



MALTA TAX LAW UPDATE

Update 21

EDITOR'S NOTE

The last three months have witnessed a number of major developments. In July, the EU Council formally adopted the Anti-Avoidance Directive, a legal instrument that will lead to major changes to our Income Tax law. Meanwhile, our Constitutional Court has delivered a landmark judgment that is bound to change the whole tax collection system leading to major amendments to the VAT Act and, in future, to the Income tax Management Act too.

The European Court of Human Rights began delivering judgments on exchange of information. Important guidelines have been created and other important judgments are expected in the area of transparency.

For the first time, the Court of Appeal has reversed a tax judgment of the Administrative Review Tribunal and the case has been decided in favour of the taxpayer.

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1. LEGISLATIVE CHANGES

1.1 Acts of Parliament

None

1.2 Legal Notices

L.N. 231 of 2016 INCOME TAX ACT (CAP. 123) Deduction (Electric Vehicles) (Amendment) Rules, 2016

With respect to electric vehicles, the tax deduction is being increased from 125% to 150%. A deduction will be allowed with respect to Hybrid Vehicles too. The deduction for hybrid vehicles will be of 125%. In any case, the total deduction claimed under the rules cannot exceed €40,000

in the case of an electric vehicle and €30,000 in the case of a hybrid vehicle.

"Electric vehicle" is defined as meaning a vehicle that derives its motive power exclusively from an electric motor.

"Hybrid vehicle" is defined as meaning a vehicle having at least two different energy converters and two different energy storage systems for the purpose of vehicle propulsion.

L.N. 232 of 2016 INCOME TAX ACT (CAP. 123) Seed Investment Scheme (Income Tax) Rules, 2016

These rules grant tax relief to natural persons resident in or operating in Malta investing in start-up businesses. The rules shall be deemed to have come into force on the 1st January, 2016 in respect of investments made as from basis year 2016 and thereafter, and shall have effect until the 31st December, 2018 or upon such later date as may be determined by the Minister responsible for finance by order published in the Gazette.

The rules apply to qualifying investors who subscribe to fully paid up equity shares at par in a qualifying company on their own behalf. Their initial investment must leverage other investment in the qualifying company involving the sharing of risks and rewards in proportion to the investment.

Any company wishing to obtain the status of a "qualifying company" shall lodge an application to the competent entity for a formal determination and for issue of the relative compliance certificate in terms of these rules, which application shall be made on such form or in such manner as the competent entity may require and shall contain the information and documents therein requested:

Investments made in a qualifying company and qualifying in terms of the Rules shall, in aggregate, not exceed €750,000 per qualifying company.

Any natural person wishing to obtain the status of a "qualifying investor" in relation to an investment in a qualifying company shall lodge an application to the competent entity for a formal determination and for issue of the relative compliance certificate in terms of these rules, which application shall be made on such form or in such manner as the competent entity may require and shall contain the information and documents therein requested:

In order to qualify as being eligible for benefits under these rules, and subject to the satisfaction of the competent entity in this respect, a qualifying investor shall:

(a) continue to hold the investment in the qualifying company for a period of not less than three years subsequent to the subscription by the qualifying investor to such equity shares;

(b) not be connected to the qualifying company prior to the subscription to the equity shares.

A qualifying investor shall invest in the qualifying company within a period of two years from when the qualifying company is first issued with a compliance certificate for the status of a 'qualifying company' by the competent entity. Any subscription of shares made in a qualifying company subsequent to this date shall not entitle the investor for benefits in terms of these rules. Nothing in the rules prohibits an investment in a qualifying company from being made in instalments over a period of more than one year, as long as the commitment to invest, subject to the achievement of defined targets or criteria, is made within the two year period referred to above. In such instance, the qualifying investor shall avail of the tax benefits under these rules as the investment, or part thereof, is made.

Any qualifying investor to whom rule 3 applies shall benefit from a tax credit equivalent to a sum amounting to 35% of the aggregate value of the investments made by such investor in one or more qualifying companies, so however that the total tax credit applicable to any such investor shall not exceed €250,000 per annum. Such tax credit shall be set off against the tax due by the qualifying investor in respect of any income or gains brought to charge to tax in the year of assessment immediately following the basis year during which the investment is made.

Any tax credit available in terms of the Rules shall not give rise to a right for any tax refund. Any loss incurred in any year of assessment by the qualifying investor from the disposal of an investment made by him in a qualifying company or from the liquidation of such qualifying company shall not be allowed as a deduction in respect of income or gains chargeable under articles 4 and, or 5 ITA.

Where the investment in a qualifying company is disposed of within three years from the date of subscription to the equity shares by the qualifying investor, and where the qualifying investor qualified for benefits in terms of these rules relative to such investment, the tax due in respect of the income derived from such disposal shall be calculated on the basis of the higher of the market

value of such investment and the consideration received by the qualifying investor and shall be charged to tax at the applicable rate as set out in article 56 ITA. For the avoidance of doubt, the

amount on which tax is chargeable in terms of this sub-rule shall not be reduced in any manner by the cost of acquisition of the investment, nor by any deduction or credit whatsoever.

Where the competent entity or the Commissioner is in receipt of information that, had it been available during the application process lodged, would have resulted in the status of a qualifying company being refused or alternatively in the status of a qualifying investor being refused, then all amounts invested by qualifying investors in the said qualifying company or by that particular qualifying investor, as the case may be, and which would have benefited from a tax credit as outlined in rule 3 shall be brought to charge under articles 4 and 5 ITA, together with interest at the rate of one per cent for every calendar month of the amount availed of as a tax credit by the qualifying investor.

"Qualifying activities" are defined as meaning any activity the income derived from which is chargeable under the provisions of article 4(1)(a) ITA, other than the carrying out of any one of the excluded activities.

"Qualifying company" is defined as meaning an SME that satisfies the following cumulative conditions:

- (a) is incorporated in Malta or controlled and managed from Malta or has a place of business in Malta;
- (b) has been in existence and engaged in carrying out qualifying activities for a period not exceeding three years following its first commercial sale;
- (c) is not listed on any recognised stock exchange;
- (d) has a maximum of ten employees;
- (e) has gross assets of not more than €250,000 immediately preceeding the issue of equity shares to the qualifying investor, and that has been duly issued with the relative compliance certificate by the competent entity in terms of these rules:

Undertakings in difficulty, undertakings which are subject to an outstanding recovery order, other undertakings which are expressly excluded from receiving such aid in terms of the Regulation, as well as undertakings which, directly or indirectly, hold shares in any company which carries out any excluded activities, do not fall within the purport of the definition of qualifying company.

"Excluded activities" is defined as meaning any one of the following activities:

- (a) dealing in immovable property, shares, securities and, or other financial instruments;
- (b) dealing in goods other than in the normal course of business;
- (c) carrying on banking, insurance or any other activity covered by the Investment Services Act, the Banking Act, and the Financial Institutions Act;
- (d) providing legal, accounting or other professional services;
- (e) activities relating to the development of immovable property;
- (f) receiving royalties or licence fees;
- (g) operating or managing hotels, hostels, guest houses or residential care homes;
- (h) carrying on activities in connection with the generation of electricity and other energy sources;
- (i) the holding of shares, whether directly or indirectly, in any company which carries out any of the activities listed in any one or more of paragraphs (a) to (h).

L.N. 247 of 2016 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax Act (Amendment of Fifth Schedule) Regulations, 2016

This Legal Notice aligns the VAT Act to the VAT Directive. Previously the exemption for educational services contemplated in the VAT Act was much more restrictive than its equivalent in the Directive.

Legal Notice 24 removes this anomaly substituting paragraph (5) of item 12 in Part Two of the Schedule by the following:

"(5) The supply of goods and services where the said supply is connected with and essential for the supply of services referred to in paragraphs (1), (2), (3) and (4) by the school, institution, university, teacher or organisation, as the case may be, supplying the said services, or supplied by any other organisation recognised by the Commissioner as an organisation which has similar objectives."

L.N. 262 of 2016 INCOME TAX ACT (CAP. 123) Recognised Pension Commutation (Exemption) Rules, 2016

This Legal Notice refers to the exemption relating to commutations of pensions, an exemption that has recently been restricted. Recent amendments to the ITA had anticipated the enactment of a Legal Notice regulating the matter.

Rule 3 of the LN prescribes that the total amount of capital sum received by way of scheme which is exempt from the tax under the provisions of article 12(1)(h) of the Act shall amount to 30% of the total pension.

The rules above apply irrespective of whether the said capital sum is paid as one lump sum or in a series of tranches within one year from retirement date as prescribed under the Retirement Pensions Act, including any regulations or Pension Rules issued thereunder.

The retirement scheme administrator shall provide the Commissioner with the information in its possession regarding sums paid to a member of a recognised retirement scheme as the Commissioner may require for the purpose of administration of these rules.

"Recognised retirement scheme" is defined as meaning a retirement scheme licensed, registered or otherwise authorised under the Retirement Pensions Act, and which qualifies as a Recognised Overseas Pension Scheme in accordance with the Finance Act 2004 of the Parliament of the United Kingdom.

"Retirement date" is defined as meaning the date when the payment of retirement benefits commences, as prescribed in terms of the Retirement Pensions Act, including any regulations or Pension Rules issued thereunder.

"Retirement scheme administrator" is defined as meaning an entity appointed to perform duties in connection with the overall operation and the ordinary and day-to-day operations of a recognised retirement scheme and which is so licensed, registered or otherwise authorised under the Retirement Pensions Act, including any regulations or Pension Rules issued thereunder.

"Total pension" is defined as meaning the total value of the assets held by a recognised retirement scheme for a member and which are available to provide retirement benefits to the member, such value being determined on the member's retirement date.

L.N. 283 of 2016 INCOME TAX ACT (CAP. 123) Deductions (Pharmacy Of Your Choice) (Amendment) Rules, 2016

This LN extends the purview of the POYC rules. As from year of assessment 2017, the rules shall also apply to any person carrying on a business through a pharmacy outlet who incurs capital expenditure or labour expenditure.

"Capital expenditure" is defined as meaning expenditure for the acquisition of equipment (including a motor vehicle), as approved by the Standing Advisory Committee, which equipment shall be used for the home delivery scheme as part of the Pharmacy of Your Choice scheme.

"Labour expenditure" is defined as meaning additional labour costs, as approved by the Standing Advisory Committee, for the purposes of the home delivery scheme as part of the Pharmacy of Your Choice scheme.

Rule 4A is being added to the Rules. Rule 4A prescribes that where a qualifying person incurs qualifying expenditure after the 1st January, 2016, a tax credit equivalent to 100% of the cost incurred with respect to each pharmacy outlet shall be allowed against the said person's tax charge for the relative year of assessment.

The total tax credit available in respect of each pharmacy outlet shall not exceed €14,000. No tax credit under Rule 4A may be claimed for any expenditure in respect of which a deduction has been claimed under rule 4.

No tax credit under 4A may be claimed in respect of any expenditure incurred after the 31st December, 2019. The deduction or tax credit provided for by these rules shall only be allowed where the works related to the expenditure have been completed or the expenditure ascertained.

2 Bills

None

3 Judicial Decisions

3.1 Judgments of the ART

Rikors Nru. 185/12VG XXX Vs Kummissarju tat-Taxxa fuq il-Valur Mizjud

This case involved a small business that was closed down. An application for VAT de-registration was filed but processing it took some time. The VAT Department investigated the taxpayer concluding that the taxpayers owed it VAT on the basis of a deemed mark-up on sales of 79%. During the investigation stage, taxpayer failed to produce documents .

The Tribunal was critical of taxpayer's failure to keep proper books and records. It was also critical of the VAT Department's delay in processing VAT de-registration. The ART concluded that the 79% mark-up was too high reducing it to a conservative 47% mark-up. The ART held that one cannot apply an arbitrary mark-up right across the board; one cannot expect a small outlet in a village to apply a mark-up used by a high end outlet. The assessment was reduced accordingly.

3.2 Judgments of the First Hall Civil Court

No important tax judgments have been delivered by this Court in this quarter.

3.3 Judgments of the Constitutional Court

Rikors Numru 24/10 JZM David Mifsud v. L-Onorevoli Prim Ministru, L-Avukat Generali, Il-Kummissarju tat-Taxxa fuq il-Valur Mizjud, Il-Kummissarju tal-Pulizija

This lengthy 71 page judgment signals the death knell of Article 83 (3) of the VAT Act. In addition, it settles a number of legal issues relating to administrative penalties. In brief, the bone of contention was whether a person who has been punished with an administrative penalty could be prosecuted criminally for the same infringement. In truth, the Constitutional Court had been clear enough in the case of Angelo Zahra v. PM when it had concluded that punishing a person for a tax offence with an administrative penalty and punishing him a second time with a penalty imposed by the Magistrate's Court for the same violation amounted to a violation of the non bis in idem (double jeopardy) rule.

The case in Mifsud revolved around a provision in the VAT Act which specifically allowed the Commissioner to institute criminal proceedings after imposing an administrative penalty. Mifsud's case involved a direct challenge to Article 83 (3) of the VAT Act which seemed to specifically allow for double jeopardy. Mifsud claimed that Article 83 (3) was incompatible with the ECHR.

The Constitutional Court's judgment is very long and the case was quite complex (taxpayer won at first instance and the judgment was partially reformed at second instance) but the bottom line is that Mifsud won his case; Article 83 (3) was ruled unconstitutional and the Constitutional Court has notified Parliament with this judgment. Given the importance of this judgment, an extract is being reproduced:

“...fil-fehma ta’ din il-Qorti dak li huwa vjolattiv tal-principju tan-ne bis in idem mhumix il-proceduri kriminali wahedhom izda l-fatt li dawn il-proceduri kienu ttiehdu fl-istess zmien li fih il-Kummissarju kien diga` impona fuq l-attur multi amministrattivi sostanzjali ghall-istess nuqqas li kien jifforma l-mertu tal-proceduri kriminali.

78. F’dan l-istadju huwa opportun li jigi ezaminat il-quantum ta’ dawn il-multi amministrattivi imposti fuq l-attur. Fir-risposta taghhom ghar-rikors tal-appell il-konvenuti jissenjalaw li “l-late payment penalty tigi kkalkulata bir-rata ta’ 1% fix-xahar. Madankollu, il-proviso tal-artikolu 28[1] tal-Kap. 406 li ddahhal fl-1 ta’ Jannar 200 jipprovdi li f’kull kaz il-late payment penalty hija capped ghal 250”. Din il-Qorti tosserva fir-rigward li, ghalkemm huwa minnu li permezz tal-Att II tas-sena 2004 l-Artikolu 38 [1] kien gie emendat inter alia bl-introduzzjoni tal-proviso li ghaliha jirreferu l-konvenuti, din il-bidla fil-ligi, li skont l-istess Att kellha tigi fis-sehh fl-1 ta’ Jannar 201031, ma tista’ tkun ta’ ebda konfort ghat-tezi tal-konvenuti, ghaliex meta dahlet fis-sehh l-imsemmija proviso s-sentenzi tal-Qorti tal-Magistrati kienu diga` inghataw u l-effett legali taghhom fuq l-attur kien diga` vigenti.

79. Mill-provi jirrizulta li l-multi amministrattivi li l-attur kien qed jigi mitlub li jhallas mill-Kummissarju kienu jammontaw ghal sommom sostanzjali ta’ flus ...

89. Id-duplicita` tal-proceduri kontra l-attur li rrizultaw f’impozizzjoni ta’ multi amministrattivi u kundanni fi proceduri penali ittiehdu abbazi tal-Artikolu 83[3] fuq citat.

90. Din il-Qorti tosserva li l-ewwel Qorti kienet korretta fil-konkluzjoni taghha li l-Artikolu 83[3] tal-Kap. 406, safejn jippermetti proceduri kriminali b’zieda mal-multi u penali amministrattivi, huwa inkonsistenti mal-Artikolu 4 tas-7 Protokoll tal-Konvenzjoni, in kwantu dak is-subinciz jipprospetta proprju sitwazzjoni bhal dik in dizamina fejn persuna, oltre l-impozizzjoni ta’ multa amministrattiva ghan-nuqqas taghha tigi sottoposta ghal proceduri penali ulterjuri u sentenzjat ghall-istess nuqqas.

Tordna li a kura tar-Registratur tal-Qrati u Tribunali Civili kopja ta’ din is-sentenza tintbaghat lill-iSpeaker tal-Kamra tad-Deputati a tenur tal-Artikolu 242 tal-Kodici ta’ Organizzazzjoni u Procedura Civili.”

3.4 Judgments of the Court of Appeal

Appell Civili numru:- 75/11 AE X (Appellant) vs Kummissarju tat-Taxxi Interni (Appellat)

This is the first tax judgment of the ART that has been reversed on appeal. The case began its life under the BSC. The original appeal application had been submitted to the BSC but, subsequently, the appeal was transferred to the ART. Whilst the appeal was still pending in front of the BSC, the taxpayer submitted all books and records pertinent to the appeal because, at the time, taxpayer had a legal obligation to file their books and records at the BSC. Taxpayer retained evidence that he had submitted all books of and records to the BSC. When the case went to the ART, taxpayer based his case on the classification of the income he had received (viz. the classification of his income as trading income subject to capital allowances). The ART agreed with taxpayer’s legal classification of his income but rejected his appeal because of lack of evidence. It pinpointed that taxpayer had failed to submit his books and records. Taxpayer appealed to the Court of Appeal arguing that his appeal was on a point of law (a failure to apply the onus of proof correctly). Taxpayer argued that there was a mistake on the face of the records resulting in a defective judgment. The Court of appeal held that, as a matter of fact, a receipt proving that taxpayer had submitted books and records was in the Court file implying that, contrary to the ART’s conclusions, taxpayer did produce evidence..

The Court of Appeal found that the fact that the ART did not take vital evidence into consideration amounted to an infringement of the right to a fair trial. The Court of Appeal upheld taxpayer’s appeal ordering a re-hearing of the whole case.

3.5 Judgments of the CJEU

Case C-332/15 (Giuseppe Astone)

The CJEU held that the VAT Directive must be interpreted as meaning that it does not preclude national legislation which provides for a limitation period for exercising the right to deduct input VAT provided that the principles of equivalence and effectiveness are observed, which it is for the referring court to ascertain.

The VAT Directive must be interpreted as meaning that it does not preclude national legislation which allows the tax authorities to refuse a taxable person the right to deduct value added tax when it is established that that person has fraudulently failed to fulfil most of the formal obligations incumbent upon him in order to be able to benefit from that right, which it is for the referring court to ascertain.

Case C-18/15 Brisal — Auto Estradas do Litoral SA, KBC Finance Ireland v Fazenda Pública

The CJEU held that Article 49 EC does not preclude national legislation under which a procedure for withholding tax at source is applied to the income of financial institutions that are not resident in the Member State in which the services are provided, whereas the income received by financial institutions that are resident in that Member State is not subject to such withholding tax, provided that the application of the withholding tax to the non-resident financial institutions is justified by an overriding reason in the general interest and does not go beyond what is necessary to attain the objective pursued.

The CJEU added that Article 49 EC precludes national legislation which, as a general rule, taxes non-resident financial institutions on the interest income received within the Member State concerned without giving them the opportunity to deduct business expenses directly related to the activity in question, whereas such an opportunity is given to resident financial institutions.

It is for the national court to assess, on the basis of its national law, which business expenses may be regarded as being directly related to the activity in question.

Case C-332/14 Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR v Finanzamt Krefeld

The CJEU held that Article 17(5) of the VAT Directive must be interpreted as meaning that, where a building is used in order to carry out certain output transactions in respect of which value added tax is deductible and others in respect of which it is not, the Member States are not required to prescribe that the input goods and services used for the construction, acquisition, use, conservation or maintenance of that building must, in a first stage, be assigned to those various transactions when such assignation is difficult to carry out, in order that, in a second stage, only the deduction entitlement due in respect of those of the goods and services which are used both for certain transactions in respect of which value added tax is deductible and for others in respect of which it is not is determined by applying a turnover-based allocation key or, provided that this method guarantees a more precise determination of the deductible proportion, on the basis of floor area.

Article 20 of Sixth Directive 77/388, as amended by Directive 95/7, must be interpreted as requiring value-added-tax deductions made in respect of goods or services falling within Article 17(5) of that directive to be adjusted following the adoption, during the adjustment period in question, of a value-added-tax allocation key used to calculate those deductions that departs from the method provided for by the directive for determining the deduction entitlement.

The general principles of EU law of legal certainty and of the protection of legitimate expectations must be interpreted as not precluding applicable national legislation which does not expressly prescribe an input tax adjustment, within the meaning of Article 20 of the Sixth Directive, as amended by Directive 95/7, following amendment of the value-added-tax allocation key used to calculate certain deductions or lay down transitional arrangements although the input tax allocation applied by the taxable person in accordance with the allocation key applicable before that amendment had been recognised as generally reasonable by the supreme court.

Case C-479/14 Sabine Hünnebeck v Finanzamt Krefeld

The CJEU held that Articles 63 TFEU and 65 TFEU must be interpreted as precluding rules of national law that provide, in respect of gifts between non-residents, in the absence of a specific request by the beneficiary, for recourse to a method of calculation of taxation by application of a lower tax-free allowance. Those articles also preclude, in any event, rules of national law which provide, at the request of such a beneficiary, for recourse to a method of calculation of taxation by application of a higher tax-free allowance which applies to gifts in respect of which at least one party is a resident, the exercise of that option by the non-resident beneficiary involving the aggregation, for the purpose of the calculation of tax due on the gift in question, of all the gifts received by that beneficiary from the same person over the course of the 10 years preceding and the 10 years following that gift.

3.6 Judgments of the ECtHR

Arnaud and Others v. France (applications nos. 36918/11, 36963/11, 36967/11, 36969/11, 36969/11, 36970/11 and 36971/11)

The case involved a retrospective tax law that forced French nationals who had settled in the Principality of Monaco liable, retroactively with effect from 2005, to pay a solidarity tax on wealth on the same basis as if they were domiciled or resident in France.

The ECtHR did not find a violation because it held that the retrospective law had been enacted in the context of a foreseeable longstanding and close relationship between France and Monaco in tax matters. The ECtHR concluded that the taxpayers had received advanced notice of the retrospective tax law, enabling them to comply with their obligations to the best of their abilities noting that measures to mitigate the severity of retroactivity were in place. In view of the above, the ECtHR concluded that the retrospective tax charge had not upset the fair balance which was to be struck between the applicants' interests and the general interest.

HUITSON v. THE UNITED KINGDOM (Application no. 50131/12)

The case involved tax treaty shopping. Huitson had used the UK's double tax treaty with the Isle of Man in a way that had been judged artificial and fictitious. The UK relied on a retroactive specific anti-avoidance provision cancelling Huitson's tax treaty rights. Huitson argued that the provision breached his right to property.

The ECtHR noted that the applicant entered into what the domestic courts described as a marketed and wholly artificial tax avoidance scheme with the effect that the general rule that United Kingdom taxpayers should pay United Kingdom income tax on the profits of their trade or profession was contravened. By the time the challenged legislation, with its retrospective amendments, was enacted there were about 2,500 taxpayers exploiting similar arrangements, and the amount of income tax at stake for the respondent Government had risen to GBP 100 million. As a result of the scheme, the applicant claimed that he was able to reduce his effective income tax rate to 3.5%, thereby ensuring a considerable competitive advantage in comparison to other IT consultants. Although advised to make payment on account in respect of the disputed sums, so as to avoid the accrual of interest and the incurrance of a possible penalty.

The ECtHR noted that the object of the legislative amendments in issue was to prevent the DTA tax relief provisions from being misused for a purpose different from their originally intended use, that is relieving tax payers from double taxation. The ECtHR considered that it is a legitimate and important aim of public policy in fiscal affairs that a DTA should do no more than relieve double taxation and should not be permitted to become an instrument by which persons residing in the United Kingdom avoid, or substantially reduce, the income tax that they would ordinarily pay on their income. Moreover, it is in the general interest of the community to prevent taxpayers resident in the United Kingdom from exploiting the DTA in a way which would enable them to substantially reduce their income tax and secure a competitive advantage over those who chose not to use such a scheme.

As to the reasonable relationship of proportionality between the means employed and the aims pursued, the ECtHR considered that it was within the area of discretionary judgment for Parliament to legislate with retrospective effect to ensure a fair balance between the general body of resident taxpayers and the individuals who sought to benefit from the scheme, in particular taking into account the number of taxpayers relying on the scheme and the potential financial loss at stake for the Respondent Government.

The ECtHR accepted the domestic courts' finding that there was no legal requirement on the respondent Government to carry out either a formal or informal impact assessment before enacting retrospective legislation, nor was there any legal obligation to bring legal proceedings in respect of the scheme before enacting retrospective legislation. Given the highly artificial nature of the tax avoidance scheme, the ECtHR held that the absence of such an assessment, as well as test litigation, does not affect the proportionality of the impugned measure.

Taking into account the wide margin of appreciation which the States have in taxation matters, the ECtHR held that the actions taken by the respondent State, in legislating retrospectively, did not upset the balance which must be struck between the protection of the applicant's rights and the public interest in securing the payment of taxes. It held that the complaint was manifestly ill-founded.

Application no. 784/14 Maurice Marcellin Marie VAN WEERELT against the Netherlands

The German tax authorities received information concerning assets held in a Liechtenstein bank by non-Liechtenstein residents, a number of Netherlands residents among them. In May 2008 the German tax authorities transferred to the Netherlands Tax and Customs Administration (Belastingdienst) a file containing particulars concerning the Netherlands residents under the procedure for spontaneous exchange of tax information in terms of the Mutual Assistance Directive. The Netherlands tax authorities requested the German tax authorities' permission to use these particulars in criminal proceedings to be held in public; their request was granted.

It emerged that a Liechtenstein foundation (Stiftung) by the name of C. had been created in 1986 to administer a bank account held in Switzerland. The foundation was controlled through a trustee (Treuhand) in Liechtenstein.

Subsequently, the German tax authorities wrote to the applicant stating that he had information from which it appeared that the applicant was, or had been, involved with a financial interest in a foundation under the law of the Principality of Liechtenstein and asked him to submit certain information with a view to a tax adjustment.

The German tax authorities reached the conclusion that the applicant was, or had been, involved with the Liechtenstein foundation and had failed to report its assets and income issuing an assessment.

The applicant alleged that the order to surrender information to the tax authorities on pain of penalty payments although the tax authorities had already imposed substantial fines on him constituting a violation of the *nemo tenetur* principle (protection from self-incrimination) enshrined in Article 6. The ECtHR did not find a violation because the domestic Courts had previously imposed the necessary guarantees against self-incrimination.

The Supreme Court had qualified the Order of the Tax and Customs Administration for the provision of information by adding the restriction that in so far as the information to be provided by the applicant concerned material the existence of which was dependent on his will, it should be supplied subject to the restriction that it should only be used for the levying of taxes, not for the purpose of imposing tax fines or bringing a criminal prosecution. In so doing the Supreme Court had already protected taxpayer from self-incrimination. For this reason, the ECtHR found that there had not been a violation.

Application no. 75292/10 OTHYMIA INVESTMENTS BV against the Netherlands

This case involved exchange of information. Applicant argued that the undertaking of an investigation by the Netherlands Tax and Customs Administration at the request of the Spanish authorities, followed by the transfer of the information thus obtained to the Spanish tax authorities without its prior knowledge, constituted an unwarranted interference with its rights under Article 8.

The ECtHR accepted that there had been interference with the applicant company's rights under Article 8 adding that such interference will constitute a violation of that Article unless it is "in accordance with the law", pursues one or more of the "legitimate aims" set out in the second paragraph, and is "necessary in a democratic society".

The applicant company's essential argument was that the transfer of its tax information to the Spanish tax authorities without its prior knowledge was not "in accordance with the law" because the bilateral arrangement in place did not admit of the investigation by which this information was obtained.

The ECtHR noted at the outset that the applicant company can derive no comfort from Article 28 of the 1971 Convention between the Government of the Kingdom of the Netherlands and the Government of the State of Spain for the avoidance of double taxation with respect to taxes on income and on capital. In becoming a Member State of the European Communities, Spain committed itself to the entire *acquis communautaire*, including Council Directive 77/799/EEC. The parties to the pertinent international instrument, the 1985 Accession Treaty, include all States then Member States of the European Community including the Netherlands. Whether or not it be correct that Article 28 of the 1971 bilateral treaty opposes investigations by the respondent Party for the purpose of providing information to the Spanish tax authorities as the applicant company argues, the ECtHR held that that provision is superseded by Council Directive 77/799/EEC.

The ECtHR held that the interference in issue has an adequate statutory basis and is thus "in accordance with the law". The ECtHR did not doubt that the aim of ensuring that taxes are paid is a legitimate one for the purposes because even though the taxes concerned be due to Spain, the economies of the European Union Member States form a unified whole.

The final question determined by the ECtHR was whether the interference in issue could properly be considered "necessary in a democratic society". The ECtHR considered it in the light of the interpretation given by the Court of Justice of the European Union to Council Directive 77/799/EEC.. The Court of Justice of the European Union, in its *Sabou* judgment, drew a distinction between the "investigation" stage of tax proceedings, in which information may be obtained from the tax authorities of other European Union Member States, and the "contentious" stage, which started when the taxpayer was sent the proposed adjustment and became entitled to what the Court of Justice of the European Union referred to as the "rights of the defence". A request for information under Council Directive 77/799/EEC was part of the investigation and did not require either the requesting State or the requested State to inform the taxpayer.

The ECtHR observed that it may well be that the applicant company is not the "taxpayer" and therefore not directly concerned by the *Sabou* judgment, that distinction cannot be decisive. For its part, the ECtHR accepted, in the context of "the interests of national security" and "public safety" and "the prevention of crime", that investigative methods may have to be used covertly (even against persons who are not themselves objects of investigation or surveillance). The ECtHR held that the same principle applies in matters of taxation: it cannot be a requirement of Article 8 of the Convention that prior notice of lawful tax investigations or exchanges of tax-related information be given to all persons potentially implicated. The ECtHR held that the applicant company had no "arguable claim" under Article 8.

CASE OF M.N. AND OTHERS v. SAN MARINO (Application no. 28005/12)

Criminal proceedings were instituted in Italy against named individuals (not including the applicants) who were charged, inter alia, of conspiracy, money laundering, abuse of a position of influence in financial trading, embezzlement, tax evasion and fraud. In particular it was suspected that a certain Mr EMP organised, financed and managed, directly or indirectly a network of companies situated in various states (including Malta) which were all traceable to one source namely, San Marino Investimenti S.A. The Italian authorities ordered the seizure of documents relating to applicants, despite them not being linked to any of the criminal activities in that decision or them having ever had relations with the Italian companies.

According to the applicants there had been a violation of their right to privacy because there had been an interference in their “private life” and “correspondence”. Taxpayer argued that the right to privacy encompassed a plurality of personal information, it also included documents related to banking and trust relationships.

The ECtHR held that information retrieved from banking documents undoubtedly amounts to personal data concerning an individual, irrespective of it being sensitive information or not. Moreover, such information may also concern professional dealings and there is no reason of principle to justify excluding activities of a professional or business nature from the notion of “private life”.

The ECtHR held that Article 8 protects the confidentiality of all the exchanges in which individuals may engage for the purposes of communication. Moreover, emails clearly fall under the concept of correspondence. The ECtHR concluded that applicant M.N. had suffered an interference with his right to respect for his private life and correspondence. The Court held that the mere fact that under San Marino law, the term seizure may refer to the mere copying of data does not alter this conclusion. It is undeniable that copying constitutes a way of acquiring and therefore seizing data irrespective of the fact that the original medium may have remained in place. Furthermore, the copying in the present case entailed the immediate and independent storage, by the authorities, of the data at issue.

In conclusion, the ECtHR held that the seizure in the sense of copying of banking data (retrieved from bank statements, cheques, fiduciary dispositions and emails), which the Court considers as falling under the notion of both “private life” and “correspondence”, and the subsequent storage by the authorities of such data, amounts to interference for the purposes of Article 8.

The Court considered that the interference in the present case was prescribed by law which provided for an exception to the right of banking secrecy precisely in the context of measures taken by judicial authorities in criminal proceedings. The ECtHR considered that the measure pursued various legitimate aims, namely, the prevention of crime, the protection of the rights and freedoms of others, and also the economic well-being of the country.

Nonetheless, it remained to be determined whether the measure, as applied to the applicant, was necessary in a democratic society and in particular whether it was accompanied by the relevant procedural safeguards.

The ECtHR noted the wide extent of the Italian tax authorities’ powers, which also affected the applicant, an individual not subject to the ongoing investigation in relation to which the letters rogatory were made, and in respect of whom no clear suspicions had been advanced.

The ECtHR proceeded to assess whether an “effective control” was available to the applicant to challenge the measure to which he had been subjected. The Court noted that the applicant, like other persons in his position, only became officially aware of the authorities’ decision and its implementation following a notification more than a year after the measure was ordered. Subsequently, the applicant instituted proceedings challenging the decision. These proceedings were not however examined on the merits, the domestic courts having considered that the applicant had no standing to impugn the measure as he was not an “interested person”.

The ECtHR underlined that in the circumstances of the case, the applicant, who was not an accused person in the original criminal procedure, was at a significant disadvantage in the protection of his rights compared to an accused person, or the possessor of the banking or fiduciary institute, subject to the exequatur decision (and who were entitled to challenge it), with the result that the applicant did not enjoy the effective protection of national law. Thus, the ECtHR found that, despite the wide extent of the measure which had been applied extensively and across to all banking and fiduciary institutes in San Marino, the applicant did not have available to him the “effective control” to which citizens are entitled under the rule of law and which would have been capable of restricting the interference in question to what was “necessary in a democratic society”. In view of the above, the ECtHR concluded that there had been a violation of Article 8 of the Convention and the Government’s objection as to non-exhaustion of domestic remedies was dismissed.

4. The Anti-Avoidance Directive (the ‘ATAD’)

On June 21, the EU Council reached an agreement relating to the ATAD and on 12 July the Council formally adopted the directive. The ATAD has been described as the EU’s response to BEPs and builds on the 2015 OECD recommendations addressing BEPs. The Directive contemplates mandatory interest limitation rules, exit taxation, a general anti-abuse rule, CFC rules and rules tackling hybrid mismatches. In restricted cases, some flexibility has been allowed. The ATAD will result in major changes to the ITA. Malta must, by 31 December 2018, adopt and publish the laws, regulations and administrative provisions necessary to comply with the ATAD. The contents of the ATAD, as transposed into Maltese law will be discussed in a future update.

5. Important Guidelines

Tax Guidelines on Qualifying Employment in Aviation

On July 18 the IRD published the Tax Guidelines on Qualifying Employment in Aviation (Personal Tax) Rules. The Guidelines explain SL 123.168 a law which is quite similar to the HQPR.

Individuals who derive income from a qualifying contract of employment who meet a number of eligibility criteria have a right to pay tax on their employment income at a reduced 15% rate of tax. Employment income must be at least of EUR45,000. The 15% tax rate applies for a consecutive period of five years for European Economic Area (that is, EU countries as well as Norway, Iceland and Liechtenstein) and Swiss nationals and for a consecutive period of four years for third country nationals.

The four or five year period, as the case may be, commences from the year when the individual concerned first becomes taxable in Malta. In cases where the individual was taxable in Malta but not benefiting under this Scheme and subsequently becomes eligible under the Scheme, he/she can benefit only if the four or five year period has not elapsed; the benefit is then available for the years remaining from the date of eligibility under the Scheme until the said four or five year period from the date of first being subject to tax in Malta elapse.

An individual may benefit from the 15% tax rate if the person satisfies all of the following conditions:

- (a) he is an individual who derives income subject to tax under article 4(1)(b) of the Act, being emoluments payable under a qualifying contract of employment, and received in respect of work or duties carried out in Malta, or in respect of any period spent outside Malta in connection with such work or duties, or on leave during the carrying out of such work or duties;
- (b) he is protected as an employee under Maltese law, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else, is paid, and has the required adequate and specific competence, as proven to the satisfaction of the competent authority;

- (c) he proves to the satisfaction of the competent authority that he is in possession of professional qualifications or experience;
- (d) he fully discloses for tax purposes and declares emoluments received in respect of income from a qualifying contract of employment and all income received from a person related to his employer paying out income from a qualifying contract as chargeable to tax in Malta;
- (e) he proves to the satisfaction of the competent authority that he performs activities of an eligible office; and
- (f) he proves to the satisfaction of the competent authority that: i.he is in receipt of stable and regular resources which are sufficient to maintain himself and the members of his family without recourse to the social assistance system in Malta;
- (g) he resides in accommodation regarded as normal for a comparable family in Malta and which meets the general health and safety standards in force in Malta;
- (h) he is in possession of a valid travel document;
- (i) he is in possession of sickness insurance in respect of all risks normally covered for Maltese nationals for himself and the members of his family; and
- (j) he is not domiciled in Malta.

Income shall not be construed to be income from a qualifying contract of employment if it is paid by the employer who has received a benefit or benefits under business incentive laws or arrangement in terms of the business incentive laws or is paid by a person who is related to the employer who has received a benefit or benefits under any business incentive laws or arrangement in terms of business incentive laws.

An application for a formal determination relating to eligibility must be made to the Chairman, Transport Malta. The benefit is exercised for each year of assessment by means of a declaration made on the RA21 form signed by the beneficiary and endorsed by Transport Malta. The form once endorsed by Transport Malta is to be attached to the income tax return and filed with the Inland Revenue Department by the tax return date.

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