



# THE TAX ADVISER

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## **FROM THE PRESIDENT'S DESK**



The Institute's newspaper makes a reappearance after a longish break, albeit in a reduced form. The preparation of a newspaper in the format adopted in 2015 and earlier this year has proved to be a more difficult task than expected at this stage of the Institute's development. The project has not been abandoned but only deferred: hopefully for a short time.

In this edition we focus on issues, past and present, connected with or arising from the Taxpayers Charter. The Charter is of course one of the pillars of a just and reasonable tax system, indicating with equal emphasis the rights and obligations of both the state and the taxpayer. We are proud to have been a prime mover, in Malta and in Europe, of this concept, and today we present a new development whereby the tax advisor finds his rightful and central place in the latest version of the Charter which has been launched by three important associations of practitioners from all quarters of the globe. We welcome this new approach which we embrace unhesitatingly. Details of this new development are given in this issue under the heading "Tax Advisors in Taxpayer Charters".

In this issue we also carry a detailed exposition of our thoughts on formalisms in tax administration and how these un-necessarily create obstacles to a just and fair tax system. It is true that we have come a long way from the rigid thinking based on the outdated aphorism that "there is no equity about a tax", but we still do not understand why the law permits certain administrative obstacles such as that perhaps best illustrated by the case of a taxpayer who had his appeal thrown out because he could not present records which had been buried under the rubble and swept away together with his house whilst he was abroad during a memorable storm!

We also carry an account of the Institute's International Tax Conference held earlier this year. It is the Institute's intention to make this an annual event.

## KEEPING UP WITH THE TAXPAYERS' CHARTER

### CERTAIN FORMALITIES AND PRACTICES IN TAX ADMINISTRATION

The publication of the Taxpayers' Charter a few years ago heralded a new era in relations between the Revenue departments and the taxpayers. Unfortunately, some of the valuable concepts introduced by the Charter may have fallen by the way-side. At this stage, we simply record this perception, though it may be necessary in future to elaborate further. We only seek to discuss some issues connected with taxation which now need to be considered within the ambit of the Charter. These concern the degree and extent of legal formalities to be insisted upon in the administration of taxation which seem to be unnecessarily strict and inflexible, a more reasonable appreciation and application of the distinction between 'fresh grounds of objection' or 'fresh reasons' sustaining an objection that has already been filed, and policy concerning time limits.

Our current system of general legislation had its origin in the middle of the nineteenth century. The great Codes of Law were based as regards their substance mostly on models contained in the rigorous legal systems of continental civil law countries, but several procedural issues of great importance, such as the way in which criminal trials are held, were imported from common law practice of Great Britain. A reference to this matter is found in the decision delivered by the Board of Special Commissioners (Income Tax) in case n0 224<sup>1</sup>. This concerned certain procedural issues which, unfortunately eventually led the Board to declare the appeal null and void, but the Board took occasion to state:

"The old style formalism has been under attack at least since the last century. A Scottish jurist who had a large say in the development of various aspects of Maltese legislation (*Lord Jameson*) had this to say in his report of the 26 December 1850 on a draft of what eventually became the Code of Organisation and Civil Procedure: *there is a medium between over-strictness in regard to form and a dangerous laxity of procedure, and the safer side to err upon is to disregard errors and deviations which do not affect substantial rights*. He had therefore suggested – because he appreciated well the real value of procedural law – that the new Code should include the following article reproduced from the then current procedural code of New York: '*And whenever any proceedings taken by any party fails to conform in any respect to the provisions of the Code, the Court may permit the amendment of such proceedings, so as to make it conformable thereto*'. The local legislator did not adopt this recommendation, but fortunately several judges have appreciated since then that formalism was an anachronism which lost sight of real justice, and they proceeded to deliver decisions which, linked with the efforts of persons such as Jameson,

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<sup>1</sup> Decision dated 9 February, 1998.

have contributed not a little to our modern just procedural law". The Board, together with similar arrangements in other fiscal laws, has since been dissolved and replaced by the Administrative Review Tribunal. The ART has followed closely the above line of thinking, and has taken a refreshingly innovative stand on these issues – though obviously always within the limits of the legislation.

In the very first case of income tax which was carried to the Court of Appeal many years ago<sup>2</sup>, the Court aligned itself with this trend: "Modern juridical systems ..... abhor formalisms and favour freedom of persuasion of the judge ..... consequently, procedural restrictions incompatible with this aim cannot be presumed unless they are clearly set out in the law"<sup>3</sup>. Unfortunately, this warning too often fell on deaf ears, and just a few years later<sup>4</sup> the Court itself seemed to have forgotten its own statement: holding that filing one copy of a form instead of two copies invalidated an appeal – in the process over turning the Board's decision. One had to wait for nearly half a century before the Court adopted a more liberal attitude in this particular respect<sup>5</sup>. In many cases where such issues have been over-emphasised, one is left with a feeling that justice has not really been done. Both the taxpayers and the tribunals have to shoulder their share of blame in this matter, but the main 'culprits' continue to be the Revenue authorities, including those entrusted with the preparation of legal texts, that is laws and legal notices. Questions relating to the amount of tax payable in given circumstances are not within the purview of this discussion, which is only concerned with procedural issues, but whether, for example, a taxpayer should automatically lose a right of appeal if records are not filed at the appropriate time, does fall within this discussion. Some of these procedural impositions have in fact had to be declared unconstitutional by the Courts: e.g. requiring the payment of a substantial part of the disputed tax before a valid appeal could be filed, or denying a right of appeal if not all the undisputed tax has been paid.

It must also be recorded that in at least two instances the Court of Appeal effectively overturned what appeared to be rather clear provisions of the law without waiting for a Constitutional Court to declare that the provisions in question were unacceptable. These concerned the precise meaning of the provisions relating to the payment of tax by persons about to leave Malta<sup>6</sup>, and a decision (over-ruling another decision of the same Court) on whether the time limit for the raising of assessments applied also to their service, or whether there was in fact no time limit fixed for service<sup>7</sup>.

None the less, there have been a large number of cases where the tribunals upheld rigidly a provision that, in certain cases, an appeal has to be rejected unless proper trade records are

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<sup>2</sup> Case no 1 decided 1 April, 1951.

<sup>3</sup> Both of the above quotations are informal translations from the Maltese original.

<sup>4</sup> Case no 21 decided on 17 November 1958.

<sup>5</sup> Case no 176 decided on 10 January 2003.

<sup>6</sup> Case no 83 decided on 9 May 1971. Actually, a fairly old case which predates later constitutional and allied E.U. Arrangements.

<sup>7</sup> Cases no 178 and 185.

filed within stipulated time limits. This provision was contained in article 36(b) of the Income Tax Management Act. It had to be modified on the advent of the Administrative Review Tribunal, but the substance of this imposition is still found (admittedly in a slightly diluted form) in the proviso to article 31(5) of the ITMA, read in conjunction with the re-hashed article 36(b). (The equivalent VAT provisions are found at article 48(5) of the VAT law). The law is of course there to be applied, but should this requirement have been insisted upon even in cases such as where, following a severe storm, the records had been swept away together with the debris of the collapsed premises in which they were stored – and all this at a time when the taxpayer happened to be abroad, and already retired from the business?<sup>8</sup> With respect, such decisions tend to make a mockery of substantive justice. It has also to be recorded, however, that in not a few such cases, the tribunals have taken matters into their own hands and proceeded to hear the appeal and deliver judgement on the real merits of the case. It may here be noted that in several VAT decisions the ART has refused outright to consider applying these provisions, pointing out that the Court of Appeal had expressed doubts about their constitutionality and that, in any case, they ran counter to the provisions of its constituent law<sup>9</sup> But one may ask: why should tribunals need to proceed in this way? The relative provisions originated in amendments made to the Income Tax Act in the late 1970s in an effort at boosting the then nascent accountancy profession and its influence on Income Tax. They have now become not only unnecessarily draconian, but also harking back to the dinosaurs.

A large number of procedural issues which have from time to time hindered the free dispensation of justice are set out in a publication of the Malta Institute of Taxation mentioned below, and need not be repeated. One procedural issue which requires specific attention, however, concerns the question of ‘precise grounds of objection’. This is connected with the process of determining the amount of tax payable which can extend itself over four levels: assessment stage, objection stage, appeal to first tier tribunal and final appeal to the Court of Appeal on points of law. (Strictly speaking, recourse to the Constitutional Court or the European Court of Justice or the European Court of Human Rights, does not form part of this structure, and judges in the said Courts have repeatedly pointed out that their function was not that of a further appeal from the normal courts). Movement from the first to the second stage is at the option of any taxpayer who feels himself aggrieved by an assessment which has been raised upon him. This can be done by filing, in writing, a notice of objection and it is specifically set out that: ‘such application shall state precisely the grounds of the objection’<sup>10</sup>.

Very early after its constitution<sup>11</sup>, the Income Tax Board of Special Commissioners had pointed out that a notice of objection could be couched in general terms in the sense of contestation in

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<sup>8</sup> Court case no 137a decided on 25 January 1986, and case no 197 decided by the Board on 2 March 1987.

<sup>9</sup> Cap 490: the Administrative Justice Act.

<sup>10</sup> This wording harks back to the Model Income Tax Ordinance and was first incorporated in our law as section 55(2) of the Income Tax Act, 1948. It is now found in article 33 of the Income Tax Management Act.

<sup>11</sup> Board case no 30 decided 28 April 1954.

general of the assessment, or it could specify particular points on which disagreement existed. Both methods satisfied the requirements of the law highlighted as above. Once the second road was chosen, however, the taxpayer cannot thereafter bring in new grounds of objection. In actual fact, it is well known that during the objection stage the Revenue rarely finds any difficulty in accepting new or expanded grounds of objection. But if disagreement still persists and the case has to be remitted to the tribunals, the area of contestation may become restricted to the original grounds of objection as filed. On final disagreement between the Revenue and the taxpayer, a notice of refusal is issued in writing by the department, but the important point is that the consideration by the Commissioner of an objection and its eventual refusal is the exercise by that official of quasi-judicial functions. The notice of refusal must therefore contain all that which is to be contained in a decision by an authority which is hearing an appeal, and has to be considered as such. Clearly, the further stages in the process of determining the amount of tax payable cannot deviate from the points of disagreement which will have been crystallized at that stage. The introduction of the Administrative Review Tribunal in lieu of the former Boards of Special Commissioners (Income Tax and Duty on Documents and Transfers) and Appeals Board in VAT, has added importance to this aspect of the proceedings as, at least in this regards, the ART has to act more like a traditional court of justice than the more informal Boards.

A large number of cases have had to be decided on the issue whether points brought up on appeal constituted new or fresh grounds of objection<sup>12</sup>. It may be queried why taxpayers do not make more often use of the facility afforded by the Board as above of making 'generalised' notices of objection rather than raising specific points of disagreement. This is a moot point, but in most cases it is far more reasonable to specify the particular point on which one feels aggrieved by an assessment, rather than to query the assessment in toto. (The ART certainly encourages this line).

The general trend of the law's arrangements in this regards is fairly clear and acceptable: once the boundaries of disagreement have been clearly drawn, these cannot be allowed to shift at the taxpayer's whim as otherwise the matter would never be finalised. One may here remark that the Revenue is likewise prohibited from bringing in fresh income at the stage of refusing an objection<sup>13</sup>. But just as the Revenue have a way out of this difficulty by raising an additional assessment where this is not statute barred, so also it could be argued that some means should be available to make sure that unfortunate slips in filing a notice of objection do not mean that clear rights have to be lost.

The real point at issue in this regards is the fact that at any stage of the proceedings the taxpayer cannot be prohibited from using fresh reasons to buttress his grounds of objection.

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<sup>12</sup> See the publication "Sixty Years of Income Tax Appeals", Malta Institute of Taxation, 2015. Progress Press.

<sup>13</sup> Board Case no 16, decision dated 19 May 1953.

This was decided by the Court in the first case which it dealt with in income tax<sup>14</sup>. Actually, the Court in that case appeared to be almost ready to sanction the bringing forward of new grounds, but it ended up by deciding that, after all, the taxpayer was not bringing up fresh points of disagreement, but only suggesting new reasons in support of his objection<sup>15</sup>. As already indicated, this distinction has been used ever since, and the issue has been re-examined and argued in detail every time that the Revenue objects to something new being brought up which they had not heard before. It is useless to try to set out the general lines followed by the tribunals except in very clear cases. Though in theory it may be fairly easy to understand the distinction between new grounds of objection and fresh reasons supporting old grounds, in many cases it may be difficult to forecast on which side of the argument the tribunals will come down. There is also an understandable feeling that in any particular case the tribunal will decide what obvious substantive justice really requires, irrespective of the niceties of juridical interpretation<sup>16</sup>. Obviously, the point regarding fresh grounds of objection is always raised by the Revenue, and the taxpayer will never have any reason to bring forward this point. The tribunals do not seem to be much in favor of raising this matter themselves *ex officio*, and it must be admitted that the Revenue Departments now appear to be more liberal in this regards. The situation, however, remains too fluid for comfort and something tangible should be done about this issue.

The Courts have profoundly affected the way in which taxation is levied. Two cases are mentioned above, but other fundamental points have also emerged from the courts in Malta, not to mention the European courts. Local decisions include a ruling that penal additional tax chargeable is effectively a criminal penalty, so that no further administrative penalty can be levied as that would be two fines or penalties for the same “crime”. The Courts have also finally openly accepted that the onus of proof shifts from the taxpayer to the Revenue in certain circumstances. One cannot also fail to mention that the tribunals have stipulated that the departmental tax file concerning any person must be open for his inspection. It must be admitted, however, that ART decisions to the effect that departmental files must be exhibited in their entirety during the hearing of an appeal, may be going too far. It is a principle of public administration that hard and uncomfortable views may have to be aired, discussed and decided upon internally: this can hardly be done freely with effectively the taxpayer and everybody else looking over one’s shoulder to note who has said what. Nevertheless, the

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<sup>14</sup> Case no 1, *supra*.

<sup>15</sup> A totally opposite line was taken much later by the Court which, in case no 232 decided on 28 January 2008, seemed to indicate that the Board had wrongly allowed the bringing in of fresh *grounds* rather than merely fresh *reasons*.

<sup>16</sup> In actual fact, the Board once said that it would be monstrous to expect it to confirm the taxation of certain income which had clearly not existed, simply because this had not been clearly specified as a ground of objection. In another case, the Court of Appeal declared openly that the Revenue practice (which it found itself bound to confirm) that a dependent who had a ridiculously trivial personal income could not be said to be wholly maintained by appellant was something which was giving a bad name to the Department.

protection now given to the taxpayers has come as a welcome relief: it is hoped that it will be carefully nurtured in the future, without going to extremes.

Mention must also be made of a sore point regarding appeals in all branches of tax legislation. This concerns the large number of appeals which have had to be declared null and void because of late filing. To some extent, this may be due to a lack of attention by taxpayers and their advisers, but a review of the cases shows that in many instances there had been attenuating circumstances which could have been reasonably accepted as a valid excuse for late filing. The tribunals have however been inflexible in this latter on the basis that time limits for the filing of appeals are matters of public policy which admit of no exception whatsoever. The tribunals can hardly be faulted for taking this stance: not only is our legal system steeped in the traditions of 'public policy', but the draftsman of the Income Tax Act, 1948, went out of his way to remove from the draft law a provision which would have given elbow room to admit late appeals on the same basis as late objections can be accepted. In the Model Income Tax Ordinance which had been prepared in the early 1920s in London for use by overseas territories wishing to introduce their own tax legislation, both late objections and late appeals could be accepted if the taxpayer can satisfactorily show that he was prevented from filing the objection or appeal in time through absence abroad, illness or other reasonable cause. Essentially, this was in line with the arrangements on this matter holding good in the United Kingdom at that time (and still extant), but the draftsman of the local law saws fit to retain the possibility of filing late applications in reasonably acceptable circumstances only in the case of objections, but not in the case of appeals. This practice was followed in all subsequent local fiscal legislation. The Administrative Review Tribunal has had no option but to follow the traditional line. The small number of deviations which the ART (like its predecessors) has been able to make in practice in no way infringes the practice.

The rule of public policy appears to have been written in stone: is now time to remove it and, if needs be, blow up the stone as well?

**THE INSTITUTE'S POSITION** on the matters discussed above can now be set out as follows:

**1<sup>st</sup>: A study should be carried out as to how the tendency of lapsing into formalisms by revenue authorities and taxpayers (as well as the tribunals) can be discouraged, with glaring procedures identified and eradicated.**

**2<sup>nd</sup>: Any formalism which leads to a denial of real justice should be immediately, even if informally, avoided.**

**3<sup>rd</sup>: Close co-operation between the Revenue and the taxpayers on this aspect of tax administration is to be sought and fostered.**

4<sup>th</sup>: Possible amendments to the legislation should be explored where considered to be necessary to achieve the above aims. In particular, the rigid and inflexible rules regarding time limits, albeit based on so-called “public policy” have to be modified within reasonable limits.

5<sup>th</sup>: Court decisions which over-ride old established practices must be openly accepted and given publicity. An effort should be made to anticipate changes in outlook, and these should be given effect to without waiting for formal decisions. This would indeed be creative thinking and action along the lines of the Taxpayers’ Charter.

## TAX ADVISORS IN TAXPAYERS CHARTER

The Confederation Fiscale Europeenne, in conjunction with the Asia Oceania Tax Consultants Association, and the Society of Trust and Estate Practitioners (total membership of some 550,000 professionals), has prepared “A Model Taxpayers’ Charter: “Towards Greater Fairness in Taxation”. This is an excerpt from a Final Report prepared by three experts on taxation appointed by the three associations. The C.F.E. nominee was our old acquaintance Ian Edward Hayes.

The Charter develops further usual themes, but it also puts forward important new suggestions and criteria. Among these are new provisions regarding Tax Advisors who, for the first time, enter the Charter with important functions. In fact, article 3.1 states that: “The persons covered by this Charter include all Taxpayers and their duly appointed **Tax Advisors** and, in their dealings with Taxpayers and **Tax Advisors**, all States, Tax Administrations and Tax Officers”. The term ‘Tax Advisor’ is defined to mean “A duly appointed representative of a Taxpayer **recognised by the State** to act on behalf of a Taxpayer in matters concerning Tax”. In terms of sub-Article 9.6, relations between Taxpayers and their Tax Advisors are granted the status of privilege. It may also be relevant to note that Article 27 of the new Report refers to “Matters concerning **Tax Advisors**”. The suggestions made are useful: of particular significance is sub-Article 27.3 which clearly envisages the right of the State to lay down conditions as to who can be recognised to be a Tax Advisor. The full Article 27 is set out below.

### Article 27 of “A Model Taxpayer Charter”.

#### Matters Concerning Tax Advisers

1. The rights and responsibilities in this Charter shall apply to Advisors as the context may require.
2. A Taxpayer shall have the right to be represented by a Tax Advisor.

3. The State may define requirements and procedures for who may represent a Taxpayer as a Tax Adviser.
4. A Tax Advisor shall at all times act truthfully and in good faith and in compliance with applicable rules of ethics and professional conduct.
5. In an appeal a Taxpayer shall have the right to be represented by a Tax Advisor, except that in judicial proceedings the Tax Advisor shall be a lawyer where the judicial system requires this.
6. A Tax Advisor shall have authority to certify Tax returns and information filings on behalf of a Taxpayer and negotiate arrangements on behalf of the Taxpayer if specifically authorised to do so, and in such a case, this authorisation is binding on the Taxpayer.

## ANNUAL TAX CONFERENCE -- 2016



The Malta Institute of Taxation held its Annual Tax Conference on Friday 29<sup>th</sup> April 2016, under the patronage of Hon. Minister for Finance and Hon. Shadow Minister for Finance. The theme for this Conference was '*TOWARDS A FAIR AND EFFICIENT TAX SYSTEM?*'

At this full-day Conference, a number of professional local and foreign speakers, leading experts in their field, delivered presentations on current topics in the field of taxation, involving both direct and indirect taxation. The high caliber foreign guest speakers included 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 reviewed VAT exemptions on gambling and financial services and the modernization of the cross-border EU movements of goods and services.

Another high profile speaker was 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 used this Conference as a platform to provide a deep insight into the new Institutional Tax Framework within the EU.

The plenary session also included two presentations from well known local tax experts. Dr. Neville Gatt analysed whether the concept of withholding Taxes under Maltese law is a matter of efficiency over fairness. Mr. Marc Alden delved into the subject of the automatic exchange of information and the vital role that this plays in the drive towards global tax transparency. Dr Conrad Cassar Torregiani acted as the Conference Moderator.

Various workshops also featured during this Conference. These discussed topical issues including the EU Anti-Tax Avoidance Directive; the new Common Reporting Standard, based on the US Foreign Account Tax Compliance Act, which came into effect this year; recent legislative tax changes in Malta; recent developments in VAT affecting Maltese industry as well as the setting of the Transfer Price as governed by Article 9 of the OECD Model Treaty coupled with the drive in the EU for fairness and efficiency.

Dr Renald Micallef, MIT Chairman, thanked Bank of Valletta plc, MGI Malta and Finance Malta for their support for having sponsored this Annual Tax Conference.