



MALTA
INSTITUTE
OF TAXATION



MALTESE TAX LAW UPDATE

(Update 28)







EDITOR'S NOTE

The number of tax developments registered this quarter is quite unprecedented. The month of February turned out to be particularly eventful. In mid-February the European Commission published its December 2017 report relating to the Maltese Tonnage Tax System and the Minister of Finance published the new NID Rules. The Commission Report incorporates an annex which explains commitments entered into by Malta to reform its tonnage tax system. The relevant law was passed in April.

A number of developments took place in March. On 7 March, the European Commission published a report entitled Aggressive tax planning (ATP) indicators and on 8 March, the European Commission published its Malta Report. The Report states that some indicators suggest that Malta's tax rules are used by multinationals engaged in aggressive tax planning structures. The Report singles out some tax rules (among them the design of the planned Notional Interest Deduction regime and the absence of withholding taxes on payments made by companies based in Malta, combined with a lack of some anti-abuse rules) concluding that Malta's tax rules may still be used in tax avoidance structures.

On 8 March, the European Commission decided to send letters of formal notice to Cyprus, Greece and Malta for not levying the correct amount of Value-Added Tax (VAT) on the provision of yachts. On 13 March 2018, the Council reached agreement on a draft directive requiring intermediaries such as tax advisors, accountants and lawyers that design and/or promote tax planning schemes.

In April, Parliament enacted the Budget Implementation Act, a law providing for substantial changes to our Income Tax Acts. Our Courts delivered around 20 judgments, the most interesting of which are probably the Court of Appeal's judgment in *Cove Limited v. KT* and the Constitutional Court's Judgment in *Antonio Busuttil v. Kummissarju tal-Pulizija*. Arguably, our Courts are applying legal provisions relating to personal liability of directors quite strictly and a legislative reform should be considered.

Robert Attard
18/4/18

Act No. VII of 2018

Act No. VII incorporates major amendments to the ITA and ITMA.

Changes to the ITA

Changes to the ITA include:

- A change in the definition of participating holding: The shareholding quota requirement has been reduced from 10% to 5%. The first proviso to the definition has been changed too. The change relates to EEIGs and non-election partnerships being treated as participating holdings.
- Changes to the remittance basis of taxation: A new paragraph added to 4 (1) (g) ITA reflects the contents of Legal Notices providing that Long-term Residents and EU Permanent Residents cannot benefit from the remittance basis of taxation. A remittance base charge has been introduced via the addition of 56 (27) ITA providing for a remittance base charge of EUR5,000. In certain cases the remittance base charge may be capped to an amount which is lower than EUR5,000 (the lower cap applies to non-doms who are low-earners).
- Amendments to the definition of 'project' contained in Article 5A (Property Transfers Tax): A proviso excluding from the remit of the definition undeveloped land sold tale quale has been added.
- Obligation to draw up a Balancing Statement: Article 5A (12B) ITA has been added. It provides for an obligation to draw up a balancing statement whenever capital allowances are claimed with respect to immovable property and the property subject to capital allowances is transferred. Any resulting balancing charge is brought to tax under Article 56 ITA.
- Introduction of New Tax Exempt Person: The MCAST is being added in the list of tax exempt persons.
- Tweaking of Financial Assistance Exemption: The exemption on financial assistance has been augmented with the addition of a new paragraph recognising financial assistance stipulated by public deed.
- Tax Amortisation of IP: The third paragraph to 14 (1) (m) ITA has been eliminated implying that any sums receivable from sales of intellectual property do not have to be included in the total income for the year when receivable.
- Notional Deduction IP: Article 14 (1) (p) ITA contemplating a notional deduction (equivalent to

a percentage of qualifying income from qualifying intellectual property) has been added.

- The definition of rents in 31D has been clarified with references both to rents from urban tenements as well rural tenements.
- The addition of 33 (2A) ITA prescribes that payors of investment income must submit by 31 January an account containing details of recipients of investment income.
- The rules providing for cases where unmarried persons and widowers can use the married rates have been improved. The structure of paragraph (b) (i) to the first proviso to 56 (1) ITA has been improved and the age of the dependant has been increased from not over 16 years to not over 18 years. The income bracket has been increased from EUR2,400 to EUR3,400. The same increase has been reflected in the parental computation.
- In 56 (26) dealing with the special beneficial rate of tax applicable to sports activities references to Kunsill Malti Ghall-Isport have been replaced with references to Sport Malta and references to licensing now refer to the 'national regulatory body'.
- The addition of 92 (3) ITA providing for new rules governing the application of FRFTC when NID is applied. 92 (3) ITA provides that, in determining the profit for the purposes of the limitations rules, no account is taken of NID.

Changes to the ITMA

Important changes to the ITMA include the following:

- Via the addition of a new 10 (2) (c) (iii) ITMA companies may benefit from an entitlement to determine the order in which credits granted in terms of the Business Promotion Act shall be claimed for set-off.
- A new rule provides that privileged claims are to apply with respect to assets of principal officers of employers.
- Services of notices shall take place even by electronic means to a verified email address.
- Privileged claims are registrable at the Public Register upon the lapse of 2 days from service of the judicial letter.

L.N. 35 of 2018 DUTY ON DOCUMENTS AND TRANSFERS ACT(CAP. 364) Duty on the Acquisition of the Second Immovable Property to be used for Own Residence (Exemption) Order, 2018

L.N. 35 provides for refund of duty promised in a Budget Measure. The L.N. provides that where an individual transfers his residential immovable property (the “replaced property”), and acquires another residential immovable property (the “replacement property”) within 12 months from the date of transfer of the replaced property, the duty paid on the first €86,000 of the value of the replacement property shall be refunded. The right to refund applies only when all the following conditions have been satisfied:

- a. the transfer of the replaced property must qualify for tax relief under article 5A(4)(c) of the Income Tax Act
- b. the replaced property must have been acquired by way of a transfer that qualified for relief under article 32(4)(a) of the Duty on Documents and Transfers Act;
- c. the acquisition of the replacement property must qualify for duty relief under article 32(4)(a) of the Duty on Documents and Transfers Act. Acquisitions made through a gratuitous title in accordance with rule 3(2) of the Duty on Documents and Transfers Rules are excluded;
- d. if the replaced property had qualified for an exemption under article 3 of Exemption of Duty in Terms of Article 23 Order or under article 32C of the Duty on Documents and Transfers Act, 5 years must have elapsed on the date of acquisition of the replacement property;
- e. the individual must not have owned any other residential immovable property acquired through a transfer *intervivos* before the acquisition of the replacement property, other than the replaced property in the case where the replacement property is acquired before transferring the replaced property. The individual must not own any other residential immovable property at the time of acquisition of the replacement property, other than the replaced property in the case where the replacement property is acquired before transferring the replaced property. “Residential immovable property” is defined as including a plot of land or airspace;
- f. the transfer of the replaced property must be made within 12 months from the acquisition of the replacement property. In the case of persons who are on the Register of Persons with Disability kept by the Commission for the Rights of Persons

with Disability set up in terms of the Equal Opportunities (Persons with Disability) Act, and who are in possession of an identity card issued by the said Commission, and who benefit from any Disability Assistance according to article 27 of the Social Security Act, the duty paid on the first €150,000 of the value of the replacement property will be refunded. In the case of guardians of persons who are on the Register of Persons with Disability kept by the Commission for the Rights of Persons with Disability set up in terms of the Equal Opportunities (Persons with Disability) Act, who reside in the same household and who are in possession of an identity card issued by the said Commission, and who benefit from any Disability Assistance according to article 27 of the Social Security Act, or from Disabled Child Allowance according to article 77 of the same Act, the duty paid on the first €150,000 of the value of the replacement property shall be refunded.

**L.N. 37 of 2018, the Income Tax Act (CAP. 123) Notional Interest Deduction Rules, 2018 (the ‘NIDR’).
L.N. 38 of 2018 – the Tax Accounts (Income Tax) (Amendment) Rules, 2018**

L.N. 37 of 2018 incorporates the latest version of Malta’s Notional Interest Deduction Rules (the ‘NIDR’).

L.N. 37 must be read in conjunction with L.N. 38 of 2018 – the Tax Accounts (Income Tax) (Amendment) Rules, 2018 which adapted the Tax Accounting Rules so as to provide for NID.

Rule 3 NIDR provides that for the purpose of ascertaining the total income of an undertaking for a year of assessment, the undertaking shall be entitled to a deduction for sums that are deemed to be payable by way of interest on risk capital or such part thereof as may be determined by the undertaking for the particular year. Definitions of the important terms ‘interest on risk capital’ and ‘undertaking’ are contained in Rule 2.

The definition of ‘interest on risk capital’ in Rule 2 directs the reader to Rule 4 providing that Interest on risk capital for a year of assessment shall be calculated on the basis of the following formula:

$$Y = A \times B$$

Where –“Y” represents the interest on risk capital that an undertaking is entitled to claim in the relevant year of assessment;

“A” represents the reference rate;
“B” represents the risk capital of the undertaking for the accounting period ending in the year preceding the year of assessment less any risk capital directly employed in the form of securities, interest in a partnership, contributions and any other loans or debts that do not bear interest that the undertaking holds in or provides to any other person whether resident in Malta or otherwise (referred to as “the invested risk capital”), to the extent that such invested risk capital is:

- a. not employed by the undertaking in producing any income in the year preceding the year of assessment in a situation where had any such income been produced it could have been exempt from tax in terms of the Act, or
- b. employed in producing income in the year preceding the year of assessment which is exempt from tax in terms of the ITA.

Rule 2 defines ‘undertaking’ as means a company or a partnership resident in Malta or any other company or partnership that is not resident in Malta that derives income that is effectively connected with a permanent establishment of the company or partnership situated in Malta.

The term “the reference rate” is defined as meaning the risk free rate set by reference to the yield to maturity on Malta Government Stocks with a remaining term of approximately 20 years plus a premium of 5%.

“Risk capital” has a dual meaning:

- (a) where the undertaking is a company or partnership resident in Malta, the share or partnership capital of the undertaking, any share premium, positive retained earnings, loans or other debt borrowed by the undertaking which do not bear interest, and any other reserves resulting from a contribution to the undertaking, and any other positive balance which is shown as equity in the financial statements of the undertaking; and
- (b) where the undertaking is a company or partnership that is not resident in Malta, that part of the risk capital, as defined in paragraph (a), of that undertaking that is attributable to the permanent establishment situated in Malta.

Limitation rules are found in the proviso to Rule 3 (1), Rule 3 (2) NIDR and Rule 4 (2) NIDR. The proviso to Rule 3 (1) NIDR prescribes that the entitlement to a deduction shall apply only in respect of profits which stand to be allocated to a company’s Foreign Income

Account or Maltese Taxed Account or in respect of profits of any other undertaking which, had it been a company, would have stood to be allocated to its Foreign Income Account or Maltese Taxed Account.

Rule 4 (2) NIDR prescribes that where in respect of any year preceding a year of assessment, interest resulting from the above computation exceeds ninety per cent (90%) of the undertaking’s chargeable income for the said year prior to taking into account the deduction allowable the amount of such excess shall not be available for deduction against the profits for the said year, but may, at the option of the undertaking, be carried forward for deduction and be added to the deduction due for the following year and deemed to be part of that deduction, or if there is no such deduction for that year, be deemed to be the deduction for that year and so on for subsequent years and any amounts carried forward as set out in this proviso shall be increased by such rate as may be prescribed by the Commissioner.

Where a shareholder or partner of an undertaking that is a company is deemed to have received interest income pursuant to a deduction claimed by such undertaking, the shareholder or partner will be entitled to deduct any interest on risk capital which it is deemed to have incurred in terms of the NIDR against such deemed interest income without the limitation set out above.

Rule 3 (2) prescribes the limitation rule in 4 (2) shall be calculated on the basis of the undertaking’s income which stands to be allocated to Foreign Income Account or Maltese Taxed Account or which would stand to be so allocated if the undertaking were a company.

NID is claimed at the option of the undertaking in the return made pursuant to article 10 of the Income Tax Management Act, so however that such deduction may only be claimed if it is demonstrated that all shareholders or partners of the undertaking approve the claiming of such deduction in respect of the particular year of assessment. The undertaking shall be entitled to a deduction against such income for sums that are deemed to be payable by way of interest on risk capital.

Where an undertaking claims NID the shareholder or partner, as the case may be, of the undertaking at the end of the year preceding the particular year of assessment shall be deemed to have received in that year an amount of income equal to the interest on risk capital claimed as a deduction by the undertaking for

the said year of assessment. Income that is deemed to be received is characterised as interest.

L.N. 39 of 2018 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) Duty on the Acquisition of the Second Immovable Property to be used as Sole Residence (Exemption) Order, 2018

This LN provides for situations when Duty on Documents and Transfers paid on the acquisition of a home becomes refundable.

LN. 39 prescribes that, subject to a number of conditions, where an individual transfers his residential immovable property (the “replaced property”), and acquires another residential immovable property (the “replacement property”) within 12 months from the date of transfer of the replaced property, the duty paid on the first €86,000 of the value of the replacement property shall be refunded.

For the refund to apply, the following conditions must be met:

- a. the transfer of the replaced property must qualify for tax relief under article 5A(4)(c) of the Income Tax Act (the own residence exemption);
- b. the replaced property must have been acquired by way of a transfer that qualified for relief under article 32(4)(a) of the Duty on Documents and Transfers Act (the first time-buyers scheme);
- c. the acquisition of the replacement property must qualify for duty relief under article 32(4)(a) of the Duty on Documents and Transfers Act. Acquisitions made through a gratuitous title in accordance with rule 3(2) of the Duty on Documents and Transfers Rules are excluded;
- d. if the replaced property had qualified for an exemption under article 3 of the Exemption of Duty in Terms of Article 23 Order or under article 32C of the Duty on Documents and Transfers Act, five (5) years must have elapsed on the date of acquisition of the replacement property;
- e. the individual must not have owned any other residential immovable property acquired through a transfer intervivos before the acquisition of the replacement property, other than the replaced property, in the case where the replacement property is acquired before transferring the replaced property. The individual must not own any other residential immovable property at the time of acquisition of the replacement property, other than the replaced property in the case where the replacement property is acquired

before transferring the replaced property. The term “residential immovable property” is deemed to include also a plot of land or airspace;

- f. the transfer of the replaced property must be made within twelve (12) months from the acquisition of the replacement property.

In the case of persons who are on the Register of Persons with Disability kept by the Commission for the Rights of Persons with Disability set up in terms of the Equal Opportunities (Persons with Disability) Act, and who are in possession of an identity card issued by the said Commission, and who benefit from any Disability Assistance according to article 27 of the Social Security Act, the duty paid on the first €150,000 of the value of the replacement property will be refunded.

L.N. 53 of 2018 INCOME TAX ACT (CAP. 123) Deduction (Income from Employment) (Amendment) Rules, 2018

This LN increases the threshold of maximum employment income subject to the deduction has been increased from €9,500 to €9,700.

L.N. 67 of 2018 INCOME TAX ACT (CAP. 123) Deduction for Transportation Cost of Employees Rules, 2018

LN. 67 provides for a new tax deduction. Rule 3 prescribes that an undertaking may claim a deduction against its income equivalent to 150% of the employee transportation costs incurred in the relative year.

The term “undertaking” is defined as a person carrying on a trade, business, profession or vocation as set out in paragraph (a) of sub-article (1) of article 4 ITA.

“Employee transportation costs” is defined as meaning costs incurred by an undertaking for transportation of employees to and from the place of work using means of transport capable of carrying more than eight (8) persons, whether organized by the undertaking or any other entity.

The deduction may only be claimed on the lower of:

- i. €25,000 of the employee transportation costs incurred by the undertaking in the year preceding the year of assessment; or
- ii. €300 per employee whose transportation costs have been incurred by the undertaking in the year preceding the year of assessment.

The employee transportation costs in respect of which a deduction is claimed under the rules may not benefit from any other deduction.

The deduction available under the rules may only be availed of if the undertaking benefiting thereunder:

- a. maintains proper records of the employee transportation costs in respect of which the deduction is claimed;
- b. claims the deduction in its income tax return relative to the basis year in which the employee transportation costs were incurred;
- c. submits with its income tax return a declaration by a Certified Public Accountant confirming that the undertaking has correctly computed the said costs, in such manner as the Commissioner may require.

The rules will remain in effect up to the year of assessment 2020.

L.N. 68 of 2018 INCOME TAX ACT (CAP. 123) Qualifying Employment in Innovation and Creativity (Personal Tax) (Amendment) Rules, 2018

The date of effect of the Rules has been extended from 31st December, 2017 to 31st December, 2018.

L.N. 82 of 2018 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) Duty on Donations of Marketable Securities and Immovable Property Used for Business (Exemption) (Amendment) Order, 2018

The effective date of the exemption order has been extended to 1 October 2018.

L.N. 114 of 2018 INCOME TAX ACT (CAP. 123) Tax Credit (Higher Educational Qualifications) Rules, 2018

This LN provides for a tax credit that applies to individuals meeting a number of requirements.

Rule 6 prescribes that when the individual has obtained a relevant qualification upon the completion of a course or programme of studies on a full-time basis that commenced in 2017 or later, the tax credit shall be in an amount equivalent to the tax chargeable for the year of assessment in question on the income from his whole-time employment. When the income from the whole-time employment exceeds €60,000, the tax credit for that year shall be calculated as if the said income was €60,000. When the individual has obtained the relevant qualification upon the completion of a course or programme of

studies on a full-time basis that commenced before 2017, the tax credit shall be equivalent to –

$$[A - 2017] / [A - B] \times C$$

Where:

A = the year in which the course or programme of studies is successfully completed

B = the year in which the course or programme of studies commenced

C = the amount calculated in accordance with Rule 6 (1).

When the individual has obtained the relevant qualification upon the completion of a course or programme of studies on a part-time basis, the tax credit shall be equivalent to fifty percent.

“Relevant qualification” is defined as meaning a qualification that satisfies all the following conditions:

- a. it is an MQF 7 qualification or an MQF qualification;
- b. it is awarded following the successful completion of a course or programme of studies that is completed on or after 1 January 2018;
- c. it is awarded to an individual who had not completed forty years of age on the date of the commencement of the course or programme of studies in question;
- d. where the individual is employed in a professional capacity the qualification was not obtained in fulfilment or part-fulfilment of the conditions which he had to satisfy in order to be able to exercise that profession.

L.N. 115 of 2018 INCOME TAX ACT (CAP. 123) Double Taxation Relief (Taxes on Income) (The Republic of Azerbaijan) Order, 2018 (L.N. 214 of 2016)

The Treaty with Azerbaijan has been brought into force with effect from 27th December 2016.

L.N. 116 of 2018 INCOME TAX ACT (CAP.123) Double Taxation Relief (Taxes on Income) (The Socialist Republic of Viet Nam) Order (L.N. 286 of 2016)

The treaty with Vietnam has been brought into force with effect from 25 November 2016.

L.N.118 of 2018 INCOME TAX ACT (CAP. 123) Double Taxation Relief (Taxes on Income) (The Principality of Andorra) Order, 2018

LN. 118 transposes the Treaty with Andorra into Maltese law. The Treaty is heavily based on the OECD Model. Noteworthy provisions include the following:

- a. The PE definition neither incorporates a services nor a stock PE but refers to 'an agricultural, pastoral or forestry exploitation';
- b. Interest is taxed only in the country of residence of the payee;
- c. Royalties are taxed only in the country of residence of the beneficial owner;
- d. The Entitlement to Benefits Clause incorporates a Principal Purpose Test;
- e. The Treaty incorporates a Protocol stipulating that investment funds and pension funds are treated as 'residents of a contracting state'. In the case of Malta, the term investment fund is defined as meaning a collective investment scheme as defined in the Investment Services Act (Chapter 370 of the Laws of Malta) and any other law or regulation that may develop, replace or modify this law in the future. In the case of Malta, the term 'pension fund' is defined as meaning a retirement fund or retirement scheme licensed, regulated or otherwise authorised under the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta) and any other law or regulation that may develop, replace or modify this law in the future;
- f. The Protocol prescribes that a partnership or a trust which is formed under the laws of a
- g. Contracting State and which is registered for tax purposes in that Contracting State shall be considered as a resident of that Contracting State.

L.N. 120 of 2018 MALTA ENTERPRISE ACT (CAP. 463) Tax Credits Supporting the Refurbishment of Hotels and Restaurants Regulations, 2018

This short LN provides for tax credits for relating to expenditure incurred with respect to the refurbishment of hotels and restaurants. Rules relating to the credits will be determined in guidelines issued by Malta Enterprise.

L.N. 121 of 2018 MALTA ENTERPRISE ACT (CAP. 463) Tax Credits for Micro Enterprises and the Self-Employed (Amendment) Regulations, 2018

This LN amends an existing law. Amendments provide that the incentive contemplated in the law is to be taken over 3 consecutive years. Undertakings established in Gozo, female owned undertakings and family businesses as may be defined in the Guidelines, may be granted a total amount of tax credits in terms of this regulation that shall not exceed €70,000 over any period of three consecutive years, under the terms and conditions specified in the Guidelines.

Another amendment contemplated in L.N. 121 provides that as from 1st January 2018, in order to qualify for the tax credit, the undertaking shall not employ more than fifty full-time employees, in its trade or business.

L.N. 122 of 2018 MALTA ENTERPRISE ACT (CAP. 463) Investment Aid for Energy Efficiency Projects Regulations, 2018

This short L.N. provides for a tax credit that shall be regulated in Guidelines that shall be issued by Malta Enterprise.

L.N. 128 of 2018 MERCHANT SHIPPING ACT (CAP. 234) Merchant Shipping (Taxation And Other Matters Relating To Shipping Organisations) Regulations, 2018

Rule 5 of this L.N. provides for a major tax exemption prescribing that if certain compliance obligations are complied with and all relevant tonnage taxes are duly paid by a shipping organisation and, in the case of a ship operated under charter, an amount paid to the Registrar by the shipping organisation equal to the annual tonnage tax for that year in addition to that paid by the owner:

- a. no further tax under the Income Tax Act shall be charged or payable on the income of that shipping organisation, to the extent that such income is derived from shipping activities, and
- b. no further tax under the Income Tax Act shall be charged or payable on any income, profits or gains of a shipping organisation derived from the sale or other transfer of a tonnage tax ship which had been acquired and sold whilst under the tonnage tax system or from the disposal of any rights to acquire a ship which when delivered or completed would qualify as a tonnage tax ship. The exemption applies provided that the activities and objects of the organisation, where applicable, are restricted to such shipping activities and related activities;

The distribution of profits derived from shipping activities or from other transactions referred to above are exempt from tax under the Income Tax Act in the hands of the shareholders.

The term "shipping activities" is defined as meaning:

- a. the international carriage of goods or passengers by sea in terms of the EU Maritime State Aid Guidelines and such other activities that have been approved or considered as eligible for tonnage tax

- b. such activities as are integral or directly linked to the business of operating tonnage tax ships, when carried out in conjunction with activities described in paragraph (a) above;
- c. ancillary activities qualifying in terms of regulation 7, when carried out in conjunction with activities described in paragraph (a) above.

The definition of 'ship' in Regulation 2 excludes from the remit of the Regulations:

- a. fishing and fish factory ships;
- b. private yachts and ships used primarily for sport or recreation;
- c. fixed offshore installations and floating storage units;
- d. non-ocean going tug boats and dredgers;
- e. ships whose main purpose is to provide goods or services normally provided on land;
- f. stationary ships employed for hotel and or catering operations (floating hotels or restaurants);
- g. ships employed mainly as gambling and/or casinos (floating or cruising casinos);
- h. non-propelled barges;
- i. any other description of ship which may be determined, from time to time, by the Registrar-General, as not being engaged in the international carriage of goods or passengers by sea.

Any income derived by a ship manager from ship management activities is deemed to be income derived from shipping activities and is exempt from tax provided that:

- a. compliance obligations are abided by;
- b. the ship manager has paid to the Registrar-General annual tonnage tax;
- c. at least two-thirds of the tonnage of the ships to which the ship manager provides ship management activities is managed from the territory of the Union;
- d. the tonnage in respect of which the ship manager provides ship management activities satisfies the flag-link requirement; and
- e. for the purposes of paragraph (d), the percentage of a ship manager's total tonnage which is Union-flagged shall be determined by expressing as a percentage the sum obtained by dividing the aggregate net tonnage of Union-flagged ships in respect of which the ship manager provides the ship management activities as at a particular date by the aggregate net tonnage of all ships in respect of which the ship manager provides the ship management activities at such date.

Rule 7 prescribes that the provision of ancillary activities linked to maritime transport, may benefit under the regulations, as provided in the Schedule to these regulations provided that revenues generated from such activities is up to 50% of the gross revenues generated from shipping activities, which threshold shall be applied on a ship-by-ship basis.

Any profits generated from, the following ancillary activities may also benefit under the regulations -

- a. the embarkation and disembarkation of passengers on a tonnage tax ship operated by the shipping organisation;
- b. sales and facilities which are normally provided to customers by seagoing passenger ships, including –
 - i. the provision of food or drink for immediate consumption,
 - ii. entertainment for which no additional fee is charged, but not betting or gambling;
- c. activities carried on by the shipping organisation in relation to a tonnage tax ship operated by another qualifying shipping organisation in the same group, which would be shipping activities of the first-mentioned shipping organisation if carried on in relation to a tonnage tax ship operated by that shipping organisation;
- d. such other activities that in substance are similar in nature to those listed above or have been approved or considered as eligible for tonnage tax purposes by the European Commission.

Under Rule 8 (1) the provision of ocean towage services may benefit from the provisions of the regulations provided that:

- a. the tug is a Union ship;
- b. more than 50% of the towage activity effectively carried out by the tug constitutes maritime transport. Towage activities which are carried out inter alia in ports, or which consist in assisting a self-propelled vessel to reach port do not constitute maritime transport. Any waiting time shall be proportionally assimilated to that part of total activity effectively carried out by a tug which constitutes maritime transport.

Under Rule 8 (2) the provision of dredging services may benefit from the regulations provided that:

- a. the ship providing such services is self-propelled and is a Union ship;
- b. the ship spends at least 50% of its yearly operational time in maritime transport which

- includes time spent for travelling to the dredging site located at sea and for carriage of the dredged goods to the place of discharge; and
- c. the tax exemption shall only apply in respect of income derived from maritime transport services.

Companies applying for the exemption under the Regulations must keep separate accounts clearly distinguishing the payments and receipts by the shipping organisation concerned in respect of shipping activities, including the ownership, operation, administration or management of a tonnage tax ship, and payments and receipts in respect of any other business.

2. BILLS

3. JUDICIAL DECISIONS

3.1 JUDGMENTS OF THE ART

Rikors Nru. 5/12VG Paul Mallia u martu Carmen Mallia Vs Kummissarju tat-Taxxi Interni

The ART changed an assessment to Duty on Documents and Transfers because it concluded that the valuation carried out by the Government appointed Architect was wrong because it incorrectly assumed that the property was brand new. Interestingly, whilst confirming that both transferor and transferee were liable to additional tax under the Duty and Documents and Transfers Act, the ART observed that the transferor remained liable to additional duty even when transferor had benefitted from an Income Tax Exemption with respect to the transfer. The ART remarked that:

“It-Tribunal però ma jaqbilx ma’ dak affermat mir-Rikorrenti u dana ghar-raguni li t-Taxxa fuq il-Qligh Kapitali u kwalunkwe ezenzjoni minnha kontemplata fl-Att dwar it-Taxxa fuq l-Income, Kap. 123 tal-Ligijiet ta’ Malta, u t-Taxxa fuq Dokumenti u Trasferimenti u kwalunkwe ezenzjoni minnha kontemplata fid-disposizzjonijiet ta’ l-Att dwar it-Taxxa fuq Dokumenti u Trasferimenti, Kap.364 tal-Ligijiet ta’ Malta, huma zewg tipi ta’ taxxa differenti u distinti minn xulxin. In effetti l-Artikolu 5 tal-Kap.123 tal-Ligijiet ta’ Malta jittratta dwar it-taxxa li ghandha titihallas minn min jaghmel qligh kapitali minn bejgh ta’, fost affarijiet ohra, proprjetà immobbli (ossia t-taxxa dovuta mill-venditur), filwaqt li l-Artikolu 32 tal-Kap.364 tal-Ligijiet ta’ Malta jittratta dwar it-taxxa li ghandha titihallas minn min jakkwista/jircievi proprjetà immobbli (ossia t-taxxa dovuta mill-kompratur). Entrambe l-Ligijiet jipprospettaw

sitwazzjonijiet fejn ikun hemm ezenzjoni shiha jew parzjali mill-hlas tat-taxxa rispettivamente dovuta però dan ma jfissirx li ezenzjoni taht Ligi minnhom tikkostitwixxi, b’mod kwazi awtomatiku, ezenzjoni taht il-Ligi l-ohra. L-uniku mod kif ezenzjoni tista’ tapplika huwa biss jekk din tigi specifikatament u espressament disposta fil-Ligi innifisha. Fid-dawl ta’ dan ghalhekk jirrizulta li minkejja l-fatt li r-Rikorrenti kienu ezenti mill-hlas tat-Taxxa fuq il-Qligh Kapitali b’referenza ghat-trasferiment in kwistjoni, huma ma humiex awtomatikament ezenti mill-imposizzjoni ta’ taxxa addizzjonali (li in verità hija penali ta’ natura punitiva) imposta bl-Artikolu 52(4) tal-Kap.364 tal-Ligijiet ta’ Malta. Kieku l-Legislatur ried li jkun hemm tali ezenzjoni huwa kien jipprovdi ghalha b’mod dirett u espress u ladarba dan ma sarx it-Tribunal ghandu jinterpreta u japplika l-Artikolu 52(4) tal-Kap.364 tal-Ligijiet ta’ Malta (fil-kaz in ezami kif applikabbli fiz-zmien rilevanti ghal dawn il-proceduri) kif rizzultanti mill-istess Ligi u cioè li fejn il-valur dikjarat fl-att ta’ trasferiment ghat-trasferiment ta’ immobbli jkun inqas minn 85% tal-valur reali ta’ dak l-immobbli fiz-zmien tat-trasferiment, kemm il-kompratur kif ukoll il-venditur ikunu, kull naha minnhom, soggetti ghat-taxxa addizzjonali kontemplata fl-imsemmi artikolu tal-Ligi.”

Rikors Nru. 125/11VG George Camilleri et Vs Kummissarju tat-Taxxi

The ART upheld taxpayer’s appeal cancelling an assessment to Duty on Documents and Transfers because the ART disagreed with the method the Government’s Architect had used to value the

property. The ART held that in the case of rented property special valuation rules applied. Transfer value is to be reduced to reflect the fact that the property was tenanted. The fact that the tenant and the transferee were the same person was held to be irrelevant. The ART held:

“It-Tribunal però ma jaqbilx mal-Perit Simon Saliba li l-fatt li jkun l-inkwilin stess tal-fond li qed jakkwista d-dritt ta’ proprjetà tal-fond minghand il-lokatur ma ghandux impatt fuq il-valur tal-proprjetà, fis-sens illi l-valur tal-proprjetà ma jonqosx. Una volta li hemm proprjetà okkupata minn inkwilin necessarjament il-valur ta’ dik il-proprjetà fuq is-suq se jkun ferm inqas mill-valur ta’ proprjetà simili izda bil-pussess vakanti, fatt dan li kif appena osservat gie rikonoxxut mill-Perit Saliba stess li ddikjara li f’tali cirkostanza l-valur tal-proprjetà jonqos b’madwar 30%. Tali karatteristika tas-suq ma tinbidilx, jew għall-inqas zgur ma tinbidilx b’mod drastiku jew addirittura tigi eliminata kompletament, f’kaz li l-kompratur tal-fond ikun l-inkwilin stess. Huwa veru li mill-mument ta’ l-akkwist ‘l quddiem il-fond in kwistjoni jsir di proprjetà ta’ l-inkwilin izda certament il-fatt li fil-mument ta’ l-akkwist il-fond kien okkupat minn inkwilin – anke jekk l-inkwilin ikun il-persuna li eventwalment takkwista il-fond – se jkollu effett u impatt dirett fuq il-valur tal-fond.”

Rikors Nru. 57/15VG XXX Vs Kummissarju tat-Taxxi

The ART rejected a reference appeal filed by a company secretary who was seeking a declaration that he was not liable for his company’s infringements of VAT law. According to the ART, the company secretary had not exercised the levels of good faith needed to exonerate him from personal liability. An appeal from this judgment has been filed to the Court of Appeal.

Rikors Nru. 16/11VG XXX Vs Kummissarju tat-Taxxa fuq il-Valur Mizjud

The ART held that appellant was not entitled to bring evidence at appeal stage because the same taxpayer had failed to produce such evidence at investigation stage without a reasonable excuse.

Rikors Nru. 22/14VG Compass Point Villas Limited Vs Direttur Generali (Taxxi Interni)

The ART cancelled a highly material assessment to duty on documents on the basis that the Government Architect’s valuation had disregarded servitudes and other factors that negatively impinged on the value of the property.

Rikors Nru. 279/12VG XXX Vs Kummissarju tat-Taxxi

The ART dismissed a VAT Appeal because taxpayer had failed to bring evidence confirming that a Profit and Loss Account the VAT Department had used to articulate its assessment was wrong. Serious discrepancies in taxpayer’s books and records indicated that the assessment was based on a correct premise.

Rikors Nru. 343/12VG XXX Vs Id-Direttur Generali (Taxxa fuq il-Valur Mizjud)

The ART dismissed an appeal from a VAT assessment because it held that the Department was justified in denying taxpayer’s request to benefit from the tax amnesty because it emerged that taxpayer had failed to comply with the conditions of the tax amnesty.

Citazzjoni Numru 559/04TA Patrick Spiteri et v Kummissarju tat-Taxxi Nterni et

The Court dismissed taxpayer’s application to impugn an executive title which referred to unpaid FSS because taxpayer did not apply the correct procedure and seemed to admit that the tax was due.

Rikors numru 84/12 AF Antonio Busuttil v. Kummissarju tal-Pulizija,

This judgment follows a judgment of the Criminal Appeal which held that a director was personally criminally liable for a company's failure to settle FSS tax (discussed in Update 7). Busuttil filed a Constitutional Case based on the right to a fair hearing and the right to property. Busuttil complained that the Revenue's delay in prosecuting him, the fact that he had been found guilty even when he had brought evidence of his good faith and the exorbitant fines he had been subjected too amounted to a violation of his human rights. Although the Constitutional Court confirmed the principles it had previously established in the John Geranzi Case and the Angelo Zahra Case, it held that the principles it had previously established did not apply to this particular case. The Court placed a lot of emphasis on the fact that a director was bound to ensure that the company in which he served in was in line with the law. Consequently, far from being a defence, the Revenue's delay to proceed, further indicted taxpayer's omission to solve the company's situation in a timely fashion. Given that the case did not involve a challenge to the administrative penalties but only a challenge to the pure tax, the Court did not find a violation of the right to property. Whilst confirming that the administrative penalty imposed on Busuttil was a 'criminal penalty' within the meaning of the

ECHR it found no violation of the non bis in idem rule because in this case administrative penalties had not been issued in the name of Busuttil.

As a side note, the Constitutional Court held that in criminal cases involving prosecutions for FSS, lack of knowledge should not be a defence:

"22. Fir-rigward, din il-Qorti tqis li bhala direttur tal-kumpannija fiz-zmien meta l-kumpannija naqset milli tosserva l-ligijiet fiskali, ir-rikorrent ma jistax jakkampa fuq id-difiza li ma kienx jaf bin-nuqqasijiet talkumpannija. Anke jekk dan kien il-kaz, id-diretturi qatt ma jistghu jinhelsu mir-responsabbilitajiet li tghabbi l-ligi fuqhom. Din il-Qorti tirribadixxi li: "Id-diretturi ma jistghux jaharbu mir-responsabbilita' taghhom billi jghidu li huma ma kienux jafu x'kienet il-vera sitwazzjoni tal-kumpannija li ma jifhmux jew li huma joqghodu fuq dak li jghidulhom il-konsulenti imqabbda minnhom. Direttur anke jekk non executive jew minoritarju ghandu l-istess responsabbilita' bhad-diretturi l-ohra u ghandu l-obbligu li jkun jaf u jimpenja ruhu li jwettaq id-doveri impost fuqu mil-ligi."

23. Ukoll:

"Ladarba huwa kien direttur huwa kellu jaderixxi ruhu mal-obbligi kollha ta' direttur u jinteressa ruhu anke fl-aspett finanzjarju tal-kumpannija li tieghu, kemm siehbu kif ukoll hu, huma f'ghajnejn il-ligi responsabbli ghall-obbligi tal-kumpannija".

Appell numru:- 4/2015 Gozo Channel Company Limited et Vs Direttur Generali (Taxxa Fuq il-Valur Mizjud) gja l-Kummissarju tat-Taxxi Fuq il-Valur Mizjud

The Court of Appeal upheld an appeal filed by the VAT Department requesting a reversal of a judgment of the ART. The Court of Appeal held that the ART was not empowered to decide with respect to taxpayer's eligibility under the penalty remission scheme. The Court of Appeal held that the issues pertinent to the remission scheme fell within the Cfr's sole discretion and prerogative.

Appell numru: 63/2013 Cove Limited Vs Direttur Generali (Taxxa Fuq il-Valur Mizjud)

The Court of Appeal confirmed a judgment of the ART allowing taxpayer credit for input VAT

with respect to expenses subject to a change in intentions. Taxpayer had incurred expenditure relating to the constructions of 5 villas. Originally, the taxpayer had the intention to rent out 3 of the villas and sell another 2 villas. Consequently, taxpayer claimed credit for input VAT only on the expenses relating to the 3 villas to be used in a taxable activity (renting). Subsequently, because of the boom in the rental market, taxpayer changed his intention deciding to rent out all 5 villas without selling any of the villas. Given that taxpayer had (correctly) registered for VAT as a property leasing company, taxpayer informed the Department of his change in intentions claiming credit for input VAT with respect to the expenditure on the 2 villas which were, after the change in intentions, to be leased out too. Basing itself on a prior judgment of the Court of Appeal, the VAT Department rejected the claim. After entering into an exchange of correspondence

with the VAT Department, taxpayer submitted a reference appeal. Taxpayer based his case on the generic principle of fiscal neutrality and recent judgments of the CJEU. The ART held for taxpayer and the ART's judgment was confirmed on appeal. An extract from the judgment of the Court of Appeal follows:

"25. Hi s-sentenza tal-Qorti tal-Gustizzja Udenkaupungin kaupunki (C-184/04) tat-30 ta' Marzu, 2006, li twassal lill-qorti biex taqbel mas-sentenza tat-Tribunal:

"25. The period laid down in Article 20 of the Sixth Directive for adjustment of deductions makes it possible to avoid inaccuracies in the calculation of deductions and unjustified advantages or disadvantages for a taxable person where, in particular changes occur in the factors initially taken into consideration in order to determine the amount of deductions after the declaration has been made. The likelihood of such changes is particularly significant in the case of capital goods, which are often used over a number of years, during which the purposes to which they are put may alter. The Sixth Directive therefore provides for an adjustment period of five years, extendable to 20 years in the case of immovable property, with varying deductions staggered over the whole period.

26 The system of adjustment of deductions is an essential element of the system introduced by the Sixth Directive in that its purpose is to ensure the accuracy of deductions and hence the neutrality of the tax burden. Article 20(2) of the Sixth Directive concerning capital goods, which are relevant to the main proceedings, is moreover drafted in terms which leave no doubt as to its binding nature".

Ragunament li gie applikat ukoll fis-sentenza Gmina Miedzydroje v Minister Finansow tal-5 ta' Gunju, 2014 (ara paragrafi 19-27).

26. L-opinjoni tal-Avukat Generali Stix-Hackl tal-15 ta' Settembru, 2005 f'dan il-kaz ikompli jikkonvinci lill-qorti. F'dak il-kaz kien qiegħed jingħad li d-dritt ta' tnaqqis kellu jigu kkunsidrat esklussivament fid-dawl tas-sitwazzjoni li kienet teżisti fiz-zmien meta servizzi kienu akkwistati. Jekk kienu akkwistat għall-iskop ta' 'non-taxable activity', ma kien hemm l-ebda jedd ta' tnaqqis. F'dak il-kaz il-Kummissjoni kienet qegħda targumenta li tibdil tat-tnaqqis japplika, għaliex skont il-gurisprudenza tal-Qorti (inkluż il-kaz ta' Lennartz), il-konsiderazzjoni deciziva kienet jekk il-beni jew servizzi għall-investiment kapitali, kinux akkwistati minn persuna taxxabbli li kien qiegħed jagħxi bħala tali. Fl-opinjoni, l-Avukat Generali qalet:

"35. Attention must first be drawn to the connection between the origin of the right to deduct, on the one hand, and the application of the adjustment of deductions, on the other...

43. In my view, however, the fact that the capital goods on which the construction and restoration work was undertaken were first used in non-taxable activity and only later in taxable activity based on the exercise of the right of option, does not preclude the right to deduct and consequently the application of an adjustment to the initial deduction....

47. If, on the other hand, the adjustment mechanism did not apply in a situation in which capital goods were first used in non-taxable activity and later in taxable activity, the result would be that, contrary to the principle of neutrality, value added tax would effectively be payable more than once on goods and services included in the value of the capital goods...

27. L-opinjoni tal-Avukat Generali hi cara u m'għandha bzonn ta' ebda interpretazzjoni. Opinijoni li giet addottata mill-Qorti tal-Gustizzja

(ara paragrafi 37-41 tas-sentenza) tant li fir-rigward tat-tieni domanda wiegħbet:

"42. The answer to the second question must therefore be that Article 20 of the Sixth Directive must be interpreted as meaning that the adjustment provided for therein is also applicable where the capital goods were first used in non-taxable activity that was not eligible for deduction and were then used in activity, subject to VAT during the adjustment period".

28. Għaldaqstant, għal darba l-appellata kienet persuna taxxabbli meta għamlet it-tnaqqis inizjali, kellha sussegwentement fit-termini tal-artikoli 186 u 187 tad-Direttiva tal-VAT, dritt li tagħmel tibdil tat-tnaqqis fir-rigward tal-ispejjeż relatati maz-zewg viles li inizjalment kellha l-intenzjoni li tuza għal non-taxable activity. Ir-riferenza għar-regolament 4(b) tar-Regolament dwar Taxxa Fuq il-Valur Mizjud (Aggustamenti li għandhom x'jaqsmu ma' Oggetti Kapitali)5, ma jvarja xejn. Regolament li wara kollox jirrifletti dak li jipprovdli l-artikolu 185 tad-Direttiva."

Appell numru: 69/2011 Raymond Farrugia Vs Il-Kummissarju tat-Taxxi Interni

The Court of Appeal confirmed a judgment of the ART wherein the ART had held that a taxpayer had failed to prove that an assessment raised by the Department was incorrect. Taxpayer had failed to bring evidence rebutting the assessment.

Appell numru: 230/2011 Thea Pisani u Nicole Pisani Vs Kummissarju tat-Taxxi

The Court of Appeal dismissed an appeal filed by the CfR from a decision of the ART cancelling an assessment to duty on documents because the Court confirmed that the ART was legally empowered to determine a case involving an assessment raised with respect to a transfer that had been impugned.

Appell numru: 37/2009 Salvi Holdings Limited Vs Kummissarju tat-Taxxa

The Court of Appeal rejected an appeal filed by the CfR from a judgment of the ART cancelling an assessment to duty because the Court found that the ART was justified in relying on the conclusions of its technical expert.

Appell numru: 45/2010 Ta' Seraqa Limited Vs Kummissarju tat-Taxxi

The Court of Appeal dismissed an appeal from a judgment of the ART confirming an assessment to Duty because it agreed with the ART that appellant company had failed to bring evidence corroborating its version of the facts.

No major judgments.

C-398/16 and C-399/16, X BV (C-398/16), X NV (C-399/16) v Staatssecretaris van Financiën

The CJEU held that Articles 49 and 54 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which a parent company established in a Member State is not allowed to deduct interest in respect of a loan taken out with a related company in order to finance a capital contribution to a subsidiary established in another Member State, whereas if the subsidiary were established in the same Member State, the parent company could avail itself of that deduction by forming a tax-integrated entity with it.

Articles 49 and 54 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, pursuant to which a parent company established in a Member State is not allowed to deduct from its profits capital losses derived from fluctuations in the exchange rate, in connection with the value of its shares in a subsidiary established in another Member State, where the same legislation does not provide, symmetrically, for tax to be levied on capital gains derived from those fluctuations.

Case C-628/16 Kreuzmayr GmbH v Finanzamt Linz

The CJEU ruled that In circumstances such as those in the main proceedings, the first paragraph of Article 32 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that it applies to the second of two successive supplies of the same goods which gave rise to only one intra-Community transport.

Where the second supply in a chain of two successive supplies involving a single intra-Community transport is an intra-Community supply, the principle of the protection of legitimate expectations must be interpreted as meaning that the person ultimately acquiring the goods, who wrongly claimed a right to deduct input value added tax, may not deduct, as input value added tax, the value added tax paid to the supplier solely on the

basis of the invoices provided by the intermediary operator which incorrectly classified its supply.

Case C-396/16 T-2, družba za ustvarjanje, razvoj in trženje elektronskih komunikacij in opreme, d.o.o., in insolvency, v Republika Slovenija

The CJEU ruled that:

1. Article 185(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted to the effect that the reduction of a debtor's obligations resulting from the final approval of an arrangement with creditors constitutes a change in the factors used to determine the amount to be deducted, for the purposes of that provision.
2. The first subparagraph of Article 185(2) of Directive 2006/112 must be interpreted to the effect that the reduction of a debtor's obligations resulting from the final approval of an arrangement with creditors does not constitute a case of a transaction remaining totally or partially unpaid that does not give rise to an adjustment of the initial deduction, where that reduction is definitive, although that is a matter for the referring court to determine.
3. The second subparagraph of Article 185(2) of Directive 2006/112 must be interpreted to the effect that, in order to implement the option provided for in that provision, a Member State is not required to make express provision for an obligation to adjust the deductions in the case of transactions remaining totally or partially unpaid.

Case C-182/17 Nagyszénás Településszolgáltatási Nonprofit Kft. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

The CJEU held that:

1. Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning, subject to verification of the relevant facts by the referring court, that an activity such as that at issue in the main proceedings, whereby a company performs certain public tasks under a contract concluded between that company and

a municipality, constitutes a supply of services effected for consideration and subject to VAT under that provision.

- Article 13(1) of Directive 2006/112 must be interpreted as meaning that, subject to verification of the relevant matters of fact and national law by the referring court, an activity such as that at issue in the main proceedings, whereby a company performs certain public municipal tasks under a contract concluded between that company and a municipality, does not fall within the scope of the rule of treatment as a non-taxable person for VAT purposes laid down by that provision, if that activity constitutes an economic activity within the meaning of Article 9(1) of that directive.

Case C-182/17 Nagyszénás Településszolgáltatási Nonprofit Kft v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

The Court held that:

- Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning, subject to verification of the relevant facts by the referring court, that an activity such as that at issue in the main proceedings, whereby a company performs certain public tasks under a contract concluded between that company and a municipality, constitutes a supply of services effected for consideration and subject to VAT under that provision.
- Article 13(1) of Directive 2006/112 must be interpreted as meaning that, subject to verification of the relevant matters of fact and national law by the referring court, an activity such as that at issue in the main proceedings, whereby a company performs certain public municipal tasks under a contract concluded between that company and a municipality, does not fall within the scope of the rule of treatment as a non-taxable person for VAT purposes laid down by that provision, if that activity constitutes an economic activity within the meaning of Article 9(1) of that directive.

Case C-518/16 ‘ZPT’ AD v Narodno sabranie na Republika Bulgaria, Varhoven administrativen sad, Natsionalna agentsia za prihodite

The CJEU held that Article 1(1)(d) of Regulation No 1998/2006 must be interpreted as not precluding provisions of national law, such as those at issue in the main proceedings, which exclude investments

in assets used for export-related activities from the benefit of tax relief constituting de minimis aid.

Case C-387/16 Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos v Nidera BV

The CJEU held that Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in the light of the principle of fiscal neutrality, must be interpreted as precluding a reduction in the amount of interest normally payable under national law on overpaid value added tax which was not refunded in due time for reasons connected to circumstances not attributable to the taxable person, such as the high amount of that interest when compared with the amount of the overpaid value added tax, the period of time during which the overpayment was not refunded and the underlying reasons for this, as well as the losses actually incurred by the taxable person.

Case C-159/17 Întreprinderea Individuală Dobre M. Marius v Ministerul Finanțelor Publice — A.N.A.F. — D.G.R.F.P. Galați — Serviciul Soluționare Contestați

The CJEU held that articles 167 to 169 and 179, Articles 213(1) and 214(1), and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows tax authorities to refuse a taxable person the right to deduct value added tax when it is established that, on account of the alleged infringements committed by that person, the tax authorities could not have access to the information necessary to establish that the substantive requirements giving rise to the right to deduct input value added tax paid by that taxable person have been satisfied or that that person acted fraudulently in order to enjoy that right, a matter which it is for the referring court to ascertain.

Case C-524/15, Luca Menci v. Procura della Repubblica

The Court (Grand Chamber) ruled that:

- Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay value added tax due within the time limits stipulated by law, although that

person has already been made subject, in relation to the same acts, to a final administrative penalty of criminal nature for the purposes of Article 50 of the Charter, on condition that that legislation

- pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating value added tax offences, it being necessary for those proceedings and penalties to pursue additional objectives,
- contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and
- provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.

2. It is for the referring court to ensure, taking into account all of the circumstances in the main proceedings, that the actual disadvantage resulting for the person concerned from the application of the national legislation at issue in the main proceedings and from the duplication of the proceedings and penalties that that legislation authorises is not excessive in relation to the seriousness of the offence committed.

Case C-532/16 Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos v SEB bankas AB

The Court (First Chamber) ruled that:

1. Article 184 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the obligation to adjust undue value added tax (VAT) deductions set down in that article also applies to cases where the initial deduction could not be made lawfully because the transaction giving rise to that deduction was exempt from VAT. By contrast, Articles 187 to 189 of Directive 2006/112 must be interpreted as meaning that the mechanism for the adjustment of undue VAT deductions provided for in those articles is not applicable in such cases, in particular in a situation such as that at issue in the main proceedings, where the initial VAT deduction was unjustified as it concerned a VAT-exempt transaction relating to the supply of land.

2. Article 186 of Directive 2006/112 must be interpreted as meaning that, in cases where the initial deduction of VAT could not be made lawfully, it is for the Member States to determine the date on which the obligation to adjust the undue VAT deduction arises and the time period for which that adjustment must be made, in accordance with the principles of EU law, in particular the principles of legal certainty and legitimate expectations. It is for the national court to determine whether, in cases such as that at issue in the main proceedings, those principles have been respected.

Case C-8/17 Biosafe — Indústria de Reciclagens SA v Flexipiso — Pavimentos SA

The Court (Seventh Chamber) ruled that:

Articles 63, 167, 168, 178 to 180, 182 and 219 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, and also the principle of fiscal neutrality, must be interpreted as precluding legislation of a Member State pursuant to which, in circumstances such as those at issue in the main proceedings in which, following a tax adjustment, additional value added tax (VAT) was paid to the State and was the subject of documents rectifying the initial invoices several years after the supply of the goods in question, the right to deduct VAT is to be refused on the ground that the period laid down by that legislation for the exercise of that right started to run from the date of issue of those initial invoices and had expired.

Case C-110/17 European Commission v Kingdom of Belgium

The CJEU (Sixth Chamber) declared that, by retaining provisions under which, in respect of the estimation of income relating to unrented immovable property or immovable property rented either to natural persons who do not use them for professional purposes or to legal persons which make such property available to natural persons for private purposes, the tax base is calculated on the basis of the cadastral value so far as immovable property on national territory is concerned, and on the actual rental value so far as immovable property located outside Belgium is concerned, the Kingdom of Belgium failed to fulfil its obligations under Article 63 TFEU and Article 40 of the Agreement on the European Economic Area of 2 May 1992;

4. OTHER

VAT – Small Undertakings

On 20 February 2018 the EU Commission by way of derogation from point 13 of Article 287 of Directive 2006/112/EC, authorised Malta to exempt from VAT taxable persons whose economic activity consists principally in supplies of services with a high value added (low inputs) and whose annual turnover is no higher than EUR 20 000.

The measure shall apply from 1 January 2018 until 31 December 2020, or until the entry into force of a directive amending Articles 281 to 294 of Directive 2006/112/EC, whichever date is earlier.

Tonnage Tax Investigation

The investigation was formally concluded on 19 December 2017 when the European Commission published its final decision.

Pursuant to the Commission's decision, Malta committed to reforming its Tonnage Tax System as follows:

1. to specifically exclude from the operation of tonnage tax Fishing and fish factory ships, Private yachts and ships used primarily for sport or recreation, Fixed offshore installations and floating storage units, Non-ocean going tug boats and dredgers, Ships whose main purpose is to provide goods or services normally provided on land, Stationary ships employed for hotel and or catering operations (floating hotels or restaurants), Ships employed mainly for gambling/as casinos (floating or cruising casinos);
2. to reflect explicitly in legislation, following directly the terms of the Maritime Guidelines, a restriction of tonnage tax to vessels engaged in the international carriage of good or passengers by sea and the following vessels (previously approved on submission by other Member States) namely Cable-laying vessels, Pipe laying vessels, Crane vessels and Research vessels;
3. to remove the possibility of financial institutions benefitting from tonnage tax and to restrict the benefits of tonnage tax to organisations which have assumed risks and responsibilities for the operation of a tonnage tax ship (i.e. technical management and crewing) or the carrying out of shipping activities;
4. to explicitly limit the application of tonnage taxation to the chartering out of vessels on bareboat basis and similar transactions between third parties and to commit that the chartering out of vessels on bareboat basis to third parties and similar transactions can be eligible only as ancillary activity of genuine shipping companies in the context of temporary overcapacity subject to the following conditions:
 - a. Only to deal with a situation of temporary excess capacity;
 - b. For a maximum period of up to three years;
 - c. Bareboat chartered out capacity will not exceed 50% of the shipping companies' fleet, calculated on a group basis;
 - d. Excess capacity specifically acquired for chartering out cannot be eligible.
5. that existing and new entrants to the tonnage tax scheme must have at least 25% of their tonnage tax fleet EEA-flagged notwithstanding the requirement to maintain or increase the share as set out in 3.1 (paragraph 8) of the Maritime Guidelines;
6. to explicitly limit eligibility to tonnage taxation for dredgers to those dredgers whose activity consists in "maritime transport" - that is, the transport at deep sea of extracted materials - for more than 50 % of their annual operational time and only in respect of such transport activities. Eligible dredgers will be only those registered in a Member State or the EEA;
7. to explicitly limit eligibility to tonnage taxation for towage to those vessels whose activity consists in maritime transport for more than 50 % of their annual operation. Waiting time may be proportionally assimilated to that part of total activity effectively carried out by a tug which constitutes maritime transport. Towage activities which are carried out inter alia in ports, or which consist in assisting a self-propelled vessel to reach port will not constitute maritime transport and only vessels registered in a Member State or the EEA will be eligible;
8. to regulate the eligibility of revenues ancillary as set out at recitals of the Commission's final Decision in the present case, by way of detailed regulation the draft of which has been shared with the Commission and that ship specific and non-ship-specific ancillary activities will not exceed 50% of overall gross revenue (both ship-specific and other) of a beneficiary company. Malta also commits to exclude entirely from tonnage taxation revenues from the activities set out in recital Error! Reference source not found. of the Commission's final Decision in the present case;
9. to ensure that the capital gains exemption on the sale of ships covers only ships operated under the tonnage tax regime by companies engaged in genuine shipping activities and to introduce a

requirement that only ships acquired and sold whilst under the tonnage tax regime may benefit from such an exemption;

10. to commit that shipping companies (except ship management companies) will not benefit from tonnage tax (except for ship management companies) unless they:
 - a. (a) have at least 60% of the tonnage of their fleet under the flag of a Member State of the Union or of a State party to the EEA Agreement on entering the scheme; or
 - b. (b) maintain or increase the share of tonnage of their fleet that they operated under the flag of a Member State of the Union or of a State party to the EEA Agreement at the moment that they entered the scheme.

In any event, by the third year of operation the organisation must have at least 60% of the tonnage taxed fleet EEA-flagged.

However, in connection with the initial entry of a shipping organisation into the Maltese tonnage tax system, the said applicable threshold may be reduced to twenty-five percent (25%). Malta will continue to check that the share of EEA-flagged fleet has not decreased on average over a period of three years (both for existing and new beneficiaries).

11. that income from non-EEA-flagged vessels will only be eligible when then above criteria on flagging (see commitment 10) are met and shall apply only to fleets which are entirely managed from the EEA for commercial and strategic management. Ships which are not commercially and strategically managed from the EEA will be accepted under tonnage taxation only if flying an EEA flag (except for vessels bareboat chartered out under conditions respecting the limitations mentioned in commitment 4).
12. to commit to introduce a formal provision on control of the aid ceiling set in Section 11 of the Maritime Guidelines.
13. to commit that legislation will be amended to clearly distinguish between:
 - a. fees which are payable by vessels on registration and annual taxes on nonqualifying ships under the Maltese flag; and
 - b. tonnage tax, which is only payable in respect of qualifying ships.
14. to commit to publish internal guidelines which will make clear the ineligibility of a number of activities that may be in competition with land-based companies, in particular:
 - a. ship building;
 - b. sale on board of goods or services not customarily provided to passengers e.g. cars, domestic appliances or livestock; and

- c. the operation of a port or harbour, ship based holidays where the ship remains moored and there is no sea transportation element.

15. to commit to require beneficiaries of tonnage tax to submit mandatory annual compliance declarations for all controllable parameters such as type of vessel, activities performed with the vessel, net tonnage, days in use, flag, types of operation and compliance with the aid ceiling;
16. to commit to remove current sector-specific exemption from taxation of capital gains on shares in shipping companies for Maltese residents, as set out in Article 84Z (1)C of the Merchant Shipping Act;
17. to commit to remove the exemption in Article 5 of the Merchant Shipping Taxation Regulations from fees and charges payable under the Duty on Documents and Transfers Act;
18. to commit to amend the legislation to clarify that ships below 1000 net tonnes may only be declared as eligible for tonnage tax where that ship is engaged in shipping activities and which but for its tonnage would be eligible for such treatment under Article 85 (1) of the Merchant Shipping Act. and to exercise the power in such cases where the criteria are met by applicants. Malta will reformulate Article 85A (1) of the Merchant Shipping Act in the following way: "The Minister shall with the concurrence of the Minister responsible for finance and subject to such conditions deemed appropriate in line with these Regulations, declare to be a tonnage tax ship, a ship of any net tonnage, which is engaged in shipping activities)".
19. to commit to issue guidance clarifying that the ministerial discretion contained in the First Schedule to the Merchant Shipping Act to exempt any ship or class of ships from the payment of fees shall be exercised only in the case of philanthropic and humanitarian operations which do not involve the offer of goods or services on a market;
20. to commit to separate accounting wherever a company is not solely engaged in shipping activities;
21. to commit to restrict the benefit of tonnage tax to organisations which have assumed risks and responsibilities related to the operation of a tonnage tax scheme or to the carrying out of shipping activities and will include a specific definition in legislation following that in the Maritime Guidelines;
22. to commit to delete from Article 85 of the Merchant Shipping Act the words "or as otherwise may be prescribed".
23. to commit that the new rules that will render the

4. OTHER

measures of this Decision compatible with the internal market will come into force within three months of the date of this Decision.

24. to commit to continue to administer the tonnage tax scheme and the other measures forming the object of this Decision in a way that does not lead to payment of incompatible aid that would then need to be recovered from the beneficiaries.
25. to commit to re-notify the tonnage tax scheme within ten years of the date of the Commission's final Decision in the present case.

The ATP Report

On 7 March, the European Commission published a report entitled Aggressive tax planning (ATP) indicators. The Report concludes that the broad picture emerging from the summary of the indicators is that several Member States appear to be exposed to ATP structures. This includes smaller Member States such as Ireland, Luxembourg, Cyprus, Malta or the Netherlands where the country-level indicators strongly suggest that ATP plays an important role.

The Malta Country Report

On 8 March, the European Commission published a report entitled Country Report Malta 2018. The Report states that some indicators suggest that Malta's tax rules are used by multinationals engaged in aggressive tax planning structures. Whilst acknowledging that Malta has taken steps to amend certain aspects of its tax system that may facilitate aggressive tax planning the Report singles out some tax rules (among them the design of the planned Notional Interest Deduction regime and the absence of withholding taxes on payments made by companies based in Malta, combined with a lack of some anti-abuse rules) concluding that Malta's tax rules may still be used in tax avoidance structures.

Formal Notice Yacht Leasing Schemes

On 8 March, the European Commission decided to send letters of formal notice to Cyprus, Greece and Malta for not levying the correct amount of Value-Added Tax (VAT) on the provision of yachts. the infringement procedures launched concern:

- A reduced VAT base for the lease of yachts – a general VAT scheme provided by Cyprus, Greece and Malta. While current EU VAT rules allow Member States not to tax the supply of a service where the effective use and enjoyment of the product is outside the EU, they do not allow

for a general flat-rate reduction without proof of the place of actual use. Malta, Cyprus and Greece have established guidelines according to which the larger the boat is, the less the lease is estimated to take place in EU waters, a rule which greatly reduces the applicable VAT rate.

- The incorrect taxation in Cyprus and Malta of purchases of yachts by means of what is known as 'lease-purchase'. The Cypriot and Maltese laws currently classify the leasing of a yacht as a supply of a service rather than a good. This results in VAT only being levied at the standard rate on a minor amount of the real cost price of the craft once the yacht has finally been bought, the rest being taxed as the supply of a service and at a greatly reduced rate.

The 3 Member States had two months to respond to the arguments put forward by the Commission.

Corporate tax avoidance: Agreement reached on tax intermediaries

On 13 March 2018, the Council reached agreement on a draft directive requiring intermediaries such as tax advisors, accountants and lawyers that design and/or promote tax planning schemes to report schemes that are considered potentially aggressive.

Member states will be required to automatically exchange the information they receive through a centralised database. The draft directive establishes 'hallmarks' to identify the types of schemes to be reported to the tax authorities. Member States will have until 31 December 2018 to transpose it and the new reporting requirements will apply from 1 July 2020.

Digital Taxation: Commission proposes new measures

On 21 March 2018 the Commission proposed new measures relating to Digital Taxation namely:

- a. A reform of corporate tax rules so that profits are registered and taxed where businesses have significant interaction with users through digital channels (the Commission's preferred long-term solution involving the introduction of a virtual PE concept).
- b. The second proposal responds to calls from several Member States for an interim tax which covers the main digital activities that currently escape tax altogether in the EU.

This package sets out a coherent EU approach to a digital taxation system which supports the Digital Single Market and which will feed into international discussions aiming to fix the issue at the global level.

The Commission has put forward a proposal for a Directive laying down rules relating to the corporate taxation of a significant digital presence.

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