



THE TAX ADVISER

AN IN-HOUSE NEWSLETTER FOR MEMBERS OF THE MALTA INSTITUTE OF TAXATION: ISSUE NO 6: February 2016

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FROM THE PRESIDENT'S DESK



EDUCATING FOR TAX PRACTICE AND WORK

It is common knowledge that the main activity of the Institute has been that of education, in a very broad sense and in the context of taxation in Malta. This is a subject which we have to revert to repeatedly in this Newsletter.

One can trace three lines in which our educational activities have developed –

Publications

Courses of study

Seminars, workshops etc.

It appears that we are the only profession in Malta which has prepared its own text books on the speciality which it caters for. Unfortunately, the cost of producing text books is not small, so that their selling price has always to be fairly steep. We also had some initial losses to cater for. This notwithstanding, we are now in the process of converting our printed text books into E-books. This is another expensive process, but it has to be done. Future text books will probably be issued in this form straightaway. We now also have this Newspaper which has had a fair success, and efforts are under way to give it a permanent and final form. Current thinking is that publication should be at least on a regular quarterly basis, and at the highest professional level.

Our courses of study are steadily taking their final shape. Agreement has been reached with the University about a Masters in Taxation which we hope to have in place later this year. This will be a joint venture between the Institute and the University and satisfies a long felt need. The course will be at the highest standard, and we hope to welcome both local and foreign students.

The M.A. will be at the top of our academic work: immediately below it comes the Professional Certificate in Taxation which is the new version of the Diploma Course that we had been operating successfully for over a decade. It now enjoys a high grading at level 6 by the National Commission for Further and Higher Education: this provides several openings to students who successfully obtain the Certificate.

Our lower, or first rung of courses is the Foundation Course. This is being totally recast, and it is suspended while this is being done. We are doing our very best to have it reactivated later this year.

The three courses will together constitute an integrated scheme of academic training for practitioners. There will not, however, be any requirement for students to take all three courses, whether in the above sequence or otherwise. Everybody can pick and choose to take any course which he is qualified to attend, and according to his own requirements.

The third branch of our educational activities consists of public lectures, which are currently being held at a hotel in Sliema. Over the years, however, we have used several different venues and at times found it necessary to repeat specific lectures. This was the first educational activity which the Institute embarked upon soon after its foundation, and our first lecture was on the short lived Customs and Excise Tax. This was held at the Mecopps Hall, premises of Medserv Ltd at Manoel Island which we continued using for a few years until the facility closed down. Lectures have alternated with workshops and similar events. For some time this activity had lost momentum, but during 2015 it was reactivated and we have had several successful sessions.

Education, like any other worthwhile activity, cannot be static: by its very nature (and purpose) it must be dynamic and forward looking. We believe that that we have been fairly successful and we hope to maintain this momentum in the coming years.

CONSTITUTION OF THE COUNCIL FOR 2015/2016

The Council for the year 2015/2016 is constituted as follows:

President:	Dr. Renald Micallef
Vice-President:	Dr. Conrad Cassar Torregiani
Secretary:	Mrs. Ritianne Camilleri Galea
Vice-Secretary:	Mr. Chris Borg
Treasurer:	Mrs. Geraldine Schembri
Assistant Treasurers:	Mr. Christian Vella Mrs. Jeanette Calleja Borg (non-signatory)
Members:	Dr. Robert Taylor East Dr. Jonathan Abela Dr. Jonathan De Giovanni Mr. George Farrugia Dr. Rachel Galea Mr. Shawn Agius Mr. John Ellul Sullivan

Life President: Mr. Edwin Vella

CFE MEETINGS REPRESENTITIVES

The Council nominated the following members to represent the Institute at the CFE meetings, as well as their respective alternates, shown hereunder in turn:

General Assembly: Dr. Conrad Cassar Torregiani – Dr. Renald Micallef

Professional Affairs: Dr. Robert Taylor East – Mr. Chris Borg

Direct: Mrs. Geraldine Schembri – Ms. Jeanette Calleja Borg

Indirect: Mr. Christian Vella – Mr. Matthew Zampa

VAT Expert Group: Dr Sarah Aquilina – Mr. Chris Borg

MIT ANNUAL TAX CONFERENCE

Friday 29th April 2016

TOWARDS A FAIR AND EFFICIENT TAX SYSTEM?

Being held at the Westin Dragonara Resort, St. Julians

This full-day International Tax Conference will be an opportunity to hear from a number of professional local and foreign speakers, leading experts in their field, who will deliver presentations on current topics in the field of taxation, involving both direct and indirect taxation.

The high caliber foreign guest speakers will include Dr Christian Amand, the former Chairman of the VAT and indirect taxation subgroup of the Confédération Fiscale Européenne (CFE). He is actively involved in the "EU VAT Forum" at the European Commission, assisting in the dialogue between national VAT authorities, business and VAT advisers to find practical solutions within the current framework of European VAT legislation. His presentation will review VAT exemptions on gambling and financial services and the modernization of the cross-border EU movements of goods and services.

Another high profile speaker will be Prof. Piergiorgio Valente, the Confédération Fiscale Européenne Chairman of the Fiscal Committee. He is also a member of BUSINESSEUROPE's Tax Policy Working Group, an Extended Bureau Member of the Taxation and Fiscal Policy Committee of the Business and Industry Advisory

Committee to the OECD and also chairs the IAFEI International Tax Committee. Prof. Valente will use this Conference as a platform to provide a deep insight into the new Institutional Tax Framework within the EU.

Other topical issues will also feature during this Conference, including the anti-avoidance directive, the new Common Reporting Standard (CRS) (based on the Foreign Account Tax Compliance Act in the US) which local financial institution had to implement this year, the Malta Budget 2016 amendments, recent developments in VAT affecting Maltese industry as well as Transfer Pricing in relation to BEPS. The latter is certainly the hottest topic being debated across the EU. Participants will have every opportunity to contribute towards the discussion.

This Conference will be of great benefit to accountants, lawyers and other professionals engaged in the field of taxation. It will also be of interest to business individuals who wish to learn about the latest tax developments from an EU perspective. The Conference will also be accredited in terms of the CPE regulations. The full one-day programme, including the complete list of speakers, will be made available on our website shortly.

The Conference will commence at 9am and will conclude at 5pm and will include lunch and coffee breaks. Parking will be available on a first-come first-served basis.

The price per participant to attend this Conference is as follows:

Members of the Malta Institute of Taxation	Eur 120
Members of MIA, MIM, IFSP and the Chamber of Advocates	Eur 130
Others	Eur 150

An early-bird discounted price of Eur 115 will apply to those who book a place, and effect payment, by Friday 11th March 2016.

To book a place and register, please complete the attached booking form. Alternatively, you may log on to our website mit@maintax.org and complete the online booking form. The payment should be mailed to 'Malta Institute of Taxation, 66, Mosta Road, Attard, ATD 1430. Payment will not be accepted on Conference Day.

SNIPPETS

TRANSFER PRICING AND PROFIT SHIFTING

Transfer Pricing and Profit shifting are close to the top of the agenda in the campaign against international tax avoidance. In Malta, however, it does not seem that we have

done anything in this regard – possibly because it may be considered that we may be at the beneficial end of such arrangements. The last time the question was examined appears to have been some ten years ago, but nothing much seems to have resulted. Yet the Income Tax Act has always contained some provisions which can be considered to fall within this category of exchequer safeguards. None come near to out and out transfer pricing provisions, but they indicate that the problem is not new, and that our legislators have all along been aware of possible problems and risks in such schemes. Among these provisions one can mention:-

Article 4(3) of the Income Tax Act which makes otherwise fairly mysterious provisions regarding ‘productive undertakings’.

Article 28(4) of the Income Tax Act regarding non-resident ship-owners and the submission of accounts: a fairly obsolete issue as such enterprises can hardly be liable to tax under the reciprocal exemption arrangements contained in the Act itself and in view of specific provisions contained in the 70+ double taxation agreements which Malta enjoys.

Articles 5(6) and (7) of the Income Tax Management Act which deal with profit shifting arrangements between connected enterprises resulting in loss of tax, giving powers to the Revenue to make such adjustments as may be fair and reasonable to avoid such loss.

In the only known case in Malta regarding transfer pricing and profit shifting, the Revenue, acting on behalf of Government, seems to have successfully invoked the provisions of what is now contained in article 5(7) of the I.T.M.A. The case was very publicly debated as it concerned the supply of films for exhibition in local cinemas in pre-television days when films were the main source of public entertainment. Agreement seems to have been reached on the above basis and no court case is recorded on the issue.

It may also be recorded that all of Malta’s Double Taxation Treaties contain Article 9 of the O.E.C.D. Model Treaty which deals with ‘Associated Enterprises’. This is essentially an anti-profit shifting provision, though fairly basic and limited in scope. Some of the treaties also incorporate an addition which sets out the procedure to be followed.

CONTROLLED FOREIGN CORPORATIONS

Another highly discussed, and divisive, issue in anti-avoidance quarters concerns the Controlled Foreign Corporation (C.F.C. for short). The basic mechanism of this device is fairly simple: set up a company in a low-tax, or no-tax, jurisdiction, and arrange your affairs in such way that a hefty part of your income accrues to that company. Income earned abroad by a foreign corporation and retained abroad is not normally taxable under any jurisdiction. If the funds are later repatriated by way of dividends,

they would become taxable at that stage, but a valuable tax deferral would have been achieved. Carried to extremes, the scheme could have obtained permanent benefits through the funds being repatriated by way of loans – with the interest payable thereon being a possible further benefit. This is of course by far too simplistic a description of the practice, and much ingenuity was spent in setting up and window dressing the necessary arrangements.

Clearly something had to be done about this loop hole, and Deloitte's Guide to Controlled Foreign Company Regimes examines the matter in a worldwide 72 page review freely available on the internet. It explains clearly, though obviously in summary form, what rules have been brought in to combat this menace to the state exchequers. The various look-through provisions adopted are as ingenuous as the schemes themselves!

The European Court of Justice, however, has put an awkward spoke in the wheels of anti-avoidance via its decision in the *Cadbury-Schweppes* case. The ECJ essentially found that the attack on C.F.C.s could lead to an infringement of one of the basic freedoms enshrined in the European Treaty, namely the freedom of establishment. Later, however, the ECJ held that this ruling (which, in any case, could only apply in inter-E.U. cases) was not applicable across the board to every case. Applying a so-called 'motive test', ECJ current thinking appears to be that it will only interfere in cases which are 'wholly artificial arrangements'. This requires a case by case examination to decide whether there has been tax mitigation or tax avoidance. After all, even in *Cadbury-Schweppes* the ECJ had pointed out that: "Nationals of a Member State cannot attempt, under cover of the rights created by the Treaty, improperly to circumvent their national legislation. They must not improperly or fraudulently take advantage of provisions of Community law".

Where do we stand in Malta on this matter? Our legislation on this problem has been rather confused. The Institute's Direct Taxation Manual explains in Vol II, page 253, how provisions which could be said to constitute anti-C.F.C. rules entered into our statute book sort of via the back door in the 1970s, and how they were repealed some twenty years later (probably again via the back door). The current situation appears to be that any action by the Revenue in this regards would have to be taken through the general anti-avoidance provisions of article 51 of the Income Tax Act. It is understood that this has been attempted (with unknown outcome) in certain cases of time-share arrangements.

PARTNERSHIPS

There are two categories of partnerships in Malta: those contemplated by the Civil Law and those falling under the Companies Act. Limited liability companies and limited partnerships are not being contemplated in this note, which is limited to the bodies which are normally considered to be 'partnerships' in common parlance. No

in depth analysis of the differences between the two categories is being carried out, but it may be useful to consider the following points:-

1. The Companies Act grants legal personality to commercial partnerships, separate and distinct from that of the members. Civil law does not make parallel provision but, in practice, a civil law partnership is usually also considered to have separate legal personality.
2. Partnerships falling under the Companies Act are required to be registered with an official authority – the Registrar of Companies. Partnerships falling under the Civil Code are not required to be registered anywhere, though they are often constituted by notarial deed. There does not actually appear to be a requirement of a written instrument for a partnership under Civil law, though it is difficult to conceive how this could happen in practice for a real partnership to have come into existence.
3. The two types of partnership are not linked with one another: a former link under the Commercial Partnerships Ordinance has now disappeared and the Civil Code states specifically that its partnership provisions do not apply to partnerships constituted under company law, though the old link is retained in respect of some partnerships which may still, for certain purposes, fall under the older Ordinance. There also appears to be no prohibition under Civil law to the effect that a partnership constituted under the Civil Code cannot carry on acts of trade. On the other hand, it appears from the provisions of article 14(1)(d) of the Companies Act, that commercial partnerships are restricted to acts of trade in general, or to a specified branch of trade. In practice, of course, most partnerships constituted under the Companies Act will do whatever is necessary or convenient for them to do in the carrying on of their trade or business.
4. The partners in a commercial partnership are each personally liable for all the net liabilities of the partnership, but partners in a Civil Code partnership are only personally so liable for the net liabilities of the partnership in proportion to their interest in the partnership.
5. The Income Tax Act continues to make provision for partnership income arising from any source, and without making any distinction between the two categories, but a partnership may now opt to be dealt with as a company for income tax purposes. Certain Civil law partnerships registered under the Second Schedule to the Civil Code may also fall to be so treated.

THE LONG ROAD TO TREATY RELIEF..... AND BEYOND

Conflict of Laws and Interests: Solutions Sought

The incidence of juridical double taxation, which can be defined as the imposition of broadly comparable taxes in more than one state on the same taxpayer in respect of the same income, and its harmful effects on the exchange of goods and services, as well as on the movement of capital, and persons, hence on the development of national economies and economic relations between countries, are so evident that few taxation laws fail to make some provision for the grant of relief in this regards.

While the necessity of granting relief has long been recognised, the problems in achieving this end have also been long familiar, especially as the grant of relief may have to involve tackling what may sometimes appear to be nearly insurmountable obstacles posed by conflicting tax systems, and clashing financial and economic interests. Often, there may also be underlying psychological and nationalistic prejudices and fears hindering the give-and-take process essential in arriving at an equitable solution.

Several methods have been tried over the years to remove the serious barriers to economic development otherwise created by high rates of taxation and conflicting economic, political and financial interests between nations. These include foreign tax credits, unilateral double taxation relief, reciprocal relief as well as treaty relief. With ever increasing momentum, however, nations have moved inexorably towards treaty relief as the best practical solution to the problem, and there today exists a vast, and ever expanding network of such treaties. Malta has followed suit, and though we also have Commonwealth relief, unilateral relief and the fixed rate foreign tax credit, this article concentrates on treaty relief. The country in fact now has over 70 treaties, each of which constitutes an international treaty in its own right.

Brief History of Treaty Relief

As soon as it was accepted that a network of tax treaties was the best way of introducing some measure of order in the tangled field of double taxation, it was also realized that if every pair of would-be contracting countries had to start drafting their treaty independently of all others, and all over again:-

- (a) the process would be extremely lengthy, and probably beyond the available technical skills and manpower of the smaller countries; and
- (b) another order of international chaos would be created.

¹ Edwin Vella has incorporated in this article extracts from his previous publications, as well as from more recent presentations by colleagues.

Clearly, a model for such treaties had to be formulated, and work began in earnest in 1921 when the newly founded League of Nations, acting through its Financial Committee, entrusted a team of four economists from Italy, the Netherlands, Great Britain and the United States of America with the task of preparing a study on the economic aspects of international double taxation. It will be observed that the U.S.A. was immediately roped in for this purpose even though it was not a member of the League of Nations. Clearly, such an economically strong nation could not be left out of the deliberations on the matter once it was already dominating the world economic order. On its part, the U.S.A. was only too glad to participate, even though it appears that the economists were only acting in their personal capacity.

In 1922, the Financial Committee of the League of Nations invited a group of seven high-level tax officials from European countries to study the administrative and practical aspects of international double taxation and international tax evasion. In 1925/27 the group was enlarged to include officials from other continents. In the course of sessions held from 1923 to 1927 the group drafted, amongst other documents, a Bilateral Convention for the Prevention of Double Taxation in the Special Matter of Direct Taxes dealing with income and property taxes. The convention, with commentary, was sent to the various Governments, Members and non-Members of the League which were invited to send representatives to a General Meeting of Government Experts. This meeting was held in Geneva in October 1928 and was attended by representatives of 27 countries.

Pursuant to a recommendation of the General Meeting of Government Experts, the Council of the League of Nations appointed a permanent Fiscal Committee. This Committee devoted considerable attention to the question of formulating, for tax purposes, rules for the allocation of business income of undertakings operating in several countries. Within the framework of these activities, a Draft Convention for the Allocation of Business Income between States for the Purposes of Taxation was formulated. The Draft Convention was revised by the Fiscal Committee in June 1935.

In 1940, the Fiscal Committee held a sub-committee meeting in the Netherlands to review progress made with regard to tax treaties since the 1928 General Meeting of Government Experts. Soon afterwards, it began consolidating the 1928 Model Convention and the 1935 Draft Convention. The results were reviewed at a Regional Tax Conference convened in June 1940 in Mexico City, and reconvened in July 1943, likewise at Mexico City. The Second Regional Conference adopted a Model Bilateral Convention for the prevention of the Double Taxation of Income and a protocol thereto. It will be noted that, although on a muted tone, work on this project was not allowed to lapse during the horrors of World War II.

In one of its final acts, the Fiscal Committee of the League of Nations convened in London for its tenth session, at which it reviewed and redrafted the Mexico model bilateral convention. The Fiscal Committee was of the opinion that the latter

represented “a definite improvement on the 1928 Model convention” but that “nevertheless since the membership of the Mexico City and London meetings differed considerably, it was natural that the participants at London held different views on various issues from those which had inspired the model convention prepared in Mexico”. However, the general structure of the model convention drafted in the tenth session was similar to that of the Mexico model².

The Economic and Social Council of the newly constituted United Nations set up a Fiscal Committee which was requested to “Study and advise the Council in the field of public finance, particularly in its legal, administrative and technical aspects”³. When the Fiscal Committee stopped functioning in 1954, the focus of action in the field of international taxation shifted to the Organisation for European Economic Co-operation. The Council of the O.E.E.C. adopted its first recommendation concerning double taxation on the 25th February 1955 which recommendation subsequently resulted in the establishment of the O.E.E.C. Fiscal Committee in March 1956. In July 1958, the Fiscal Committee was instructed to prepare a draft convention for the avoidance of double taxation with respect to taxes on income and capital as well as concrete proposals for the implementation of such a convention: “Since the work of the League of Nations, the value of a Model Convention has been universally recognized not only by the national authorities, but also by the taxpayers themselves”⁴.

Between 1958 and 1961, the Fiscal Committee prepared four reports, published under the title “The elimination of double taxation”, in which the Committee proposed a total of 25 Articles. After O.E.E.C. became the Organisation for Economic Co-operation and Development (O.E.C.D.) in September 1961, the mandate of the Fiscal Committee was confirmed, and it subsequently agreed on a number of new articles. All the articles were embodied in a report entitled Draft Double Taxation Convention on Income and on Capital, published in 1963.

In the meantime, the British authorities had gone ahead and entered into treaties with various countries of the British Empire, soon to become the Commonwealth of Nations. A so-called ‘colonial model’ was used which drew heavily on the work so far achieved in the wider international sphere, and was actually incorporated in Malta’s first treaty which was that with the United Kingdom⁵.

In 1967, the O.E.C.D. Fiscal Committee began revising the 1963 Draft Double Taxation Convention. The revision of the 1963 Model eventually led to the publication of the 1977 Model Double Taxation Convention on Income and Capital⁶. Work on the Model Convention has obviously not stopped since then and periodical review and updating

² Report of the tenth session held between the 20th and 26th March 1946: C37.M.37.946 II A.

³ Resolution 2(iii) of 1st October 1946.

⁴ O.E.E.C. Doc. C (63)87, page 25.

⁵ Published as Legal Notice 83 of 1961.

⁶ O.E.C.D. publication 23 77 01 1.

has gone on basically uninterruptedly. Progress in this regards is not, however, being pursued further for the purposes of this article.

The United Nations back on the Scene

In the mid 1960s, the United Nations began to take a renewed interest in the problem of double taxation as a result of the continued increase in the number of developing Member States, and as part of its action aimed at promoting the flow of foreign investment to developing countries. On a global basis substantial progress towards the elimination of double taxation had been made through unilateral relief measures and through bilateral tax conventions which had emerged since the early 1960s as a salient feature of international economic relations. Only a relatively small number of treaties had, however, been concluded between developed and developing countries, the reason being probably the fact, acknowledged in 1965 by the Fiscal Committee of the O.E.C.D. that “the traditional tax conventions have not commended themselves to developing countries”⁷. The main reason given (perhaps not totally correctly) concerned the flow of funds and the effect on national revenues when viewed in the context of domestic incentives given by developing countries. This attitude was clearly dominant in Malta where the administration had consistently refused to enter into the uncharted waters of international treaties for the relief from double taxation, and only did so in 1961 when essentially forced to comply by the Colonial Office interim administration then again in charge from 1958 to 1962. The new treaty with the United Kingdom, however, did comprise what later became a pillar of Malta’s treaties, namely tax sparing provisions to match tax exemptions given domestically in Malta.

The desirability of encouraging the conclusion of bilateral tax treaties between developed and developing countries was recognized by the Economic and Social Council of the United Nations which requested the Secretary General “to set up an ad hoc working group consisting of experts and tax administrators nominated by Governments, but acting in their personal capacity, both from developed and developing countries, and adequately representing different regions and tax systems, with the task of exploring, in consultation with interested international agencies, ways and means for facilitating the conclusion of tax treaties between developed and developing countries, including the formulation, as appropriate, of possible guide lines and techniques for use in such treaties which would be acceptable to both groups of countries and would fully safeguard their respective revenue interests”⁸. Pursuant to this Resolution, the Secretary General in 1968 set up the Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries, composed of tax officials and experts.

⁷ See 1965 O.E.C.D. Report on Fiscal Incentives for Private Investment in Developing Countries.

⁸ Resolution 1273 adopted on 4th August 1967.

The Experts completed the formulation of guidelines for the negotiation of bilateral treaties between developed and developing countries during the course of seven meetings, which were also attended by several observers, including observers from international organizations. These meetings resulted in the preparation of a “Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries”⁹.

In his report to the First 1978 Session of the Economic and Social Council on the work of the Group of Experts at its Seventh Meeting, the Secretary General expressed the view that a model bilateral convention for possible use by developed and developing countries would constitute a logical follow-up to the work done by the Group of Experts. The Economic and Social Council adopted a decision in which it welcomed the proposal and requested the Group of Experts to “complete its consideration of a draft model bilateral convention at its Eighth Meeting in 1979”. The Fiscal and Financial Branch of the Department of International Economic and Social Affairs of the United Nations Secretariat accordingly prepared a draft model convention, consisting of articles reproducing the guidelines formulated by the Group of Experts together with commentaries thereon incorporating the views of the members of the Group as expressed at its various meetings and also reproducing, where appropriate, the commentaries of the 1977 Model Double Taxation Convention on Income and on Capital of the O.E.C.D.¹⁰

Treaty Relief in Malta

At this stage one must ask where was Malta while all this international activity was going on. In reality, Malta could not, for several years, be anywhere near since it did not levy Income Tax before 1949. The relative legislation was passed on 7th December 1948 by Act LIV of 1948, the Income Tax Act, which came into effect on 1st January 1949. Few people, however, are aware that the law immediately contemplated the possibility of Malta entering into treaties for the relief of double taxation. This was done in section 71 which provided that:

71. (1) It shall be lawful for the Commissioner, with the authority of the Governor-in-Council, to enter into an agreement on Double Taxation Relief (Taxes on Income) with the Board of Inland Revenue of the United Kingdom or with the Competent Authority in any part of His Majesty's dominions (other than the United Kingdom).

(2) The said agreement shall not become valid unless it is ratified by the Legislative Assembly.

(3) The said agreement shall come into force on a date to be fixed by Proclamation, and shall be published in the Malta Government Gazette.

⁹ United Nations Doc. ST/ESA/94, 1979.

¹⁰ The new United Nations Model was published as United Nations Doc. ST/ESA/102/80.

These limited powers were never invoked. It must be admitted that, by themselves, they gave little help to the administration in a completely unknown and new field. Nor was there yet available the authoritative guidance which is now provided through the efforts of the O.E.C.D. and the United Nations as set out above. Moreover, there was always the niggling fear that inexperienced little Malta might not get a fair deal in negotiations. In any case, this was not a general power to enter into treaties, but limited to the United Kingdom and others of "His Majesty's dominions". This provision did not form part of the Model Income Tax Ordinance, and its draftsmanship seems to indicate a local origin, but its insertion in the new law does seem to indicate that the formulators of the Income Tax Act were quite aware of the world wide movement towards treaty relief then gathering momentum.

During the first decade of the income tax era, attention regarding relief for double taxation was concentrated in two directions: relief regarding U.K. tax, and relief in respect of taxes levied by other Commonwealth countries. The Income Tax Act as originally enacted comprised the then standard (non-treaty) arrangements in this regards, so that nobody seemed to feel the necessity of invoking the powers granted by section 71 of the I.T.A. as above. When, shortly after the enactment of the I.T.A., the United Kingdom changed its legislation so that the original arrangements in the I.T.A. became inoperative, several years had to pass before new arrangements were introduced¹¹. These again did not take the form of a treaty with the United Kingdom, but were essentially a rehash of the former arrangements to satisfy the new requirements of U.K. law. Commonwealth relief, however, remained always available, and was regularly operated in a fair number of cases. These were mostly cases of pensioners from the British colonial service, and employees from Banks and the Cable & Wireless company who were sent to do duty overseas. Some local employees of the British Services doing duty outside Malta were also entitled to the relief. The cases of Commonwealth relief, however, have shrunk to practically nil over the years due to the tapering out of the above cases, the introduction of treaty relief with many Commonwealth countries, and the various amendments made internally in the Income Tax Act itself. As a result, this relief has become practically superfluous and a good case could be made for its deletion from the law.

Malta Enters the Treaty Field

When the political environment was clearly pointing to a changeover from the former economy based on services to the British armed forces to a modern economy based on manufacturing, tourism and other civilian activities, it was realised that our double taxation arrangements had to be updated if we were to attract and keep the necessary investment. In practical terms, this necessitated that we become part of the general movement towards treaty relief. The enabling powers were assumed through the

¹¹ Ordinance XXV of 1960, section 14, which substituted new provisions for the original section 68 of the I.T.A.

addition of section 68A to the I.T.A.¹². The new provisions were copied from the latest version of the Model Income Tax Ordinance which had been amply amended in this respect after the introduction of the tax in Malta. In its present (and somewhat expanded) form, the law now reads as follows:

76. If the Minister responsible for Finance by order declares that arrangements specified in the order have been made with the Government of any territory outside Malta with a view to –

(a) affording relief from double taxation in relation to income tax and any tax of a similar character imposed by the laws of that territory;

(b) preventing fiscal evasion;

(c) giving assistance in the collection of tax;

and that it is expedient that those arrangements should have effect, the arrangements shall have effect notwithstanding anything in this or any other enactment.

This wording effectively removes any doubt regarding clashes between the provisions of any agreement so made and those of the I.T.A. itself (as well as of any other law). As can be readily imagined, bi-lateral international agreements for the suppression or modification of domestic law provide a fertile ground for conflict in the course of implementation. In the case of *Collco Dealings Ltd v C.I.R.*¹³, it was held that: “As the statute is unambiguous, its provisions must be followed even if they are contrary to any international treaty or arrangement”. On the other hand, in *Ostime v Australian Mutual Provident Society*¹⁴, it was held that: “It is plain that, if there is conflict, the legislation of the United Kingdom must give way”. The *Ostime* doctrine rather than that of *Collco* is now generally given preference where there is conflict between a treaty and domestic law. In any case, this has become axiomatic following Malta’s adherence to the European Union. As regards double taxation treaties, this issue has been definitely settled by the law in its present form as it subordinates domestic legislation to the provisions of any treaty made as aforesaid. In Malta, this issue does not seem to have been considered judicially so far, but the now defunct Board of Special Commissioners twice held that the Revenue could not try to override the provisions of a treaty through nit-picking under domestic law¹⁵. On the other hand, in a fairly old but still valid case, it was held that administrative procedures in the United Kingdom which were not contemplated in the relative treaty but insisted upon by the U.K. Inland Revenue, could not give the right to taxpayer to insist that the Malta Inland Revenue should adopt, in Malta, certain procedures to enable him to meet the U.K. Revenue’s requirements¹⁶.

¹² Ordinance XLI of 1961.

¹³ 39 T.C. 509.

¹⁴ 38 T.C. 492.

¹⁵ B.S.C. cases nos 149 and 238.

¹⁶ Court of Appeal Case no 65.

The powers granted under the new section 68A of the I.T.A. were first invoked to enter into treaties with the following countries:-

United Kingdom	L.N. 83 of 1961`
Libya	L.N. 7 of 1973
Denmark	L.N. 114 of 1975
Belgium	L.N. 108 of 1976
Sweden	L.N. 131 of 1976
Germany	L.N. 149 of 1976
Norway	L.N. 35 of 1979
Pakistan	L.N. 54 of 1980
Netherlands	L.N. 90 of 1980

The first treaty, that with the United Kingdom, was essentially imposed on the local administration by the British authorities who were quietly preparing for the eventual launching of Malta towards integration into the world economic order. No other treaty was entered into during the succeeding decade, but the floodgates were opened during the 1970s, so that today Malta has a comprehensive network of over 70 treaties. With few exceptions, these are all fully comprehensive treaties based on the O.E.C.D. Model, with occasional intrusions from the United Nations Model for use between developed and developing countries. These treaties are not being analysed in this article, but anti-treaty shopping provisions which are next considered are already to be found in some of these treaties, including¹⁷ –

- anti-remittance clauses;
- ‘main purpose’ test;
- special regimes or exclusions;
- limitation of benefits tests (cfr the treaty with the U.S.A.).

Current Situation and Developments

It cannot be assumed that the path to Double Taxation Treaties has been, or is smooth and easy to follow. In the past, disregarding foreign taxes was often advocated as a matter of sovereignty and national pride, as well as preventing the flight of manufacturing overseas. Thankfully, these notions have long been abandoned, but the treaties and their provisions have now become inextricably involved in the concentrated attacks being made on international arrangements by large enterprises which are considered to have been made principally, if not solely, for the purpose of unacceptable tax avoidance.

Globalisation, digitalisation, fluid movement of capital and rapidly changing business models have all been identified as factors allowing companies to exploit gaps in international tax rules so as to avoid taxation through a reduction of their taxable base

¹⁷ Dr John Ellul Sullivan, M.I.T. Seminar 2 December 2015.

by the shifting of profits to low or no tax jurisdictions. Media focus on tax strategies by multinational enterprises to minimize their tax burden has repeatedly brought this activity to public and political notice. This has triggered public interest in tax strategies employed by large companies at a time when the economy is creating pressure on such taxpayers to demonstrate their contribution to society¹⁸.

Early in 2014, the European Union Commission directed jurisdictions to give information on certain advance rulings and certain tax regimes. Some states co-operated whilst others refused, preferring to have the issue solved at a state level. In June 2014 the E.U. opened several investigations concerning transfer pricing arrangements in various jurisdictions, and in March 2015, the E.U. Commission presented a Tax Transparency Package which included a proposal for automatic exchange of information.

While recent developments have tackled the problem of 'harmful' tax regimes and the revision of E.U. tax directives, the G-20 have indicated that they endorse the development of a multinational instrument to facilitate the implementation of treaty related Based Erosion and Profit Shifting (B.E.P.S.) measures. Corporations, on their part, are seeking a responsible approach to the management of taxes – one which will be able to deliver sustainable outcomes that are right for the business and which would still feel right should the media spotlight settle on them.

Not only transfer pricing, but also jurisdiction to tax, including the all important traditional principles regarding the existence or otherwise of a Permanent Establishment or otherwise in a given territory, are now up for discussion. These issues have come under severe pressure due to the development of the digital economy which has breached many of the old concepts regarding agents and their real status in the business. So also, as regards the question of 'place of effective management'. Thin capitalization has once again been brought to the forefront: something which the D.T.A.s do not cater for directly in the context of interest and dividend outflows. Transfer pricing is receiving fresh attention as a result of the artificial splitting of ownership of assets and rights between group entities, and transactions between such entities which would hardly take place between unrelated bodies. The existence of harmful preferential tax regimes is once again being queried and the effectiveness of existing anti-avoidance measures and concepts is being reviewed. An overriding proposal is that of excluding completely from the treaties transactions where the principal purpose is clearly that of treaty benefit.

Basic changes to the O.E.C.D. Model may be on the way, including hedging against double non-taxation as well as making dispute resolution more effective. An admittedly discriminatory possibility has also been suggested for the dropping of the

¹⁸ Dr Rachel Galea, M.I.T. Seminar 7 July 2015.

traditional residency test for the application of the treaties in favour of a 'qualified person' rule – whatever this might actually mean¹⁹.

Clearly, tax practitioners are due to be faced with as many problems in the future as they have been in the past, and with the speed with which modern technology advances these are sure to pile up inordinately.

TAXATION OF TRUSTS IN MALTA²⁰

This review of the taxation of trusts in Malta covers income tax and stamp duty²¹ chargeable on the creation of a trust, and at various moments during its lifetime:

- settlement of property on trust;
- testamentary trusts;
- the on-going administration of a trust;
- trusts in an international context; and
- the delivery of property and other benefits to the beneficiaries; and also possible liability on reversion of trust assets to settlor.
- there is also a final note on VAT implications.

A preliminary word of caution regarding this article: the taxation of trusts is notoriously an excruciatingly complicated exercise which has fairly often been changed. What is set out below can aspire to present no more than a general picture. Fuller and further details may be obtained from the Institute's Direct Taxation Manual and the Indirect Taxation Manual²².

SETTLEMENT OF PROPERTY ON TRUST: THE INCOME TAX REPERCUSSIONS

The settlement of property on trust renders the settlor potentially chargeable to the Capital Gains Tax or the Property Tax in respect of the items settled²³. For capital gains purposes the charge would be at the settlor's marginal rate on the difference between market value on settlement and the value on acquisition of the property,

¹⁹ Dr J Ellul Sullivan, *ibid*.

²⁰ This final article in the series on trusts in Malta is essentially based on the Chapters prepared by Dr Robert Taylor-East for the Institute's Manuals on Direct and Indirect Taxation, respectively, and on Dr Taylor-East's lecture notes.

²¹ Properly duty under the Duty on Documents & Transfers Act, Cap 364 of the Revised Laws of Malta.

²² Both printed by the Progress Press.

²³ Articles 5 and 5A of the Income Tax Act. There does not seem to be any liability under article 4 as a settlement does not constitute trade or business, or any of the other contemplated sources. The alternative

methods of chargeability result from the provisions of the Act, possibly following from a valid option made for
for this purpose

while for property tax purposes it is the market value which is subject to charge²⁴. Provisional Tax at 7% would be chargeable in the normal way in respect of Capital Gains Tax. No Provisional Tax is involved in the Property Tax, and the chargeable rate fluctuates as follows:

- 12% on the excess of the transfer value over the acquisition value when the immovable property settled was acquired by the settlor *causa mortis* subsequent to 24 November 1992, or *inter vivos* by title of donation more than 5 years prior to the settlement;
- 7% is chargeable on the transfer value of immovable property if the property was acquired by the settlor *causa mortis* prior to 25 November 1992.
- 7% is chargeable on the transfer value of qualifying immovable property situated in Malta which has been restored in accordance with a MEPA²⁵ scheme.
- 5% is chargeable on the transfer value of immovable property situated in Malta when the property representing a capital asset transferred (or settled) by an individual within 5 years of acquisition;
- 10% is chargeable on the transfer value of immovable property situated in Malta and acquired before 1 January 2004.

No liability arises under the above charge if the property settled is not chargeable property: i.e. it is not immovable property, securities, intellectual property, business goodwill, business permits, beneficial interest in a trust or interest in a partnership. Likewise, no implications under the Income Tax Act will ensue if the settlor is not chargeable to capital gains tax under the ITA. Persons not ordinarily resident and domiciled who sell (or settle) assets situated outside Malta are also not liable under this charge.

An important exemption is that no transfer of immovable property is deemed to have taken place where the settlor is also the sole beneficiary from the trust, and a transfer is likewise not deemed to have taken place upon the settlement of shares in a company when the settlor who owned the shares prior to settlement on trust is also the sole beneficiary of the trust. Another exemption is that whereby a direct donation by a settlor to the beneficiaries is deemed to have been effected to the beneficiaries when these are persons referred to in article 5(2)(e)(i) or (ii) of the Income Tax Act²⁶, and they have an irrevocable vested right to receive all the assets settled on the trust. Another exemption is that no capital loss or gain is deemed to arise when the beneficiaries are those referred to in article 5(2)(e)(i), and the beneficiaries include persons substantially limited in their ability to administer or manage property for their maintenance.

²⁴ What constitutes market value is discussed at some length in Chapter IX 9. of the Institute's Indirect Taxation Manual. There have been some unfortunate cases regarding this issue in connection with the Duty on Documents & Transfers Tax.

²⁵ The Malta Environment and Planning Authority.

²⁶ In other words, certain close relatives and approved philanthropic institutions.

Exemption will also operate when property is settled on trust and the trustee holds such property for the purposes of designated or approved commercial transactions. Commercial transactions (which are to include connected or ancillary transactions) are as defined in article 2 of the Trusts and Trustees Act²⁷:

- (a) securities offerings, whether to the public or for private placements, portfolio management and custody of investment instruments;
- (b) the securitization of assets;
- (c) the grant or real or personal security interests including hypothecs, mortgages, pledges and guarantees;
- (d) collective investment schemes;
- (e) employee benefit or retirement schemes or arrangements;
- (f) syndicated loan agreements and other multi creditor banking facilities;
- (g) insurance policies and the payment of proceeds thereunder;
- (h) timeshare and multi-property structures;
- (i) settling an asset on trust as security for a loan obtained for commercial purposes;
- (j) such other commercial transactions as may be prescribed in a notice issued by the Minister.

The Revenue are also authorized to approve other commercial transactions for exemption. These obviously would be transactions of a similar nature: this provision is clearly necessary to cover an extremely wide range of transactions which did not obtain mention when the law was drafted.

REPERCUSSIONS UNDER THE DUTY ON DOCUMENTS & TRANSFERS ACT

Tax under the Duty on Documents & Transfers Act²⁸ is chargeable on settlements of property on a trust in the same way as if the settlement was a normal transfer *inter vivos* of such property. There are obviously differences since settlements are made for no consideration: the law has therefore to state what value is to be attributed to the property settled. This has to be what is called the real value of property: though perhaps one should take this to mean no more and no less than 'market value' referred to in a footnote above.

Seeing the nature of trusts and the very clear possibility of trusts being constituted in Malta to hold property situated overseas, it is prescribed that when one of the trustees is a resident of Malta, duty will still be chargeable notwithstanding that the property is situated abroad, and that the transfer will have also have been made abroad. However, it is submitted that the exemption on transfers of securities traded on a stock exchange granted under the general law's provisions will also be applicable in the case of any settlement made on trust. Moreover, there does not seem to be anything over-

²⁷ Chapter 331 of the Revised Laws of Malta.

²⁸ Chapter 364 of the Revised Laws of Malta.

riding the general principle that documents executed abroad are only dutiable when they are made use of in Malta. One may query when such documents are to be considered to have been used in Malta, since the simple act of settlement can hardly be said to constitute use.

The rates of duty applicable in the case of taxable settlements should be the normal rates of 5% in the case of immovable property and 2% in the case of securities, but if the security is a property owning entity, the rate will go up to 5%. Settlements of policies of insurance may also be effected in which case the rate of duty would be 2.33%.

Exemption from duty follows very closely the exemptions granted under the Income Tax Act as set out above.

TESTAMENTARY TRUSTS

As may be expected, more complications arise where the trust is constituted by a testamentary disposition. The principle that duty would be chargeable as in normal cases of transmissions *causa mortis* still applies. Transmissions of property qualifying for exemption will still be exempt: thus, no duty would be payable (subject to specific conditions) when a dwelling house is settled *causa mortis* on trust for the benefit of a person who is on the Register of Persons with Disability. For duty purposes, the trustee would be ignored and the beneficiary would be deemed to have acquired the property directly. Rather tortuous provisions are made to safeguard against undue tax avoidance schemes based on this sort of exemption.

Where a trust is established by will, property comprised in the estate of the deceased would be transferred *causa mortis* to the trustee. The trustee thereupon would need to comply with the requirements prescribed by the Duty on Documents & Transfers Act in respect of such transmissions, and he would be required to make a declaration by public deed of any devolution of immovable property to him as trustee²⁹. The trustee would also be required to pay any duty due out of the property of the trust, but he will be held responsible to do so. Duty would be chargeable at 5% as in normal transmissions. A trustee would also be entitled to the rebates of duty contemplated by the DDTA³⁰. The extent of the trustee's entitlement to rebates would be determined by reference to the beneficiaries of a given testamentary trust and, as a result, a trustee may be entitled to multiple rebates.

Duty would be chargeable upon a *causa mortis* settlement of shares in a company registered in Malta, or of an interest in a partnership so registered, but always subject to any exemptions granted to such items under the general law. The trustee is therefore required to give due notice to the Registrar of Companies of any such transmission and to pay duty at 2%, or at 5% if the company or partnership is a

²⁹ In accordance with article 33 of the DDTA and of the relevant Rules.

³⁰ See article 34.

property owning entity. Once again the duty is chargeable on the real value of the property so transmitting.

THE ADMINISTRATION OF TRUSTS: INCOME TAX CONSIDERATIONS

Any sort of income arising in Malta to a trust is chargeable to tax (including capital gains tax and property tax, which are both levied under the income tax legislation) in the normal way: there can be no question regarding this general proposition. However, the Income Tax Act makes a specific provision that the income of a trust wherever arising is subject to tax in Malta if one of the trustees is resident in Malta. Questions of domicile and/or ordinary residence do not seem to arise, except as set out below, even though these are the normal links used to determine the taxability of income arising out of Malta. Moreover, the residence of the settlor, of trustees (even if these are in a majority), and of beneficiaries is irrelevant. So also is the location of the jurisdiction under which the trust is constituted or of the assets in question³¹. Capital gains are more or less dealt with in the same way, though there may be some doubts whether the charge is leviable in all cases of immovable property, or only at the stage of settlement of property: in other words, it could perhaps be argued that property acquired by the trust through purchase may not necessarily be liable to this tax.

Income attributable to a trust qualifies for the grant of double taxation relief in the normal way. Computation of relief should only take into account the income of a trust with no intermingling with the trustees' personal affairs. It is also provided that income which has been subject to tax in the hands of a trustee in his capacity as such, is not subject to tax in the hands of any other person, so that no tax will be chargeable thereon in the hands of a beneficiary if and when distributed. This measure alleviates somewhat the 'broad brush' approach to taxability imposed by the law. The broad approach may still not be justified, though there is a further measure of relief contemplated by the law, whereby the trust can be considered to be tax transparent and its income taxable directly in the hands of the beneficiary. Transparency is essentially achieved by reference to the nature of the property, the source of the income or the gains accruing to or derived by the relevant trust, and the status of the beneficiaries' or ordinary residence and/or domicile. The relevant rules are inevitably complicated, but these provisions should take back taxability to within the familiar precincts of jurisdiction and territoriality of the tax in Malta. It must be emphasized that transparency is a tax device to achieve proper territorial and jurisdictional limits of taxation, and has nothing to do with the provisions of the Trusts and Trustees Act³², and the rights and obligations created, imposed or arising thereunder.

³¹ Article 27(B)(1) of the Income Tax Act.

³² Cap 331 of the Revised Laws of Malta.

The principle of transparency is applicable (provided the relevant administrative procedures are followed) in the case of specific income allocated to beneficiaries, irrespective of their residence and/ or domicile, being:-

- amounts over which the beneficiaries had a vested right in the year immediately preceding the year of assessment; and/or
- amounts over which an entitlement had been bestowed in favour of the beneficiaries by the end of the year immediately preceding the year of assessment; and/or
- amounts accruing to or derived by the trustees in a given year of assessment and which had been distributed to the beneficiaries by the end of the year immediately preceding the year of assessment.

In all such cases, the trust is again ignored for tax purposes, and the income deemed to be income derived by the beneficiaries with all the consequential rights and liabilities.

A further exemption which needs to be mentioned concerns income accruing to trusts which have been granted the status of a public character, being engaged in philanthropic work. This status will only be achieved in accordance with the normal provisions set out in the Income Tax Act for this purpose³³. Another exemption is that there is no charge whatsoever under the Capital Gains Tax provisions, when a trustee transfers the property of a trust to a new trustee and there has been no change in the beneficiaries or in the beneficial interest in the trust.

Any income which stands to be attributable to a beneficiary directly (that is where tax transparency applies), will be aggregated to their other income and subject to tax accordingly, with the beneficiaries being required to meet all obligations imposed by the ITA. It is treated as having been derived at the time the beneficiary becomes entitled to it or at the time it is distributed to him, as the case may be, and it retains its character as to type and country of source. The beneficiary will be entitled to all possible Double Taxation Relief with regard to that income. Any tax which will have been paid by the trustee in respect of the income in question will be credited against the overall tax liability of the beneficiary.

INTERNATIONAL REPERCUSSIONS

Difficulties concerning the residence of trustees when income arises abroad are caused by the unusual provision that the trust will be deemed to be resident in Malta if just one of the trustees is resident in Malta. The possible repercussions of this provision have to be cut down in practice. Thus, where all the income attributable to a trust consists of income arising outside Malta, and none of the beneficiaries are persons ordinarily resident or domiciled in Malta, the income is not considered to have arisen

³³ Article 12(1)(e) of Cap 123 of the Revised Laws of Malta.

in favour of the trust itself, but in favour of the beneficiaries directly. Exemption from taxation follows under the normal rules relating to jurisdiction under the ITA. Where the income is however still received by the trustee in Malta, the beneficiaries are deemed to have received income in Malta, but the trustee is under obligation to notify the beneficiary accordingly, also advising him of his obligations under the Income Tax Act.

Income arising in Malta through investments held in Malta should normally be subject to tax even if all the beneficiaries are non residents. As under the normal rules of the Income Tax Act, there are various provisions granting exemption to such income when it arises in favour of a non resident, this benefit has to be carried through to such beneficiaries, but the trustee is required to provide the tax authorities with a certificate confirming that all beneficiaries are non-resident. The rules set out above regarding transparency will also have their effect in cases with international connections or repercussions.

DISTRIBUTIONS, INCLUDING ON WINDING UP OF TRUSTS

Distributions in this context must be taken as including transfers made both as part of the normal administration of the trust and on its winding up.

One point which immediately emerges is that the legislation recognizes that the mere fact that property and income pass through trusts should not, on this account alone, bring about extra liability to tax. Thus, as has been stated above, the law creates various devices for achieving tax transparency, so that any tax due is payable immediately by the trustee. The creation, and eventual dissolution, of trusts for a temporary purpose, or for certain commercial purposes is also granted tax relief. Benefits that would have been available had there been no trust involved are also safeguarded. This principle applies under both the Income Tax Act and the Duty on Documents and Transfers Act.

A closely linked and important point is that where duty under the DDTA would have been paid on the transfer or transmission of an immovable property to a trust, on its exit from trusteeship, duty will only be payable on the increase in value during the period it spent under trust. Capital gains or property tax would appear to be chargeable on immovables exiting from trusts on a similar basis, that is on the increase in value of the asset in question during the period it was held under trust. However, transfer of an interest in a trust (that is the right of being a beneficiary) will normally be chargeable or not according to the nature of the property held by the trust. No tax should be due where the interest in a trust transits *causa mortis*. A disclaimer of such interest should likewise be exempt, but the Revenue may have other ideas about this matter. These doubts may arise where such an irrevocable disclaimer could have been a part of a tax planning transaction.

VALUE ADDED TAX AND TRUSTS

When exploitation or use of trust assets constitutes, or gives rise to a taxable supply as defined under the VAT legislation, VAT become payable in the normal way. No express provision is made regarding trusts by the law, but it is logical that a trustee should be permitted to be registered qua his position and separately from his own status.

The Vat Department has prepared guidance notes regarding trusts and trustees. It recognises that a trustee, when carrying out his functions as a trustee, is essentially the holder of a fiduciary office, much along the lines of a director of a company. As such he should not, in principle, be considered to be carrying on an economic activity for the purposes of law³⁴. Taxable persons for VAT purposes must be carrying on an economic activity, and once a trustee is not carrying on an economic activity he is not required to charge VAT on any 'supplies' made in Malta. In so far as their treatment for local VAT purposes is concerned, such supplies would be considered akin to exempt without credit supplies. It is confirmed that this interpretation applies equally where trustee services are provided by professional trustee. This status will only hold good provided the trustees remuneration is appropriated from trust assets. Whenever a trustee is remunerated otherwise than by the appropriation of trust assets, the trustee will fall to be classified as a person carrying on an economic activity and as such will be required to charge VAT in the normal way.

SOME OTHER POSSIBLE TAX ISSUES

As indicated, this article cannot reflect all the possible complications that arise regarding the taxation of trusts: there are just too many possibilities contemplated in Trust Law to enable full justice to be done to all such matters. For example, the law allows a licensed trustee to irrevocably elect for a trust to be, for tax purposes, to be treated as a company ordinarily resident and domiciled in Malta³⁵. Clearly this can only be done in certain specified circumstances and following specified procedures. Other matters concern temporary trusts: these require recognition as such by the authorities. Other matters include the possible reduction of duty under the Duty on Documents & Transfers Act, when settlements are made upon trust where, had the settlement been a transfer made direct to the beneficiary, there would have been reductions in the duty chargeable. (It is understood that, in practice, a policy of transparency is followed). Very little has moreover been said about compliance duties, though it has been made clear that where transfers or transmissions of immovable property are concerned, the trustee and the beneficiaries have the same obligations like anybody else.

³⁴ Article 5 of Chapter 408 of the Revised Laws of Malta.

³⁵ Article 27D(1)(a) cap 123 of the Revised Laws of Malta.

VALUE ADDED TAX DECISIONS

Note: These summaries of ECJ case law have been prepared by foreign law students who were serving out their intern assignments with the Malta Institute of Taxation. The precise details of the subject matter of the tax cases below may not, perhaps, be particularly important. It is the manner on which the ECJ approached the questions posed to it that is more important. Clearly, the Court will not accept restrictive interpretations: what is due to (or by) either side has to be worked out in a reasonable way. It seems obvious that the old adage that ‘.....There is no room for any intendment. There is no equity above a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to implied,’ is not much favoured these days. On the other hand, the last few words of this saying ‘.....One can only look fairly at the language used, ‘ is very liberally being made use of.

EXEMPTION – SPORT

Case C-253/07, Canterbury Hockey Club and Canterbury Ladies Hockey Club v The Commissioners for Her Majesty's Revenue and Customs, 16 October 2008.

The Hockey Clubs were members-only sports clubs which field a number of hockey teams. Their members pay an annual subscription in consideration for their membership rights. They were unincorporated associations without legal personality. The Hockey Clubs were themselves members of England Hockey, a non-profit-making organisation for the encouragement and development of the playing of hockey in England. They pay it affiliation fees on which England Hockey charges VAT. The Commissioners notified England Hockey that the affiliation fees it received in consideration for the services it supplied to hockey clubs affiliated to it should be subject to VAT at the standard rate. As the clubs were not persons taking part in sport, those supplies of services did not fall within the relative exemption. The Hockey Clubs appealed against that decision to the VAT and Duties Tribunal.

The national court decided to stay the proceedings and to refer questions to the Court of Justice. It asked whether the term ‘persons’ in the context of ‘persons taking part in sport’ include corporate persons and unincorporated associations, or whether it is limited to individual, in the sense of natural persons or human beings.

The Court declared that Article 13A(1)(m) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes is to be interpreted as meaning that, in the context of persons taking part in sport, it includes services supplied to corporate persons and to unincorporated association, provided that – which it is for the national court to establish – those services are closely linked and essential to sport, that they are supplied by non-profit making organisations and that their true beneficiaries are taking part in sport.

Moreover, Article 13A(1)(m) of the Sixth Directive is not intended to confer the benefit of the exemption under that provision only to certain types of sport but covers sport in general, which also includes sports necessarily practised by individuals in groups of persons or practised within organisational and administrative structures put in place by unincorporated associations or corporate persons, such as sports clubs, provided that the requirements set out in Article 13A(1)(m) and (2)(b) are fulfilled. To require that the services in question be directly

supplied to natural persons taking part in sport within an organisational structure put in place by a sports club would mean that a large number of supplies of services essential to sport would be automatically and inevitably excluded from the benefit of that exemption, irrespective of the question whether those services were directly linked to persons taking part in sport and who was the true beneficiary of those services. Such a result would run counter to the purpose of the exemption provided for by that provision which is to extend the benefit of exemption to services supplied to individuals taking part in sport. Besides, the principle of fiscal neutrality, in compliance with which the exemptions provided for in Article 13 of the Sixth Directive must be applied, would be overturned if the possibility of invoking the benefit of the exemption under Article 13A(1)(m) of the Sixth Directive depended on the organisational structure particular to the sporting activity practised.

Thus, in order to ensure the effective application of the exemption under Article 13A(1)(m) of the Sixth Directive, that provision must be interpreted as meaning that services supplied in connection with, among others, sports practised in groups of persons or within organisational structures put in place by sports clubs are, generally, eligible to benefit from the exemption under that provision. It follows that, to determine whether supplies of services are exempt, the identity of the material recipients of those services and the legal form under which they benefit from them are irrelevant.

Furthermore, the expression ‘certain services closely linked to sport’, in Article 13A(1)(m) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, does not allow the Member States to limit the exemption under that provision by reference to the recipients of the services in question.

The Court furthermore concluded, that, the possible restriction on the benefit of the exemptions provided for by Article 13A of the Sixth Directive may be imposed only in the context of the application of paragraph 2 of that provision. Thus, when a Member State accords an exemption for certain services closely linked to sport or physical education supplied by non-profit-making organisations, it may not make that exemption subject to conditions other than those laid down in Article 13A(2) of the Sixth Directive. Since that provision does not lay down restrictions as regards recipients of the services in question, the Member States have no power to exclude a certain group of recipients of those services from the benefit of the exemption in question.

PLACE OF SUPPLY – TRANSFER OF LIFE INSURANCE PORTFOLIO

Case C-242/08, Swiss Re Germany Holding GmbH v Finanzamt München für Körperschaften, 22 October 2009

Swiss was the parent company of a limited company which, as an insurance company, specialised in life reinsurance work. By a portfolio sale agreement, the transferor company sold to the insurance company S, established in Switzerland, a portfolio consisting of 195 life reinsurance contracts. The life reinsurance contract transferred concerned exclusively undertakings established in Member States other than Germany, or in third States. Taking the view that VAT was chargeable on the transfer in question, on the basis that it was a supply of goods, the Finanzamt München für Körperschaften issued a VAT prepayment notice and rejected the appeal lodged against that notice.

The main questions which the Court had to answer were whether a transfer for consideration, by a company established in one Member State, to an insurance company established in a third State, of a portfolio of life reinsurance contracts, with the consequence that the transferee company assumes, with the consent of the insured persons, all the rights and obligations resulting from those contracts, constitutes a transaction falling under Article 9(2)(e), fifth indent of the Sixth Directive, under Article 13B(a) of that directive or under a combination of Article 13B(d)(2) and (3), and whether Article 13B(c) of the Sixth Directive must be interpreted as meaning that it applies to a transfer for consideration of a portfolio of life reinsurance contract such as that at issue in the main proceedings and whether, if it does apply, a distinction must be made depending on whether the place in which the exempted activities are effected lies in the Member State in which the goods are supplied or in a different Member State.

The Court declared that a transfer for consideration, by a company established in one Member State, to an insurance company established in a third State, of a portfolio of life reinsurance contracts, with the consequence that the transferee company assumes, with the consent of the insured persons, all the rights and obligations resulting from those contracts, constitutes a supply of services within the meaning of Article 6 of Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes. Life reinsurance contracts cannot be regarded as tangible property within the meaning of Article 5(1) of the Sixth Directive. Consequently, a transaction which consists of the transfer of such contracts cannot be considered as a supply of goods within the meaning of the latter provisions.

Moreover, a transfer for consideration of a portfolio of life reinsurance contracts which consisted of the payment by the acquiring company of a price in return for acquiring those contracts is not, by its nature, a banking transaction. It also lacks the characteristics of an actual insurance transaction.

In addition, a transfer of a portfolio of life reinsurance contracts does not constitute, by its nature, a financial transaction within the meaning of Article 13B(d) of the Sixth Directive. It involves, furthermore, a single service which cannot be artificially split into two services comprising a dealing within the meaning of Article 13B(d)(2) of the Sixth Directive and a transaction concerning debts within the meaning of Article 13B(d)(3) thereof.

In the context of such a transfer, the fact that it is not the transferee but the transferor who pays the consideration by the fixing of a negative value, for the acquisition of some of the contracts transferred, does not affect the foregoing.

The Court concluded that Article 13B(c) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as meaning that it does not apply to a transfer for consideration of a portfolio of life reinsurance contracts, since such a transfer cannot be regarded as a supply of goods within the meaning of Article 5(1) of the Sixth Directive, but must be regarded as a supply of services under Article 6 of the directive.

