



MALTA TAX LAW UPDATE

Update 20

EDITOR'S NOTE

The First Hall Civil Court has delivered its first important judgment on the Mutual Assistance Directive. Our Courts have had the opportunity to deliver several judgments on the Mutual Assistance Directive but, unlike previous judgments, the judgment in *Reeves v. KT* involved a successful challenge leading to the rescindment of an executive title that had been improperly obtained. The Court was quite critical of the manner the Registrar of Courts was proceeding to enforce claims filed under the Directive.

The CJEU has delivered a number of judgments which should be of interest to Maltese practitioners. This quarter, the CJEU delivered important judgments relating to Insurance, the Digital Economy and Financial Services. The Judgement in *WebMindLicenses Kft* is particularly interesting because it deals with issues of Base erosion, commercial substance and use of information in tax controversy.

Our Courts have delivered some interesting judgments too. The unnumbered judgment delivered in May 2016 is important because it relates to the obligation of professional secrecy and clients' accounts.

This Update examines the Budget Act (enacted a couple of weeks after the publication of Update 19) and other recent legislative changes.

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1. LEGISLATIVE CHANGES

1.1 Acts of Parliament

1.1.1 ACT XV of 2016

Act XV amends all major tax laws.

The Income Tax Act

Part IV of Act XV introduces the following important changes to the ITA:

- A change in the definition of the term 'company';
- A change in the definition of the term "industrial building or structure";
- Changes to the Property Transfers Tax regime;
- A new rule relating to the commutation of pension exemption;
- New rules regulating the post-merger utilisation of unabsorbed losses;
- New rules on the deductibility of expenditure incurred for the supply of goods and services.
- An enabling provision relating to the business of insurance;
- Changes to the definition of 'tenement' in the articles dealing with the withholding tax on rental income;
- New tax bands;
- New rules relating to part-time sports activities;

A change in the definition of the term 'company', 2 ITA

A special rule has been introduced for securitisation vehicles, each cell is to be treated as a separate company. A proviso is being added to the definition of company. The proviso says that:

"Provided further that in the case of a securitisation cell company as defined in the Securitisation Cell Company Regulations (in this proviso referred to as 'the Securitisation Regulations'), as may be amended from time to time, or in any other law or regulations replacing the Securitisation Regulations, for all intents and purposes of the Income Tax Acts, **every cell of a securitisation cell company and that part of a securitisation cell company in which non-cellular assets are held, shall each be deemed to be a separate company** and any words and expressions in the Income Tax Acts which are relevant to a company shall be construed accordingly. The interpretation of such words and expressions insofar as applicable to a securitisation cell company shall be made on the basis of the relevant provisions of the Securitisation Regulations:"

A change in the definition of the term "industrial building or structure", 2 ITA

The definition of this term, a term which is very important for the purposes of capital allowances, has been extended to include 'offices, as may be prescribed'. We should expect a Legal Notice providing for offices that are eligible to be treated as industrial buildings or structures.

The main changes consist in the following:

Changes to the Property Transfers Tax regime, 5A ITA

The main changes consist in the following:

- (i) The 'own residence' exemption is being circumscribed to dwelling houses;
- (ii) The tax exemption applicable to property transferred in the course of a winding up is being extended to transfers of land;
- (iii) The remit of the 5% rate of property transfers tax is being extended to areas outside of Valletta. The 5% rate previously applicable to Valletta properties, will apply to urban conservation areas scheduled by MEPA;

New rule relating to the commutation of pension exemption, 12 (1) (h) ITA

An amendment provides that, with respect to retirement schemes, the Minister may prescribe rules relating to the exemption. In the absence of such ad hoc rules, the exemption may be availed of as provided in the generic rules contemplated in the ITA.

New rules regulating the post-merger utilisation of unabsorbed losses, 14 (1) (g) ITA

New rules are being added to Article 14 (1) (g) ITA regulating the deductibility of losses. The new rule restricts the 'transfer' of losses pursuant to a merger. In principle, the transfer of losses is only allowed pursuant to the group loss relief provisions. By way of exception, mergers and divisions pursuant to in the Rulings (Income Tax and Duty Treatment of Mergers and Divisions) effected for bona fide purposes to the satisfaction of the Commissioner meeting a number of conditions may result in the 'transfer' of losses even pursuant to mergers and divisions. Relevant conditions include the retention of a line of business and the Commissioner's permission.

New rules on the deductibility of expenditure incurred for the supply of goods and services, 14 (5) ITA

Deductions for expenditure incurred on supplies of goods and services subject to VAT will be allowed only if the person incurring the expense is in possession of the necessary VAT documentation (receipt/invoice).

An enabling provision relating to the business of insurance, 27 (8) ITA

A new-sub-article, 27 (8) ITA is being added to the framework relating to the tax treatment of insurance business. The new sub-article empowers the Minister to prescribe rules that take into account EU directives on solvency and IFRS rules for insurance as adopted by the EU.

Changes to the definition of 'tenement' in the articles dealing with the withholding tax on rental income, 31D ITA

The new tax system for rental income (contemplating a 15% tax rate) will begin to apply to commercial tenements too. Nonetheless, a commercial tenement will qualify as a tenement subject to the 15% rate only if it is not rented to or from a related body of persons. A body or persons is treated as being related to an individual if it is owned or controlled, directly or indirectly, as to more than twenty-five percent by that individual; and two bodies of persons are related if they are owned or controlled, directly or indirectly, as to more than twenty-five percent by the same persons.

New tax bands, 56 ITA

New tax bands have been introduced and what is colloquially known as the 'short-form' for calculating tax has been incorporated in Article 56 ITA.

In the case of married couples resident in Malta, the following rules apply:

- (i) Where the chargeable income does not exceed €12,700 the tax is to be determined by multiplying the chargeable income by 0%;
- (ii) Where the chargeable income exceeds €12,700 but is less than €21,201 the tax is to be determined by multiplying the chargeable income by 15% and then subtracting €1,905 from the result;
- (iii) Where the chargeable income exceeds €21,200 but is less than €28,701 the tax is to be determined by multiplying the chargeable income by 25% and then subtracting €4,025 from the result;
- (iv) Where the chargeable income exceeds €28,700 but is less than €60,001 the tax is to be determined by multiplying the chargeable income by 25% and then subtracting €3,905 from the result;
- (v) Where the chargeable income exceeds €60,000 the tax is to be determined by multiplying the chargeable income by 35% and then subtracting €9,905 from the result.

In the case of individuals resident in Malta, the following rules apply:

- (i) Where the chargeable income does not exceed €9,100 the tax is to be determined by multiplying the chargeable income by 0%;
- (ii) Where the chargeable income exceeds €9,100 but is less than €14,501 the tax is to be determined by multiplying the chargeable income by 15% and then subtracting €1,365 from the result;
- (iii) Where the chargeable income exceeds €14,500 but is less than €19,501 the tax is to be determined by multiplying the chargeable income by 25% and then subtracting €2,815 from the result;
- (iv) Where the chargeable income exceeds €19,500 but is less than €60,001 the tax is to be determined by multiplying the chargeable income by 25% and then subtracting €2,725 from the result;
- (v) Where the chargeable income exceeds €60,000 the tax is to be determined by multiplying the chargeable income by 35% and then subtracting €8,725 from the result.

The parental computation will change as follows:

- (i) Where the chargeable income does not exceed €10,500 the tax is to be determined by multiplying the chargeable income by 0%;
- (ii) Where the chargeable income exceeds €10,500 but is less than €15,801 the tax is to be determined by multiplying the chargeable income by 15% and then subtracting €1,575 from the result;
- (iii) Where the chargeable income exceeds €15,800 but is less than €21,201 the tax is to be determined by multiplying the chargeable income by 25% and then subtracting €3,155 from the result;
- (iv) Where the chargeable income exceeds €21,200 but is less than €60,001 the tax is to be determined by multiplying the chargeable income by 25% and then subtracting €3,050 from the result;
- (v) Where the chargeable income exceeds €60,000 the tax is to be determined by multiplying the chargeable income by 35% and then subtracting €9,050 from the result.

New rules relating to part-time sports activities, 56 (26) ITA

Individuals who derive income being emoluments from a full-time or part-time sports activity, either as a registered player or athlete or as a licensed coach may, unless they opt to have the said income charged at normal rates, be charged to tax on all such income at the rate of seven point five cents (€0.075) on every euro.

The term "sports activity" refers to a sport recognized by the Council and practised wholly or mainly in Malta. "Registered player or athlete" is defined as meaning a player or athlete registered with a club or team which is a registered member of the national regulatory body for that particular

sport and the aforesaid regulatory body is registered or recognized by the Council. "Licensed coach" is defined as meaning a person registered as a coach with a club or team which is a registered member of the national regulatory body for that particular sport and the aforesaid regulatory body is registered or recognized by the Council, and whose license to coach is recognized by the Council.

Income Tax Management Act

Part VI changes the ITMA as follows:

- (a) The Commissioner is being granted the power to determine the form to be used and conditions applicable to an election partnership;
- (b) New rules on the mechanics of provisional tax payable on the transfer of immovable property have been introduced;

The Commissioner is being granted the power to determine the form to be used and conditions applicable to an election partnership, 27 (6) ITMA

In sub-article (6) of article 27 of the ITMA, the words "as may be prescribed", have been substituted with the words "as the Commissioner may determine". Matters that were previously to be regulated by LN will be determined by the Commissioner.

New rules on the mechanics of provisional tax payable on the transfer of immovable property have been introduced, 42, 43 and 44 ITMA

Article 43 ITMA has been amended to provide for instances when provisional tax is not withheld at 7%. Similarly, Article 44 ITMA has been amended to provide for special cases. More importantly, a new sub-article, 44 (2B) (d) ITMA has been introduced. The new sub-article provides that no interest shall run on any tax payable by any person to the Commissioner when the non-payment of that tax renders that person liable to additional tax as provided for in sub-article (1) of this article or in article 23(4) (petroleum profits) or in article 73(4) ITA (income paid to non-residents).

The Duty on Documents and Transfers Act

Part XI amends the DDTA as follows:

- (a) By introducing a rule of a clarificatory nature relating to promise of sale agreements (Article 3 DDTA);
- (b) By introducing ad hoc rules relating to the transfer of rural property (Article 9 DDTA). In a document of transfer of rural property, or land, or the roof or airspace overlying urban property, the parties must start making a declaration stating whether any construction exists on the property on the date of the transfer and, where such construction exists, a description thereof ("construction" includes any improvements and any works in progress). A person who fails to make the declaration required or who makes a declaration for the purpose of that sub-article which he knows to be false or incomplete or misleading shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) of not less than five hundred euro (€500) and not more than three thousand euro (€3,000), or to imprisonment for a period not exceeding six (6) months or to both such fine and imprisonment in addition to any additional duty and liability to which he may be liable in terms of any other provision of the ITMA.

- (c) A new rule limiting abuse of duty relief for persons who do not need an AIP permit under Article 32 (4) (a) DDTA has been introduced in paragraph d. Duty relief under 32 (4) shall not be available where the person acquiring the property owns, at the time of acquisition, any other property in respect of which duty relief has been claimed under paragraph (a) or article 32C (donations). The notary who receives the deed must record in the deed a declaration by the person so acquiring the immovable that he does not own any other property in respect of which duty relief has been claimed under 32 (4) (a) or article 32C and that the said property is being acquired by him for the purpose stated in paragraph (a) and the said notary shall warn the said person of the importance of the truthfulness of such declaration

The VAT Act

Part XII amends the VATA as follows:

- (a) Rules clarifying the running of time-limits within which assessments must be raised (Article 32). When a person makes a correction to his return, the six year period in which the Commissioner may make a provisional assessment shall start to run from the date on which the Commissioner receives the request for the correction. In 48 (4), a new proviso has been added. The new proviso prescribes that where a tax return is furnished after its due date or, in the case where a person makes a correction, the six year period shall start to run from the date on which a tax return is furnished or the date on which the Commissioner receives a request for the correction.
- (b) A significant abatement of criminal penalties. Criminal penalties for offences under Article 77 have been significantly decreased (from 10 times of endangered tax to two times endangered tax). Criminal penalties for infringements of 76 (b) (failure to keep records), 77 (e) (failure to produce an invoice), 77 (f) (offences by employees and 77 (o) (supplies without being in possession of a fiscal register/receipt book) have been abated via the introduction of a form of compromise penalty. The Commissioner may enter into an agreement with the offender, whereby the said offender pays to the Commissioner within fifteen days from receipt of a notice to this effect by the Commissioner the following:
 - (a) one hundred euro (€100) in the case of a first offence;
 - (b) two hundred euro (€200) in the case of a second offence;
 - (c) four hundred euro (€400) in the case of a third offence; and
 - (d) five hundred euro (€500) in the case where the offender and, or any of his employees or any other person acting on his behalf is found in default on two separate occasions within a period of six months; and upon the payment of such fine (multa), all criminal liability under this Act with regard to the offences in relation to which the fine (multa) has been paid, shall be extinguished.

1.2 Legal Notices

L.N. 125 of 2016 INCOME TAX ACT (CAP. 123) Part-Time Work (Amendment) Rules, 2016

This LN provides for part-time work done by Police Officers. The newly introduced Rule 6 (3) will provide that remuneration paid to police officers for performing extra duty work shall be considered as income from part-time work qualifying under these rules. For the purpose of this subrule, "Extra duty" is taken to refer to work that is not part of the police officer's normal duties and is not overtime.

L.N. 126 of 2016 INCOME TAX ACT(CAP. 123) Deduction (Income from Employment or Pension) (Amendment) Rules, 2016

Rules 2 and 3 providing for a deduction have been amended. The amounts have been increased from €9,200 to €9,450 and €8,500 to €9,100.

L.N. 127 of 2016 INCOME TAX ACT (CAP. 123) Tax Rate Adjustment Rules, 2016

These new regulations provide that any person subject to tax shall be allowed a tax rebate.

In the case of a person chargeable to tax under the provisions of article 56(1)(a) ITA (resident married) and whose chargeable income for the year is higher than €28,700 but less than €28,860, a tax rebate shall be allowed as a set-off against the tax on his chargeable income, as follows:

Tax Rebate = €25,550 – (chargeable income less tax on such chargeable income).

In the case of a person chargeable to tax under the provisions of article 56(1)(b) ITA (resident separate computation) and whose chargeable income for the year is higher than €19,500 but less than €19,620, a tax rebate shall be allowed as a set-off against the tax on his chargeable income, as follows: Tax Rebate = €17,440 – (chargeable income less tax on such chargeable income).

In the case of a person chargeable to tax under the provisions of the second proviso to article 56(1)(b) ITA and whose chargeable income for the year is higher than €21,200 but less than €21,340, a tax rebate shall be allowed as a set-off against the tax on his chargeable income, as follows:

Tax Rebate = €19,055 – (chargeable income less tax on such chargeable income).

L.N. 128 of 2016 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax (Forms) (Amendment) Regulations, 2016

A new rule, Rule 8 is being added. The new Rule 8 will provide that the form to be presented for a correction in terms of article 28(1) of the Act shall be that set out in the Ninth Schedule.

A correction in terms of article 28(1) of the Act shall be subject to the following conditions:

- (a) the Commissioner for Revenue shall not accept a request for a correction unless this is made on the form prescribed for this purpose;
- (b) an applicant shall:
 - (i) fill in all the boxes in Part 1 of the form (Details of Registered Persons and Tax Return);
 - (ii) for part 2 (Correction), complete only those boxes affected by the correction;
 - (iii) sign and complete part 3 (Declaration);
- (c) a correction of an amount which has been assessed or for which a provisional assessment has been issued or which is subject to an appeal shall not be accepted;
- (d) where it results that the Commissioner for Revenue does not agree with a correction made, the applicant may be subject to an assessment in terms of the Act;
- (e) administrative penalties and interests are applicable in terms of the Act.

L.N. 147 of 2016 INCOME TAX ACT (CAP. 123) Donations (Sports and Culture) (Amendment) Rules, 2016

Rule 4 has been amended to reflect the Budget decision to increase the deduction from the actual expense incurred to an amount equivalent to 150% of such donation.

L.N. 148 of 2016 INCOME TAX MANAGEMENT ACT (CAP. 372) Letting of Residential Tenement (Forms) (Amendment) Rules, 2016

This Legal Notice changes the name of the relevant form, reflecting the fact that the 15% system no longer applies only to residential tenements.

L.N. 205 of 2016 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) Duty on Documents and Transfers (Amendment) Rules, 2016

This LN amends Sub-rule (2) of rule 3 of the principal. The amendments provides that, with respect to immovable property, the value of the full ownership of any property on the relevant date shall be the average price which such property would fetch if sold on the open market on that date, in the state it is in as on that date, including any improvements existing on that date, whether made or paid for by the transferor, the transferee or any other person.

In the case of a transfer by a gratuitous title by a person to his spouse, descendants and ascendants in the direct line and their relative spouses, or in the absence of descendants to his brothers or sisters and their descendants, who acquire such property for the purpose of establishing therein or constructing thereon their sole, ordinary residence, the value thereof shall be deemed to be eighty per centum of the market value of the property so transferred on the date of transfer.

2 Bills

None

3 Judicial Decisions

3.1 Judgments of the ART

Application No. 111/14VG Charles Richards Sayed Vs Director General (Inland Revenue)

This case involved an assessment to duty. The appeal was upheld because the Tribunal concluded that the assessment had been raised after the applicable peremptory one-year term had lapsed. The case involved an assessment that had been incorrectly notified. Under cross examination the Applicant declared that he lived alone in the premises where an assessment had been purportedly served. He declared that he had never authorized anyone to accept on his behalf mail addressed to him. In view of this clear and unequivocal declaration by the Applicant the Tribunal held that the onus of proof shifted onto the Director General (Inland Revenue) who should have proved that the Tax Assessment was indeed and not merely presumably served on the Applicant. The Director General (Inland Revenue) however did not submit any evidence which satisfactorily contradicted or at least cast doubt on that claimed by the Applicant under cross examination but merely persisted with the submission that once the envelope containing the Tax Assessment re-issued and re-sent 2012 was not returned to the Capital Transfer Duty Division, then that Tax Assessment must have been served on the Applicant.

The Tribunal held that, in view of the declarations by the Applicant under cross examination the Director General (Inland Revenue) should have, to say the least, summoned a representative of the Universal Service Provider, in Malta's case Maltapost, in order to confirm or otherwise service on the Applicant of the Tax Assessment re-issued and re-sent to him by registered mail. Even though Regulation 33 of Subsidiary Legislation 254.01 applies without prejudice to any other law regulating receipts for registered postal articles, which would therefore include Section 61 of Chapter 364 of the Laws of Malta, in view of the claims made by the Applicant, that is that he has never been served with the Tax Assessment re-issued and re-sent to him the Tribunal reiterated that the Director General (Inland Revenue) should have summoned a representative of the Universal Service Provider to give evidence regarding the service or otherwise of the said Tax Assessment, a witness who however was never summoned.

In the light of the above and in default of satisfactory evidence, as opposed to mere presumptions, by the Director General (Inland Revenue) to counter claims made by the Applicant under cross examination, the Tribunal held that it was not at all convinced and satisfied that the Applicant was indeed served with the Tax Assessment in June 2012.

Rikors Nru. 200/11VG Don Rua Developments Limited Vs Kummissarju tat-Taxxi

The Tribunal upheld an appeal from an assessment to duty because, in calculating the value of a property, the Department had ignored that the property had been transferred without vacant possession. The Tribunal awarded costs against the Department because the fact that the property was not subject to vacant possession had been brought to the Department's attention at objection stage.

Rikors Nru. 53/09VG Malcolm Pace Debono Vs Kummissarju tat-Taxxi

The Tribunal upheld an appeal from an assessment to duty because it found that the Government architect's valuation did not reflect the property's actual market value.

Rikors Nru. 320/13VG Paul Borg u Alexandra Borg Vs Direttur Generali (Taxxi Interni)

The Tribunal rejected an appeal to an assessment to duty. Appellant argued that his case fell within the parameters of the recently introduced procedure contemplated in S.L. 364.04 of 2014. He argued that because he had obtained a professional valuation, the Department was justified in issuing an assessment. The Tribunal held that appellant's case referred to an assessment which had been raised before the entry into force of the law and consequently was not covered by the special procedure introduced in 2014. In addition, the Tribunal agreed with the Department's valuation report.

Rikors Nru. 237/12VG XXX Vs Kummissarju tat-Taxxa fuq il-Valur Mizjud

The case involved an appeal against VAT penalties. According to the Tribunal, taxpayer had not submitted the necessary adjustment form and, for this reason, rejected the appeal. During final submissions, taxpayer raised issues of proportionality but the Tribunal refused to delve into the matter because issues of proportionality had not been mentioned in the original appeal application.

Xxx Vs Kummissarju tat-Taxxa fuq il-Valur Mizjud (17/5/2016)

This VAT case was published without a case number. It involved an intensive Tax Compliance Unit investigation in the affairs of a professional who was duly authorised to hold third parties' (clients') monies. It transpired that taxpayer received fees in his clients' account too. In the course of the investigation, the TCU asked taxpayer for information relating to his clients' account. Taxpayer refused to provide this information citing his obligations under the Professional Secrecy Act. Taxpayer questioned why he had been selected for investigation arguing that the assessments that had been raised were arbitrary and untenable. In taxpayer's opinion the TCU investigation had been a 'fishing expedition'.

In the course of the case, a number of procedural issues arose and the crux of the matter revolved around the TCU's right to access information relating to the clients' account. The Tribunal held for the tax department concluding that the way taxpayer chose to manage his affairs implied that he put himself in a self-inflicted precarious position. According to the Tribunal, taxpayer had put himself in a situation to be unable to provide the evidence needed to rebut the authorities' arguments. Therefore the Tribunal held for the tax authority.

3.2 Judgments of the First Hall Civil Court

Citazzjoni Nru: 876/2012 AF II-Kummissarju tat-Taxxi vs L-Avukat Dr. Anthony Philip Farrugia

This case involved an action Pauliana filed by the Commissioner for Revenue aimed at rescinding a transfer of property which in the opinion of the Commissioner was intended to defraud creditors. The Commissioner's action failed because the Commissioner had failed to prove that taxpayer was insolvent.

Referenza Kostituzzjonali Nru: 57/2012 AF II-Pulizija (Spettur Anthony Agius) vs Angelo Abela

This constitutional reference takes the principles established in John Geranzi v. PM and Angelo Zahra v. PM a step further. The case involved a criminal prosecution for failure to settle FSS. Administrative penalties had also been issued against the accused. Predictably, in line with the judgment in Zahra the Court found a violation of the non bis in idem principle. In addition, it also found that delays in prosecuting the accused were in breach of his right to justice within a reasonable time.

Rik. Nru. 8/11JRM Anthony P. FARRUGIA vs L-ONOREVOLI PRIM MINISTRU; l-Avukat Ġenerali; il-Kummissarju tat-Taxxa fuq il-Valur Miżjud u b'degriet tat-22 ta' Mejju, 2012, l-isem inbidel għal Direttur Ġenerali VAT; u l-Kummissarju tal-Pulizija

The facts of this case were quite similar to those in all the non bis in idem judgments discussed previously (Angelo Zahra, David Mifsud, Robert Ciantar and Angelo Abela). The Court found a violation of the non bis in idem principle but for reasons which are not quite in line with those of previous judgments. Both the taxpayer and AG filed an appeal.

Rikors Numru : 27/2016 JPG Kummissarju tat-Taxxi vs Yoranne Gael Gabriel Kerignard (Karta tal-identita' Nru: 81517A)

This case involved an application filed in terms of the Mutual Assistance Directive by the Commissioner for Revenue on behalf of France. The amounts involved were material. The application was notified by publication. Taxpayer did not contest the application and the Court proceeded to proceed by issuing an executive title against taxpayer.

Rikors Mahluf Numru: 870/15 LM Reeves Ricky Alan vs. Kummissarju tat-Taxxi

This judgment is very interesting because it is Malta's first important judgment on the Mutual Assistance Directive. Unlike previous judgments, it involves a successful challenge to an action brought under the Directive.

The case involved a claim filed by the HMRC for around EUR250,000. The Commissioner for Revenue had proceeded to file an application to the Competent Court and the Competent Court upheld the application. The Revenue's application had been 'served' on taxpayer at an address provided by the HMRC which was the address of a Maltese Football Club. Taxpayer became aware of these proceedings only at a later stage at a stage when the executive title obtained in terms of the Directive was in the process of being enforced against him.

Taxpayer filed an action in the First Hall Civil Court requesting an order for restitution in integrum (a cancellation of the executive title obtained consequent to the application filed by the Commissioner on behalf of the HMRC).

Under the Mutual Assistance Directive, a taxpayer's right to challenge a claim served in terms of the Directive is severely limited. In this case, taxpayer challenged the executive title obtained under the directive under the following grounds:

- (a) The application had not been notified according to the procedure laid down by Maltese law;
- (b) The application was in violation of the ECHR because it referred to the enforcement of multiple penalties for the same infringement (the HMRC's claim referred to a number of penalties for the same default).

The Court did not discuss matter (b) limiting itself to matter (a). In the context of the Mutual Assistance Directive matters of notification become quite relevant because issues of procedure must be regulated by domestic law. Whereas the merits were governed by UK law, matters of form were governed by Maltese law.

Maltese law on notification is quite particular. In brief, Maltese law provides that a person can be notified with a writ only at his residential address or his place of work. In this particular case, the taxpayer successfully brought evidence that he neither resided nor worked at the address that had been indicated by the HMRC. In addition, he had not authorised anyone at the Football Club to accept writs on his behalf. Consequently, it transpired that the executive title the First Hall Civil Court had issued versus the taxpayer had been issued on the basis of an irregular notification. Therefore, the Court felt that it had to order the extraordinary remedy of restitution in integrum ordering a rescission of the first judgment ordering the issuance of the executive title, awarding costs against the tax authorities.

The Court was quite critical of the way the Registry of Courts is implementing procedures under the Directive. It suggested that the way the Mutual Assistance Directive was being implemented did not incorporate the necessary safeguards relating to fair hearing. The Court commented that:

‘Din il-Qorti hija konxja li hemm prattika forensi li fi proċeduri bħal dawn fejn ir-rikors u d-dokument imsemmija jiġu notifikati flimkien maddigriet li jilqa’ t-talba, kif sar f’dan il-każ. B’danakollu, fil-fehma ta’ din il-Qorti din il-prattika mhix waħda ritwali, għax loġikament l-ewwel għandu jkun hemm in-notifika tar-rikors u tad-dokument lill-intimat imbagħad wara jingħata d-digriet. Ir-regolamenti tal-Avviż Legali inkwistjoni ma jgħidux li għandu jiġi innotifikat id-digriet, imma r-rikors u d-dokument.

Li kieku l-leġiżlatur ma kienx il-ħtieġa li l-ewwel jiġu notifikati r-rikors u d-dokument, kien jesiġi li jiġi nnotifikat id-digriet, u mhux li jiġu notifikati r-rikors u d-dokument.

Illi huwa r-Regolament 12 tal-Avviż Legali 153 tal-2012 li jikkontempla l-possibbiltà li l-parti interessata li tħossha li hija aggravata inter alia bilvalidità tan-notifika magħmula minn awtorità kompetenti tal-Istat Membru rikjest tista’ tfittex rimejdu quddiem il-qorti kompetenti skont is-subartikoli (2) u (3).

Illi mhux l-ewwel darba fi proċeduri simili quddiem din il-Qorti kif ippreseduta li jkunu ġew ikkontestata mill-parti interessata, wara li jsiru l-verifiki meħtieġa mal-awtoritajiet kompetenti barranin, l-ammont ta’ taxxa mitluba ġie ridott jew saħansitra ir-rikors ġie ċedut.² Għalhekk ilprudenza titlob f’każijiet bħal dawn illi l-ewwel ir-rikors u l-istrument li jippermetti l-infurzar jiġu notifikati lill-intimat, tidhol ir-risposta, isir is-smiġh u fl-aħħar nett jingħata d-digriet u mhux id-digriet joħroġ kontestwalment mal-ordni tan-notifika.’

3.3 Judgments of the Constitutional Court

Rikors kostituzzjonali numru 87/2013 JPG Federation of Estate Agents (Numru ta' Registrazzjoni APA-53) v. (1) Direttur Ġenerali (Kompetizzjoni) et

This non-tax case is based on principles established in tax cases and is a case which is relevant to tax. It confirms that a tribunal seized with jurisdiction to hear cases involving administrative penalties which are deterrent and punitive is governed by Article 39 of the Constitution under its criminal head.

3.4 Judgments of the Court of Appeal

Appell Civili numru:- 193/2012/1 Frank Spiteri (I.D. 255006L) vs Director General (Inland Revenue)

In a case involving an assessment to duty, taxpayer challenged the assessment, inter alia, because the assessment had been incorrectly served (by being notified to a wrong person, a tenant of his). Meanwhile, the Department treated the tax as being final and conclusive issuing an executive title. The Tribunal refused to take cognisance of the case because, in its opinion, it was no longer seized with jurisdiction to hear the case (the issuance of the executive title implied that, procedurally the tax was not subject to appeal). The Court of Appeal confirmed the decision of the Administrative Review Tribunal.

3.5 Judgments of the CJEU

Case C40/15 (Minister Finansów v Aspiro SA, formerly BRE Ubezpieczenia sp. z o.o.)

A Polish company providing insurance claims settlement services in the name and on behalf of an insurance company was claiming that its services were VAT exempt. The Polish tax authorities disagreed with the company and the matter was referred to the European Court. The Court stated that the expression 'insurance transactions' covers not only transactions carried out by the insurers themselves and, is, in principle sufficiently broad to include the provision of insurance cover by a taxable person who is not himself an insurer but, in the context of a block policy, procures such cover for his customers by making use of the supplies of an insurer who assumes the risk insured. However, such transactions necessarily imply the existence of a contractual relationship between the provider of the insurance service and the person whose risks are covered by the insurance, that is to say, the insured party.

The Court held that a provider of services such as Aspiro does not itself undertake to ensure that the insured person is covered in respect of a risk and is not connected in any way to the insured person through a contractual relationship. Consequently, even though the claims settlement service at issue is an essential part of an insurance transaction in that it includes, in the present case, the determination of liability and the amount of damage, and the decision to pay or refuse compensation to the insured person, it must be held that the service — provided moreover to the insurer — does not constitute an insurance transaction, within the meaning of Article 135(1)(a) of the VAT Directive.

The Court concluded that act of merely entrusting the handling of claims to a third party, without that outsourcing being linked to the finding of prospective clients and their introduction to the insurer with a view to the conclusion of insurance contracts, is not exempt from VAT. Claims settlement services such as those undertaken by Aspiro provided by a third party in the name and on behalf of an insurance company, do not fall within the exemption laid down by that provision.

Case C419/14 (WebMindLicenses Kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság)

WML is a company registered in Hungary. In September 2009, it acquired free of charge from a Portuguese company named Hypodest know-how which, on the very same day, it licensed to another Portuguese company named Lalib. The nature of the know-how was somewhat unusual summarised by the Court as consisting in the knowledge needed to enable 'a website to be operated through which erotic interactive audiovisual services in which individuals throughout the world took part in real time were supplied'.

The tax authorities investigated WML for years 2009, 2010 and 2011 and the administrative authority held that WML had under-declared its supplies. WML was condemned to pay material tax fines and interest because the first-tier authority held that the transfer of WML's know-how to Lalib did not correspond to a genuine economic transaction as, in reality, the know-how was exploited by WML. The first tier-authority held that in reality, the exploitation of the know-how had taken place in Hungary and was taxable in Hungary.

WML appealed the decision of the First-Tier Authority to the National Tax and Customs Authority. WML's appeal was upheld in part but, with respect to exploitation of the know-how, the National Tax and Customs Authority agreed with the first-tier tax authority. According to the National Tax Authority, WML had committed an abuse of rights aimed at circumventing Hungarian tax law, which was less advantageous than Portuguese tax law. In support of its conclusion, the National Authority pointed out that WML had not genuinely intended to transfer to Lalib the use of the profits from the exploitation of know-how. The Authority referred to the close personal ties between the proprietor of the know-how and the subcontractors actually operating the website. The National Authority held that the Portuguese company was irrationally managed, deliberately run at a loss and had no operating capability of its own. In arriving to its conclusions, the National Tax Authority had used evidence obtained without WML's knowledge and it transpired that the National Tax Authority had used evidence gathered in the course of a parallel criminal tax investigation.

Predictably, WML was dissatisfied with the conclusions of the National Tax and Customs Authority, filing an action to cancel the assessment. WML argued that the Authority had used evidence that had been obtained incorrectly adding that, contrary to the National Authority's conclusion, the licensing agreement was a genuine commercial transaction. The case went to the Administrative and Labour Court of Budapest which decided to stay its proceedings referring seventeen questions to the CJEU.

In brief, the most important questions referred to the European Court were the following:

- (a) For the purposes of determining whether a transaction is fictitious, has no real financial or commercial content and is only intended to secure a tax advantage, is it relevant that the manager and sole owner of the commercial company is the natural person who created the know-how transferred by means of the licensing agreement?
- (b) For the purposes of determining whether there is an abusive practice, is it relevant that this natural person exercises or may exercise influence informally over the running of the commercial company which acquired the licence and over the decisions of that company?
- (c) Is a contractual arrangement wherein a taxable person effectively shifts the VAT burden to another taxable person in a lower tax jurisdiction to be treated as an abuse of freedom of establishment and the freedom to supply services?
- (d) Does Article 8 (2) of the European Convention for the Protection of Human Rights and Fundamental freedoms in conjunction with Article 52 of the Charter prevent the use in the context of an administrative tax investigation conclusions drawn from information obtained in a parallel criminal investigation without the knowledge of the person concerned? Does the tax authority have an obligation to provide access to such information?

The Court referred to the judgment in *Halifax and Others* (C-255/02, EU:C:2006:121) when the Court held that ‘in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the VAT Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions and, secondly, it is apparent from a number of objective factors that the essential aim of the transactions concerned is solely to obtain that tax advantage’. The Court noted that the place where a supply is taxed is determined on the basis of an objective test and applies without regard to the purpose or the results of the transactions concerned and without it being necessary for the tax authorities to examine the intention of the taxable person. The shifting of the place of supply to a Member State with a lower VAT rate ‘cannot be regarded in itself as a tax advantage the grant of which is contrary to the objectives of the VAT Directive.’ The Court added that the position is different if the services are in fact supplied in the Member State with a higher VAT rate giving rise to a situation which is contrary to the objective of the provisions of the VAT Directive. The Court referred to the judgment in *Welmory* (C-605/12, EU:C:2014:2298) which held that the objective of the place of supply rules is to avoid conflicts of jurisdiction and non-taxation. It proceeded to examine whether the licensing agreement was an abusive practice designed to benefit from the lower VAT rate in Madeira.

The Court held that to determine whether the licensing agreement was a wholly artificial arrangement it must use objective factors such as the licensee’s physical use of premises, staff and equipment. It noted that Lalib was separate from WML and was neither a branch nor a subsidiary of WML. In addition, WML was paying VAT in Portugal.

It was up to the referring Court to determine whether Lalib possessed an appropriate structure in terms of premises and human and technical resources and whether it did not engage in that economic activity in its own name and on its own behalf, under its own responsibility and at its own risk.

The Court proceeded to analyse the role of shareholder of WML and its impact on ‘substance’. The CJEU noted that the fact that the manager and sole shareholder of WML was the creator of WML’s know-how, that that he exercised influence or control over the development and exploitation of that know-how and the supply of the services was not decisive.

If an abusive practice is found, the transaction and its place of supply would need to be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that practice. Place of supply would need to be rectified resulting in an adjustment of tax in the Member State in which the place where those services have actually been supplied is located. In addition, the Member State examining the case would have a duty to send a request for information to the other Member state.

The CJEU acknowledged that the question whether an abusive practice has taken place must be examined in accordance with the rules of evidence of national law. EU law does not preclude the tax authorities from being able in the context of an administrative procedure, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained in the context of a parallel criminal procedure that has not yet been concluded, provided that the rights guaranteed by EU law, especially by the Charter, are observed. It is incumbent upon the national court which reviews the legality of the decision founded on such evidence adjusting VAT to verify, first, whether the interception of telecommunications and seizure of emails were means of investigation provided for by law and were necessary in the context of the criminal procedure and, secondly, whether the use by the tax authorities of the evidence obtained by those means was also authorised by law and necessary. It is incumbent upon that court, furthermore, to verify whether, in accordance with the general principle of observance of the rights of the defence, the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it.

If the national court finds that the taxable person did not have that opportunity or that that evidence was obtained in the context of the criminal procedure, or used in the context of the administrative procedure, in breach of Article 7 of the Charter, it must disregard that evidence and annul that decision if, as a result, the latter has no basis. That evidence must also be disregarded if the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an inter partes procedure, that it was obtained in accordance with EU law.

Case C607/14 Bookit Ltd v Commissioners for Her Majesty's Revenue and Customs

The CJEU held that Article 135(1)(d) of the VAT Directive must be interpreted as meaning that the exemption for transactions concerning payments and transfers is not applicable to a 'card handling' service, such as that at issue in the main proceedings, supplied by a taxable person, the provider of that service, where an individual purchases, via that service provider, a cinema ticket which the service provider sells for and on behalf of another entity, and which the individual pays for by debit card or by credit card.

Case C130/15 (Commissioners for Her Majesty's Revenue and Customs) v National Exhibition Centre Limited

The CJEU held that Article 13B(d)(3) of the VAT Directive must be interpreted as meaning that the exemption from value added tax which is provided in respect of transactions concerning payments and transfers does not apply to a service described as 'processing of payment by debit or credit card', such as that at issue in the main proceedings, carried out by a taxable person, the provider of that service, where an individual buys, via that provider, a ticket for a show or other event which the provider sells in the name and on behalf of another entity, which that individual pays for by debit or credit card.

Case C244/15 (European Commission v Hellenic Republic)

The CJEU declared that, by enacting and maintaining in force legislation which provides for an exemption from inheritance tax relating to the primary residence, which applies solely to nationals of EU Member States who are resident in Greece, the Hellenic Republic failed to fulfil its obligations under Article 63 TFEU and under Article 40 of the Agreement on the European Economic Area of 2 May 1992.

Case C300/15 (Charles Kohll, Sylvie Kohll-Schlesser v Directeur de l'administration des contributions directes)

The CJEU held that Articles 21 and 45 TFEU must be interpreted as precluding a national tax law which restricts the eligibility for the pensioners' tax credit to taxpayers in possession of a tax deduction form.

Case C48/15 (État belge, SPF Finances v NN (L) International SA, formerly ING International SA, successor to the rights and obligations of ING (L) Dynamic SA)

The CJEU held that Articles 2, 4, 10 and 11 of Council Directive 69/335/EEC concerning indirect taxes on the raising of capital must be interpreted as not precluding legislation of a Member State imposing an annual tax on undertakings for collective investment which makes undertakings for collective investment governed by foreign law marketing units in that Member State subject to that tax.

Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), read, if appropriate, in conjunction with Article 10 EC and Article 293, second indent, EC, must be interpreted as not precluding the legislation of a Member State imposing an annual tax on UCIs which makes UCIs governed by foreign law marketing units in that Member State subject to that tax, provided that that legislation is applied in a non-discriminatory way.

The CJEU held that Article 56 EC must be interpreted as not precluding the legislation of a Member State imposing an annual tax on UCIs which makes UCIs governed by foreign law marketing units in that Member State subject to that tax.

Conversely, Article 49 EC must be interpreted as precluding a national provision, such as Article 162(2) of the Belgian Inheritance Tax Code by which a Member State imposes a specific penalty, namely the prohibition, ordered by a court, of making future investments of its units in that Member State, on UCIs governed by foreign law in the event of non-compliance by the latter with the obligation to file the annual declaration necessary for the recovery of a tax on UCIs or in the event of non-payment of that tax.

3.6 Judgments of the ECtHR

CASE OF GUBERINA v. CROATIA (Application no. 23682/13)

The case involved eligibility to an exemption from Real Property Transfer Tax Act. The exemption applied to citizens who bought their first real property to solve their housing needs. Applicant complained that he was discriminated against because the tax exemption rules failed to distinguish his situation from the general situation falling under the relevant provisions of the tax exemption. Taxpayer contended that the exemption framework did not take into account the additional infrastructure required by persons with special needs.

Whilst conceding that, in designing tax policies, state signatories have a wide margin of appreciation the ECtHR held that in any case, however, irrespective of the scope of the State's margin of appreciation the final decision as to the observance of the Convention's requirements rests with the Court. In addition, it held that, in cases of unequal treatment, the rule of burden of proof is on the State. Once the applicant has shown a difference in treatment, it is for the Government to show that it was justified.

The Court found that Croatia had failed to bring an objective and reasonable justification for its failure to take into account the inequality pertinent to the applicant's situation when making an assessment of his tax obligation. The Court held that there had been a violation of Article 14 (discrimination) in conjunction with Article 1 of Protocol No. 1 (right to property).

CASE OF RASUL JAFAROV v. AZERBAIJAN (Application no. 69981/14)

Applicant (a Human Rights lawyer) alleged that his arrest and pre-trial detention had not been justified and had been carried out in bad faith, that his right to freedom of assembly had been breached, and that his rights had been restricted for purposes other than those prescribed in the Convention. Amongst others, applicant had been investigated for aggravated tax fraud. The ECtHR concluded that the very particular circumstances of the case indicated that the actual purpose of the measures taken against applicant was to silence and punish the applicant for his activities in the area of human rights. In the light of these considerations, the Court found that the restriction of the applicant's liberty was imposed for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence. The Court considers this sufficient basis for finding a violation of Article 18 of the Convention, taken in conjunction with Article 5.

4. Important Guidelines

FSS Update 2016

The Commissioner for Revenue published an FSS Update entitled Update 2016. It incorporates additions to the FSS Rules. The main changes refer to the following matters:

- (a) The Maternity Fund: Employers in the private sector are entitled to a reimbursement of the salary of the 14 weeks maternity leave paid to their employees. Private sector employers are obliged to pay a contribution for each employee to the maternity fund. This contribution is to be paid every month to the Inland Revenue Department through the FS5 form. Consequently a new line has been added in the FS5 form, indicating the amount paid by the employer towards this fund. The FS3 and FS7, together with the FS5 payment form have been updated to incorporate the Maternity Leave contributions.
- (b) The 2016 Tax Rates: For 2016, employees whose tax is computed by using the 'single' tax rates, and who throughout this year will only be receiving employment income not exceeding €9,300 will not be taxed.

New income tax rates for 2016 and other information

A guideline published by the Revenue Department announces that the department has updated the "FSS-FBT Spreadsheet" which may be downloaded from the department's website. Monthly FS5 payments may be paid by using IR Services on-line.

Guidelines for the correction of a tax return by persons registered under article 10

On 25th April the VAT Department issued a guideline that explains the changes in the treatment of corrections to VAT returns submitted by persons registered under article 10. As from the 1st of May 2016 corrections to a VAT return would only be possible if made on the form prescribed in terms of Legal Notice 128 of 2016. Such prescribed form would be available from the VAT Department Offices or it could be downloaded from the VAT Department's website at vat.gov.mt.

Aircraft Leasing Guide GUIDELINES REGARDING VAT TREATMENT OF AIRCRAFT LEASING

On 5th April 2016 the VAT Department published a guideline which supersedes a guideline published in October 2012. The guideline determines how the use of aircraft within EU airspace is calculated. The estimated percentage portion of the lease based on the time that the aircraft is used in the airspace of the EU is calculated on the basis of a recently drawn up expert technical study. The standard rate of VAT of 18% is applied on the established percentage of the lease, deemed to be related to the use of the aircraft in EU airspace. The table below indicates the established percentage portions according to the type of aircraft:

Aircraft type by Range (KM)	% of lease taking place in the EU	Computation of VAT
0 – 2,999	60%	60% of consideration X 18%
3,000 – 4,999	50%	50% of consideration X 18%
5,000 – 6,999	40%	40% of consideration X 18%
7,000 – upwards	30%	30% of consideration X 18%

For the computation to apply, a number of conditions must be met:

- The leasing agreement shall be between a lessor who is established in Malta and a lessee who is also established in Malta and who would not be eligible to claim input tax in respect of the lease;
- The lease agreement shall not exceed a period of 60 months and the lease instalments shall be payable every month;
- The Commissioner for Revenue may require the lessor to submit details regarding the use of the aircraft;
- Prior approval must be sought in writing from the VAT Department and each application will be considered on its own merits. Furthermore, the Commissioner for Revenue may impose other conditions which he may deem appropriate;

If after the end of the lease the lessee exercises the option to purchase the aircraft, a VAT paid certificate will be issued only if all the VAT due has been fully paid.

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