going concern, thus giving rise to the taxation, before they are actually realised, of the capital gains relating to those assets generated in that territory, if it will in fact be impossible for that Member State to exercise its powers of taxation in relation to those gains when they are in fact realised, which is a matter for the national court to determine.

The CJEU added that national legislation of a Member State which provides for the immediate taxation of unrealised capital gains generated in its territory does not go beyond what is necessary to attain the objective of the preservation of the balanced allocation of the power to impose taxes between Member States, provided that, where the taxable person elects for deferred payment, the requirement to provide a bank guarantee is imposed on the basis of the actual risk of non-recovery of the tax.

4. DECISIONS OF THE ECtHR

DECISIONS OF THE ECtHR

APPLICATION NO. 39689/05 KRASIMIR MILCHEV ATEV AGAINST BULGARIA

The facts of this case resembled a number of cases previously decided against Bulgaria. In a number of judgements, the ECtHR held that by refusing to grant VAT refunds due Bulgaria had violated applicants' right to property. In this case the ECtHR did not find a violation because it found that applicant had acted negligently.

APPLICATION NO. 7552/09 CASE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS V. THE UNITED KINGDOM

The applicant alleged that the denial of a tax exemption from business rates, reserved for buildings used for public religious worship, in respect of its temple at Preston, Lancashire, was discriminatory and gave rise to violations of its rights to property. The ECtHR concluded that as a matter of fact there was no discriminatory tax treatment.

REQUÊTE NO 32492/08 DOMINIQUE RHEIMS ET AUTRES CONTRE LA FRANCE

The ECtHR held that a bailiff's fee charged by the Government in tax litigation procedures did not constitute a violation of the right to property.