



MALTA TAX LAW UPDATE

Update 15

EDITOR'S NOTE

Update 15 discusses a considerable number of developments: Over 10 legal notices and over 20 judgments.

Case 160/12 of the Court of Appeal is a turning point because it enhances taxpayers' rights significantly. Case 160/12 dealing with taxpayers' right to information provides for the application of the 'discovery rule' in taxation. The Court of Appeal established that the duty to disclose information applies in tax proceedings too. Taxpayers have been granted free and unrestricted access to their files.

A number of important judgments have been delivered by the CJEU and ECtHR. The CJEU's conclusions on cross-border group loss relief is very important. Meanwhile, the ECtHR's judgments against Sweden and Finland are expected to leave a profound impact on Maltese tax law.

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1. LEGISLATIVE DEVELOPMENTS

1.1 Acts of Parliament

1.1.1 Amendments to the ITA

None that we are aware of.

1.2 Legal Notices

L.N. 430 and 431 of 2014 INCOME TAX ACT (CAP. 123) Revocation of Subsidiary Legislation (Income Tax Act) Rules, 2014

This LN abolishes a number of obsolete pieces of tax subsidiary legislation.

L.N. 462 of 2014 INCOME TAX ACT (CAP. 123) Qualifying Employment in Innovation and Creativity (Personal Tax) (Amendment) Rules, 2014

This LN amends the Rules by changing some definitions and removing certain restrictions.

"eligible office" is now defined as an employment in a role directly engaged in industrial research, experimental development, product development, product design, product or process innovation or senior management as may be further specified in a Guideline document issued by the Corporation and as verified by the Corporation.

The definition "qualification" has been changed to any qualification issued by an educational establishment attesting the successful completion of studies at post-graduate level and as recognised by the Malta Qualifications Recognition Information Centre as established by article 6 of the Mutual Recognition of Qualifications Act.

The definition of "relevant experience" now means at least three years of experience in a role comparable to that of the eligible office as may be further specified in a Guideline document issued by the Corporation.

L.N. 465 of 2014 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) Duty on Documents and Transfers (Amendment) Rules, 2014

This LN adds a new rule to Duty on Documents and Transfers Rules, Rule 3A providing for professional valuations.

A professional property valuation may be attached to a deed of transfer. The LN provides for the contents of the property valuation report.

Subject to the Commissioner's right not to accept a valuation made by an architect, at the time of publication of the deed or declaration, it shall be deemed that the valuation of the architect is a determination of value made by the Commissioner and accordingly where the price or consideration, or the value as declared in the deed of transfer or declaration causa mortis made is not less than 85% of the value provided by the architect, the duty payable, as applicable, shall be computed and paid on the price or consideration, or the value as declared in the deed of transfer, whichever is the higher, or the value as declared in the declaration causa mortis.

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The LN incorporates provisions against abuse by warrant holders too.

L.N. 468 of 2014 INCOME TAX ACT (CAP. 123) Personal Retirement Scheme Rules, 2014

This LN incorporates conditions and eligibility with respect to the tax credit referred to in article 57 ITA.

Rule 4 provides that an individual contributing or making payments to a qualifying scheme may only claim the tax credit referred to in article 57 of the Act if the individual:

- (a) is eighteen years of age or over at the time when a contribution or payment to a qualifying scheme is made; and
- (b) is domiciled and, or resident for tax purposes in Malta; and
- (c) is in possession of a certificate issued by the licence holder administering the qualifying scheme where the administrator confirms that:
 - (i) all the details required have been provided by the individual, and
 - (ii) the qualifying scheme satisfies all the requirements; and
- (d) is included in the prescribed statement.

The term 'qualifying scheme' is defined as meaning a personal retirement scheme or a long term contract of insurance that fulfils the requirements of the rules and which is approved by the Commissioner. Rule 5 adds that a qualifying scheme shall be one which satisfies the following conditions:

- (a) in the case of a personal retirement scheme, a scheme that is registered under the Special Funds (Regulation) Act or any other law substituting the said Act; or
- (b) in the case of a long term contract of insurance –
 - (i) it provides for the commencement of payment of benefits to a qualifying individual at an age not earlier than fifty or not later than the date when the individual attains the age of seventy or any other age specified in pension rules applicable to personal retirement schemes in terms of the Special Funds (Regulation) Act, except in those cases where the long term contract of insurance provides that the payment is made by reason of the permanent invalidity or death of the beneficiary;
 - (ii) is not in conflict with the retirement directives and, or pension rules applicable to personal retirement schemes issued by the Malta Financial Services Authority in terms of the Special Funds (Regulation) Act or any law substituting the said Act;
- (c) all payments received by qualifying individuals from the long term contracts of insurance mentioned in this subrule, other than any capital sum received by way of commutation of a pension which may be exempt from taxation in accordance with the provisions of article 12(1)(h) of the Act, constitute pension income for the purposes of article 4(1)(d) of the ITA.

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Rule 6 provides that each licence holder who wishes to receive contributions or payments from a qualifying individual into a qualifying scheme shall notify the Commissioner in writing prior to accepting such contributions or payments.

Where the qualifying scheme is a long term contract of Insurance mandatory notification shall include:

- (a) a declaration by the licence holder that the long term contract of insurance satisfies the prescribed conditions, and
- (b) an undertaking by the licence holder that he shall inform the Commissioner within fourteen days of any subsequent change which would result in the long term contract of insurance no longer satisfying any of the conditions referred to above.

A licence holder who ceases to be a licence holder in terms of the Special Funds (Regulation) Act or the Insurance Business Act, or ceases to carry on long term business in Malta in exercise of a European right, must notify the Commissioner promptly, and in any case not later than fourteen days from the date when the licence holder ceases to hold a licence in terms of the Special Funds (Regulation) Act or the Insurance Business Act or from when it ceases to exercise such European right.

A license holder must keep sufficient records in respect of qualifying individuals to enable the requirements of the rules to be satisfied, including full name, address, and legally valid identification document (or income tax registration) number of each individual, and details of both spouses in the case of a married couple.

The Commissioner may, after giving due notice, require any person who is or who at any time has been a license holder who administers or who administered a qualifying scheme, or a qualifying individual, to furnish him within such time (not being less than fourteen days) as may be provided by the notice, such information about any qualifying scheme (including copies of or extracts from any books or other records) as the Commissioner may reasonably require for the purposes of these rules or to make available for inspection, at a place within Malta, all relevant documents which are in the possession or under the control of a licence holder, a qualifying scheme, or a qualifying individual.

Every licence holder must, by the end of January of the year following that in which the contributions or payments were made submit to the Commissioner a statement in electronic format as approved by the Commissioner showing the personal particulars concerning the qualifying individual's identity and other information required for income tax purposes, and the amount contributed or paid by the qualifying individual to the qualifying scheme.

When a qualifying individual intends to make any claim for a credit against the income tax chargeable in Malta in a particular year in relation to contributions or payments to a qualifying scheme, such individual must lodge an application with a licence holder who administers a qualifying scheme, which application need only be made in the year in which the qualifying individual first subscribes to that qualifying scheme. Such an application must include the following information:

- (a) the first year of assessment to which the application relates,

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- (b) a declaration that all contributions or payments to be made to the qualifying scheme shall be from the applicant's own assets or those of applicant's spouse, and not of any other person,
- (c) a declaration that the individual is ordinarily resident for tax purposes in Malta, and that the applicant will inform the licence holder if he ceases to be so ordinarily resident,
- (d) the applicant's full name,
- (e) the applicant's residential address,
- (f) the applicant's tax registration number or the tax registration number of the applicant's spouse,
- (g) the applicant's identity card or passport number, and
- (h) the applicant's date of birth.

L.N. 469 of 2014 INCOME TAX ACT (CAP. 123) Individual Savings Account Rules, 2014

This LN creates a definition of an Individual Saving Account ('ISA'), linking it to a number of rules.

An account qualifies as an ISA if:

- (a) the account holder is an individual who is at least eighteen years old, and is ordinarily resident in Malta; and
- (b) the account holder:
 - (i) declares and undertakes in writing to a payor of investment income that the account holder does not hold any other ISAs with any person at the time of application, and that he shall not thereafter open any other ISAs for as long as the ISA with such payor remains open in his name; and
 - (ii) elects by notice in writing to the payor of investment income pursuant to article 35 of the Act to be paid any such investment income arising from his holding of the ISA without deduction of tax; and
- (c) the payor of investment income shall identify the relevant account as an ISA; and
- (d) the income from such an individual savings account consists exclusively of:
 - (i) interest payable to an individual in his own name by a person carrying on the business of banking in accordance with the laws of any European Union or European Economic Area ("EU/EEA") Member State in respect of a sum of money deposited into the individual saving account, and
 - (ii) interest payable to an individual in his own name by the Government of an EU/EEA Member State or by any agency thereof, by a corporation or authority established by law, or in respect of a public issue by a company, entity or other legal person howsoever constituted and whether resident in Malta or otherwise;
- (e) deposits by the individual into the individual savings account and the value of interest-bearing securities credited for the benefit of the individual into such account do not exceed one thousand euro (€1,000) in any year:

Any deposits in, or securities credited to, a new ISA are not to be taken into account for the purpose of determining whether the aforesaid amount of one thousand euro (€1,000) has been exceeded in any one year.

The rules provide for the filing of an annual return by payors of investment income.

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The LN above refers to Articles 41B and 96 ITA and 33-42ITA but, more importantly, it is linked to the recently introduced 12 (1) (x) ITA exempting from tax interest payable to an individual in his own name by:

(i) a person carrying on the business of banking in accordance with the laws of any European Union Member State in respect of a sum of money deposited into a special individual saving account recognised as such by the Commissioner, and

(ii) interest payable to an individual in his own name by the Government of a European Union Member State or by any agency thereof, by a corporation or authority established by law, or in respect of a public issue by a company, entity or other legal person howsoever constituted and whether resident in Malta or otherwise, where the relevant interest-bearing securities are credited for the benefit of the individual to a special individual saving account recognised as such by the Commissioner.

L.N. 480 of 2014 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax Act (Amendment of Fifth Schedule) Regulations, 2014

This LN amends Part 1 of the Fifth Schedule dealing with Exemptions. Item 11 has been substituted as follows:

‘Transport

11. The supply of –

(a) transport by scheduled bus service consisting of trips on scheduled routes. For avoidance of doubt, "scheduled bus service" shall mean public passenger transport services by an operator contracted in terms of the provisions of regulation 68B of the Passenger Transport Services Regulations (S.L.499.56), or any other regulations replacing those regulations;

(b) scheduled inter-island sea transport of passengers by authorised carriers and other scheduled sea transport of passengers recognised as such by the Commissioner. For avoidance of doubt, "scheduled inter-island sea transport of passengers" shall mean scheduled transport of passengers between the islands of Malta and Gozo;

(c) special regular services consisting in the carriage of school pupils and students to and from an educational establishment recognised as such by the Commissioner;

(d) special regular services consisting in the carriage of workers to and from their place of work.

In paragraphs (c) and (d) the term "special regular services" has the meaning assigned to it in the Passenger Transport Services Regulations or any other regulations replacing those regulations.’

L.N. 64 of 2015 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax Act (Amendment of Eighth Schedule) Regulations, 2015

This LN adds a paragraph to Item 5 of the Eight Schedule (listing the items subject to a 5% rate of VAT).

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The following goods will be subject to a 5% rate of VAT:

"(c) audio books, books and similar printed matter, other than books and similar printed matter referred to in paragraphs (a) and (b) of this item, supplied on all physical means of support which include, and are not limited to, a CD, DVD, SD-card and USB, but which excludes all electronically supplied services."

L.N. 65 of 2015 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax Act (Amendment of Thirteenth Schedule) Regulations, 2015

This LN amends the Thirteenth Schedule regulating fiscal receipts. The first amendment refers to the definition of 'fiscal receipt'. The new definition provides for more detailed rules relating to Commissioner's powers to approve forms of fiscal receipts.

The LN provides for the Mini One Stop Shop exemption from issuing fiscal receipts.

L.N. 67 of 2015 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax (Registration of Certain Taxable Persons) Regulations, 2015

This LN revokes the Value Added Tax (Exemption from Registration) Regulations.

Taxable persons providing taxable or exempt with credit supplies of goods or services who are not registered or who had been de-registered by virtue of the Value Added Tax (Exemption from Registration) Regulations, 2010, must register or re-activate their registration as the case may be, under article 10 or article 11 of the Value Added Tax Act according to their preference or eligibility by not later than the 30th June 2015.

L.N. 75 of 2015 VALUE ADDED TAX ACT (CAP. 406) Remission of Interest (Amendment) Rules, 2015

The Commissioner has been granted the discretion remit wholly or in part:

- (a) any interest incurred under the provisions of article 21(4) of the Value Added Tax Act; and
- (b) any administrative penalty incurred under any of the provisions of articles 37 to 41 of the Value Added Tax Act:

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

1.3 Bills

None that we are aware of.

2. JUDICIAL DECISIONS

2.1 Decisions of the Administrative Review Tribunal

Rikors Numru. 188/2011 Joseph u Maria konjugi Dimech Vs Kummissarju tat-Taxxi

This case involved an assessment to duty. The Commissioner had treated a transfer as being the transfer of an apartment but taxpayer contended that he had only transferred airspace. The Tribunal held that taxpayer had failed to prove that the asset transferred was airspace and not a finished apartment.

Rikors Numru. 34/2009 Dr. Michel Dingli Vs Kummissarju tat-Taxxi

Even this case involved an assessment to duty. The Tribunal rejected the appeal because appellant had failed to prove that the value declared in the deed corresponded to real value. Nonetheless it reduced additional tax because it found that the value declared in the deed corresponded to the actual transfer value (i.e. suggesting that there had not been any evasion or fraud).

Rikors Numru. 189/2011 Nikka Developments Company Ltd. Vs

Kummissarju tat-Taxxi

This case involved an assessment to additional tax in an assessment to duty on documents. Taxpayer contended that the property transferred consisted in airspace but the Revenue held that, in reality, the transaction involved the transfer of a finished apartment. The Tribunal rejected the appeal because the taxpayer had failed to prove its case.

Rikors Numru. 21/2012 Emanuel Portelli u martu Rita Portelli Vs Kummissarju tat-Taxxi Interni

Even this case involved an assessment to duty. Essentially, the case was rejected on a point of fact but the Tribunal refused to apply Civil Code principles on the abatement of penalties maintaining that the rationale behind the penalties contained in the civil code was very different from that incorporated in the DDTA.

Rikors Numru. 201/2012 Raymanda Limited (C18454) Beraq Limited (C10018) vs Kummissarju tat-Taxxi Interni

Even this judgment involved an assessment to duty. Appeal was filed late and taxpayer claimed that he had filed the appeal late because he had been given bad advice from an official working at the department. The Department contended that the time-limit within which to appeal is peremptory and cannot be extended. The Tribunal rejected the case on the merits concluding that taxpayer had not brought conclusive evidence that the appeal had been filed late because of bad advice given by the Department. The appeal was rejected.

Rikors Numru. 66/2014 X vs Kummissarju tat-Taxxi (Decree)

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This decree, presently still subject to appeal, may turn out to create a very strong guiding principle that can leave a profound impact on tax litigation. The ART delivered a very strong decree following a request for an inversion of the onus of proof. A similar decree had been delivered in a previous case but this judgment is much more detailed, incorporating references to judgments of the ECtHR.

Given that the case pending before the Tribunal involved penalties that are both deterrent and punitive, taxpayer filed a request for the inversion of the onus of proof (an application of the rule on presumption of innocence). The Tribunal referred to the judgment of the Constitutional Court classifying Maltese additional tax as a 'piena'. The Tribunal referred to the ECtHR's recent judgment in *Lucky Dev* too, ordering the inversion of the onus of proof.

Rikors Nru. 99/14VG (Decree)

This decree is very similar to decree 66/2014 but is even more strongly worded. The ART referred to a number of judgments delivered after the *Lucky Dev* judgment was published. An extract from this very important decree is reproduced hereunder:

"Din hija penali amministrattiva li fl-ahhar mill-ahhar tigi imposta fuq kull tax payer li jonqos milli josserva l-provvedimenti tal-Ligi relattivi ghas-sottomissjoni tad-denunzji tat-taxxa u b'mod partikolari ghall-kontenut ta' l-informazzjoni moghtija fl-istess. Il-penali amministrattiva in kwistjoni ma hijiex intiza bhala forma ta' kumpens pekunjarju ghal xi spejjez li d-Dipartiment jista' jinkorri b'konsegwenza ta' l-agir jew ommissjoni tat-tax payer, izda l-iskop principali taghha huwa bhala deterrent ghall-vjolazzjoni tal-provvedimenti tal-Ligi da parte tat-tax payer u bhala punitive measure fil-konfront ta' dak it-tax payer li effettivament jivvjola il-provvedimenti tal-Kap.406 tal-Ligijiet ta' Malta.

Apparte minn dan kollu osservat, meta wiehed iqis il-quantum tal-penali amministrattiva li tigi imposta fuq it-tax payer ghan-nuqqas tieghu ma jistax ma tigix riskontrata the severity of the potential and actual penalty. In effetti fil-kaz tal-penali amministrattiva imposta a tenor ta' l-Artikolu 37 tal-Kap.406 tal-Ligijiet ta' Malta, ma hemmx ammont massimu ta' penali li tista' tigi imposta izda din ghandha tkun ekwivalenti ghal 20% tat-taxxa perikolata, liema fatt jirrendi ghal kollox inkoncepibbli l-kontestazzjoni tal-Kummissarju tat-Taxxi li l-kwistjoni ta' l-imposizzjoni ta' penali amministrattiva fuq tax payer hija kwistjoni sekondarja. Meta tali penali amministrattiva effettivament tigi applikata fil-prattika din tista' tammonta ghal ammonti relattivament ingenti, u fi kwalunkwe kaz anke kieku l-ammont ta' penali amministrattiva effettivament impost kelli jkun wiehed minimu, fid-dawl ta' dak osservat mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fis-sentenza *Häkkä v. Finland*, iktar 'l fuq citata, l-elementi l-ohra li jikkarakterizzaw il-penali amministrattiva ma ghandhomx jigu injorati u ghal daqshekk biss tali penali amministrattiva ma titqiesx li hija affini ghal akkuza kriminali ai termini ta' l-Artikolu 6 tal-Konvenzjoni.

B'hekk, fi kliem il-Qorti Ewropea tad-Drittijiet tal-Bniedem stess, the penalties are thus both deterrent and punitive u the latter character is the customary distinguishing feature of a criminal penalty bil-konsegwenza ghalhekk li dak it-tax payer li jigi assoggettat ghal tali penali amministrattiva ikun effettivament qed jigi rinfaccjat b'akkuza kriminali a tenor ta' l-Artikolu 6 tal-Konvenzjoni u konsegwentement ghandhom japplikaw favur tieghu l-garanziji hemm sanciti, inkluza l-garanzija tal-presunzjoni ta' l-innocenza.

Jigi in fine osservat li l-Qorti Kostituzzjonali nostrali wkoll tirrikonoxxi li pieni amministrattivi imposti f'ambitu fiskali huma "piena" inflitta fuq it-tax payer li fil-fehma tal-Kummissarju tat-Taxxi ma jkunx ghamel stqarrija shiha u sewwa tad-dhul tieghu ghall-gahnijiet tat-taxxa u konsegwentement ghalhekk japplikaw il-garanziji sanciti fl-Artikolu 6 tal-Konvenzjoni ghal dak li jirrigwarda l-process kriminali.

Fis-sentenza fl-ismijiet *John Geranzi Limited v. Kummissarju tat-Taxxi Interni et*, Rik. Nru. 22/09 deciza mill-Qorti Kostituzzjonali fit-30 ta' Novembru 2012, dik il-Qorti osservat inter alia li l-kwistjoni

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fil-kawza ta' illum ghalhekk hija dwar jedd ta' access ghal qorti fi zmien xieraq u ghalhekk ma tintlaqtax bl-eccezzjoni tal-Kummissarju illi f'materja ta' obbligazzjonijiet fiskali ma jghoddux id-disposizzjonijiet ta' l-art.6 tal-Konvenzjoni. Dwar dan, il-posizzjoni legali hija cara. Barra minn hekk, il-Kummissarju qieghed jesigi l-hlas mhux biss tat-taxxa izda ta' taxxa addizzjonali li fit-twegiba tieghu ghall-appell ta' l-attrici l-Kummissarju jsejhlha "multa amministrativa" li imponiha ghax, fil-fehma tieghu, l-attrici ma ghamlitx stqarrija sew u shiha tad-dhul taghha ghall-ghanijiet tat-taxxa. Ghall-ghanijiet tal-Kostituzzjoni u tal-Konvenzjoni, it-termini legali li nsibu f'dawk id-disposizzjonijiet tal-ligi ghandhom tifsira "awtonoma". Li ma kienx hekk, l-istat facilment jahrab mill-garanziji tal-process penali billi l-pieni jsejhlhom "amministrativi" flok penali. Izda jsejhlha x'jsejhlha l-Kummissarju, it-taxxa addizzjonali tibqa' "piena" inflitta fuq il-kontribwent illi, fil-fehma tal-Kummissarju, ma jkunx ghamel stqarrija shiha u sewwa tad-dhul tieghu ghall-ghanijiet tat-taxxa. Fi stat ta' dritt ic-cittadin ma jistax ikun imcahhad minn access ghal qorti ghad-decizjoni jekk ghandux jew le jkun soggett ghal piena.

Fid-dawl ta' dan kollu osservat ghalhekk it-Tribunal iqis li t-talba tas-socjeta' Rikorrent⁵ ghall-inverzjoni tal-provi minnu avvanzata waqt is-seduta tat-2 ta' Frar 2015, hija gustifikata u ghaldaqstant tisthoqq li tigi milqugha."

2.2 Decisions of the Court of Appeal

Appell Civili Numru. 160/12

A Maltese company could not understand the workings behind a VAT assessment it had received. According to the company's accountants, the company was owed significant amounts in excess VAT credits but an assessment issued by the VAT Department referred to debts owing by the Company to the VAT Office. Taxpayer sought to contest the VAT Assessment by filing an appeal to the Administrative Review Tribunal.

In front of the Tribunal, the taxpayer and the Department took diametrically opposed positions and taxpayer wanted to know more of the manner the Department had arrived to the assessment. Taxpayer asked the Tribunal to order the VAT Department to produce a true copy of its VAT file in Court. The VAT Department vehemently objected to the request. The VAT Department took the view that the taxpayer's file was an internal privileged document which was not available for public inspection. The VAT Department rested its case on Article 29 of the Freedom of Information Act providing that certain administrative documents are privileged.

The taxpayer contended that, in the particular circumstances of the case, the duty of official secrecy did not apply because the rationale of official secrecy was that of protecting confidential information pertaining to data subjects and not the disclosure of personal data to the data subjects themselves. In addition, taxpayer argued that the contents of his file were needed by him to argue his case.

Taxpayer held that the production of his file was indispensable for the purposes of his defence contending that lack of access to the court file would result in a denial of its right to a fair hearing. The Administrative Tribunal, the first-tier tribunal, acceded to taxpayer's request. The first-tier tribunal referred to Parliamentary debates relating to the enactment of the law creating the Administrative Review Tribunal and the Administrative Reform.

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The Tribunal emphasized the importance of the right to equality of arms in litigation involving the administration. According to the Tribunal, the administration had a duty to divulge all information relating to its deliberations.

The Tribunal referred to an important Parliamentary Debate that the intention of the legislator was to assert the 'discovery rule'. Parliamentary debates clearly indicated that the intention of the legislator was that of binding the administration with the duty of disclosure. The VAT Department appealed the decision delivered by the Administrative Review Tribunal and the case went to the Court of Appeal which rejected by the Appeal.

The Court of Appeal endorsed the views of the Administrative Review Tribunal adding reasons why, in its opinion, taxpayers were entitled to access to information concerning themselves. Interestingly, the Court of Appeal referred to data pertaining to taxpayers as the 'personal property' belonging to the taxpayers to whom such data referred to. The Court of Appeal observed that access to departmental files was in the interest of justice.

Many similar requests to the request filed in Case 160/12 had been filed to the Tribunal and Case 160/12 settles an issue that had been pending in front of the Maltese law courts for some years. Case 160/12 provided much needed clarity establishing the 'discovery rule' in Maltese tax litigation procedures.

2.3 Decisions of the Court of Magistrates and the First Hall Civil Court

No important cases to report.

2.4 Decisions of the First Hall Civil Court (Constitutional Jurisdiction) and the Constitutional Courts

No important cases to report.

2.5 Judgments of the Criminal Courts

Appell Kriminali Numru. 208/2014 Il-Pulizja Spettur Jurgen Vella Vs Robert Spiteri

Accused was found guilty of running a business without a cash register. As a matter of fact when the VAT inspectors called at accused's premises they found that, in lieu of a cash register, accused was using a computerised system that had not been approved by the Department. It transpired that taxpayer had applied to the Department for an approval of his computerised system but the inspectors had inspected the premises in the short interval of time running between the date when the request for approval had been filed and the date when the approval was granted. The Court concluded that:

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“Din il-Qorti hija sodisfatta illi l-appellant ma kellu l-ebda intenzjoni jiddefrawda d-Direttur Generali tat-Taxxa Fuq il-Valur Mizjud jew inkella jmur kontra xi regolament tal-istess Att dwar il-Taxxa Fuq il-Valur Mizjud. U ghalhekk jidhrilha illi ghandha tilqa’ l-appell, thassar u tirrevoka s-sentenza appellata u konsegwentament tordna illi l-appellant jigi liberat minn kull imputazzjoni u htija.”

3. JUDGMENTS OF THE ECtHR

CASE OF LUCKY DEV v. SWEDEN (Application no. 7356/10)

This much awaited judgment refers to the non bis in idem. Lucky Dev was in breach of tax laws and criminal proceedings were instituted against her. She was cleared of all charges. Subsequently, she had to undergo 'administrative procedures' in front of the Administrative Tribunals. The case in front of the Tribunal referred to tax surcharges. Predictably, the ECtHR found in favour of Lucky Dev. An extract from the judgment follows:

"62. Turning to the facts of the present case, it is true that both the applicant's indictment for a tax offence and the tax surcharges imposed on her form part of the actions taken and sanctions imposed under Swedish law for the failure to provide accurate information in a tax return and that the two actions were foreseeable. However, they were examined by different authorities and courts without the proceedings being connected; both sets of proceedings followed their own separate course and they became final at different times. Moreover, the Supreme Administrative Court did not take into account the fact that the applicant had been acquitted of the tax offence when it refused leave to appeal and thereby made the imposition of tax surcharges final. Thus, in accordance with the Swedish system as it stood at the relevant time, the applicant's conduct as well as her criminal guilt under the Tax Offences Act and her liability to pay tax surcharges under the relevant tax legislation were determined in proceedings that were wholly independent of each other. It cannot be said that there was a close connection, in substance and in time, between the criminal proceedings and the tax proceedings. This contrasts with the Court's earlier cases *R.T. v. Switzerland* and *Nilsson v. Sweden* (cited above) where the decisions on withdrawal of a driving licence were directly based on an expected or final conviction for a traffic offence and thus did not contain a separate examination of the offence or conduct at issue (see further *Nykänen v. Finland*, cited above, § 51).

63. Accordingly, the present case concerns two parallel and separate sets of proceedings of which the tax proceedings commenced on 1 June 2004 and were finalised on 20 October 2009 and the criminal proceedings were initiated on 5 August 2005 and became final on 8 January 2009. The two proceedings were thus pending concurrently for almost three and a half years. This duplication of proceedings did not involve a breach of Article 4 of Protocol No. 7. However, the tax proceedings were not terminated and the tax surcharges were not quashed after the criminal proceedings had become final but continued for a further nine and a half months until 20 October 2009. Therefore, the applicant was tried "again" for an offence for which she had already been finally acquitted.

64. For these reasons, there has been a violation of Article 4 of Protocol No. 7 to the Convention."

CASE OF RINAS v. FINLAND (Application no. 17039/13)

The conclusions of this judgment are similar to those in the Lucky DEV case discussed above but, from a local perspective this judgment is even more interesting than Lucky Dev because in Rinas criminal proceedings were initiated after tax surcharge proceedings had been exhausted.

3. JUDGMENTS OF THE ECtHR

CASE OF DIMITROVI v. BULGARIA (Application no. 12655/09)

This case involved a challenge to a Bulgarian law providing for the forfeiture of property believed to have originated from tax evasion. The ECtHR found that the relative Bulgarian law was incompatible with the right to property because the Bulgarian regime was too arbitrary. The law was too general and vague. It was neither foreseeable nor precise. It did not incorporate safeguards against arbitrariness. Therefore, it was not in line with the minimum standards set by the ECHR.

CASE OF KIIVERI v. FINLAND (Application no. 53753/12)

Kiiveri was served with an assessment to additional tax which it did not contest. After the assessment to additional tax became final and conclusive (after the time-period for the filing of the appeal lapsed), criminal proceedings were instituted. The ECtHR found that the criminal proceedings violated the non bis in idem principle.

CASE OF ÖSTERLUND v. FINLAND (Application no. 53197/13)

Even this case involved the institution of criminal proceedings after the conclusion of administrative proceedings. Predictably, the ECtHR found a violation of the non bis in idem principle.

4. JUDGMENTS OF THE ECJ

In Case C-190/12 *Emerging Markets Series of DFA Investment Trust Company v Dyrektor Izby Skarbowej w Bydgoszczy*

The ECJ held that Article 63 TFEU on the free movement of capital applies under national tax legislation, the dividends paid by companies established in a Member State to investment funds established in a non-Member State are not the subject of a tax exemption, while investment funds established in that Member State receive such an exemption.

The ECJ concluded that Articles 63 TFEU and 65 TFEU must be interpreted as precluding tax legislation of a Member State under which dividends paid by companies established in that Member State to an investment fund situated in a non-Member State cannot qualify for a tax exemption, provided that that Member State and the non-Member State concerned are bound by an obligation under a convention on mutual administrative assistance which enables the national tax authorities to verify any information which may be transmitted by the investment fund. It is for the referring court, in the main proceedings, to examine whether the mechanism for the exchange of information provided for within that cooperation framework is in fact capable of enabling the Polish tax authorities to verify, where necessary, the information provided by investment funds established in the United States on the conditions for their formation and the conduct of their business, in order to establish that they operate within a regulatory framework equivalent to that of the European Union.

Case C-662/13, *Surgicare — Unidades de Saúde SA v Fazenda Pública*

This VAT judgment referred Portugal's refusal to reimburse input VAT paid by Surgicare, on the ground that Surgicare had abused its right to deduction of input VAT. In essence, the point at issue was whether the VAT Directive precludes the mandatory preliminary application of a national administrative procedure limiting the right of deduction in the case of suspected abuse.

The CJEU held that, in the absence of any EU rules in the area, the means of preventing VAT fraud falls within the internal legal order of the Member States under the principle of procedural autonomy of the latter. In that regard, it is apparent from the Court's settled case-law that it is for the domestic legal system of each Member State, in particular, to designate the authorities responsible for combatting VAT fraud and to lay down detailed procedural rules for safeguarding rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness).

The CJEU held that it is for the referring court to determine whether the national measures are compatible with those principles, having regard to all the circumstances of the case.

The CJEU held that the special administrative procedure complained of contemplated a right to a hearing. The CJEU held that the national procedure in question is favourable to the person suspected of having committed an abuse of rights, inasmuch as it seeks to guarantee the observance of certain fundamental rights, in particular the right to be heard.

The CJEU concluded that the VAT directive must be interpreted as meaning that it does not preclude the mandatory preliminary application of a national administrative procedure, such as that laid down in the measure complained of, in the event that the revenue authorities suspect the existence of an abusive practice.

4. JUDGMENTS OF THE ECJ

Case C-512/13, C.G. Sopora v Staatssecretaris van Financiën

The questions raised by the referring court concerned the compatibility with EU law of a tax advantage (a notional tax deduction) which the Netherlands grants to workers who, prior to taking up employment in its territory, resided in another Member State at a certain distance from its border.

The advantage consisted in a flat-rate exemption from the tax on wages for the reimbursement of extraterritorial expenses in an amount up to 30% of the taxable base, without those workers having to demonstrate that they did in fact incur those expenses or that those expenses in fact came to the amount of that reimbursement.

The CJEU noted that the mere fact that limits are set concerning the distance in relation to the workers' place of residence and concerning the ceiling of the exemption granted, taking as the starting point the Netherlands border and the taxable base, respectively, cannot therefore, in itself, amount to indirect discrimination or an impediment to the free movement of workers.

The CJEU concluded that Article 45 TFEU must be interpreted as not precluding national legislation by which a Member State provides that workers who resided in another Member State prior to taking up employment in its territory are to be granted a tax advantage consisting in the flat-rate exemption of reimbursement of extraterritorial expenses in an amount up to 30% of the taxable base, on condition that those workers resided at a distance of more than 150 kilometres from its border, unless those limits were set in such a way that that exemption systematically gives rise to a net overcompensation in respect of the extraterritorial expenses actually incurred.

Judgment in Case C-172/13 Commission v United Kingdom

This case involved a challenge to the cross-border loss relief regime introduced in the UK in the wake of the famous M&S case. The below is drawn from the CJEU's official Press Release:

"In 2006, following the judgment of the Court of Justice in the Marks & Spencer case, the UK amended its legislation so as to allow cross-border group relief, subject to certain conditions. Under those provisions, now set out in the Corporation Tax Act 2010 (CTA 2010), a non-resident company must have exhausted all possibility of having the losses taken into account in the accounting period in which the losses were incurred or in previous accounting periods, and there must be no possibility of the losses being taken into account in future accounting periods. The CTA 2010 requires that the determination as to whether losses may be taken into account in future accounting periods must be made 'as at the time immediately after the end' of the accounting period in which the losses were sustained.

4. JUDGMENTS OF THE ECJ

The Commission argues that the CTA 2010 rules make it virtually impossible for a resident parent company to obtain cross-border group relief, since in practice it allows the resident parent company to take such losses into account in only two situations: (i) where the legislation of the Member State of residence of the subsidiary concerned makes no provision for losses to be carried forward and (ii) where the subsidiary is put into liquidation before the end of the accounting period in which the loss was sustained. The Commission also argues that losses sustained before 1 April 2006 are excluded from cross-border group relief, inasmuch as the CTA 2010 provisions concerning that relief apply only to losses sustained after 1 April 2006, the date on which the new legislation entered into force. Considering, therefore, that those rules infringed the principle of freedom of establishment, the Commission brought an action before the Court of Justice.

In today's judgment, the Court dismisses the action in its entirety.

With regard to the conditions laid down in the CTA 2010, the Court finds that the first situation referred to by the Commission is irrelevant. In a situation where the legislation of the Member State where the subsidiary is based precludes all possibility of losses being carried forward, the Member State in which the parent company is resident may refuse cross-border group relief without thereby infringing freedom of establishment. As regards the second situation, the Court finds that the Commission has not established the truth of its assertion that the CTA 2010 requires the non-resident subsidiary to be put into liquidation before the end of the accounting period in which the losses were sustained in order for its resident parent company to be able to obtain cross-border group relief. The CTA 2010 does not, on any view, impose a requirement for the subsidiary concerned to be wound up before the end of the accounting period in which the losses were sustained.

The Court observes that losses sustained by a non-resident subsidiary may be characterised as 'definitive', as described in the Marks & Spencer judgment, only if that subsidiary no longer has any income in its Member State of residence. So long as that subsidiary continues to be in receipt of even minimal income, there is a possibility that the losses sustained may yet be offset by future profits made in the Member State in which it is resident. Referring to a specific example of a resident parent company which obtained cross-border group relief, the United Kingdom confirmed that it is possible to show that losses sustained by a non-resident subsidiary may be characterised as definitive where, immediately after the end of the accounting period in which the losses were sustained, that subsidiary ceased trading and sold or disposed of all its income-producing assets.

As regards the possibility for a company to obtain cross-border group relief in respect of the period before 1 April 2006, the Court finds that the Commission has not established the existence of situations in which cross-border group relief for losses sustained before that date was not granted."

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