



MALTA
INSTITUTE
OF TAXATION



MALTESE TAX LAW UPDATE

(Update 29)







EDITOR'S NOTE

Our Courts have delivered 14 'tax' judgments this quarter. Rik. 169/11VG and Zahra v. AG must be singled out. Rik. 169 involved badges of trade and it is interesting to see the ART placing reliance on the contents of Audited Financial Statements. The way assets are booked in accounts is key. Meanwhile, Mr. Zahra won his third constitutional case, a case challenging the proportionality of the 1998 penalty regime. The judgment is heavily based on the Constitutional Court's judgment in Farrugia but the new Zahra judgment refines principles established in Farrugia and is extremely important both from an academic and practical perspective.

The CJEU has delivered several important tax judgments. Judgments of interest to Malta include the judgment in Fidelity (involving a withholding tax levied on distributions by UCITS) and the decision in Marle Participations SARL (involving letting).

Twelve 'tax' legal notices have been published this quarter; the most important of which are two legal notices providing for the tax treatment of embryologists and certain employees working in the Oil and Gas Industry, a L.N. transposing the Multi-lateral instrument, an important L.N. providing for VAT Grouping and two new tax treaties. From a comparative point of view the Treaties with Botswana and Ethiopia are quite interesting.

Robert Attard
18/7/18

1. LEGISLATIVE CHANGES

1.1
ACTS OF
PARLIAMENT

There were no legislative changes in the quarter under review.

L.N. 140 of 2018 INCOME TAX ACT(CAP.123) Qualifying Employment in Maritime Activities and the Servicing of Offshore Oil and Gas Industry Activities (Personal Tax) Rules, 2018

This L.N mirrors the contents of the HQPR creating ad hoc HQPR for particular industries. Under this special law, the term 'eligible office' is defined as meaning an employment defined as key for the operations of the particular undertaking and whose function is confirmed by the Authority for Transport, based on an administrative assessment procedure, which office is listed in the Schedule and which is held with any of the following;

- (i) any undertaking holding a Document of Compliance (DOC) issued in terms of the International Safety Management (ISM) Code or a Seafarer Recruitment and Placement Services Licence issued in terms of the Maritime Labour Convention, 2006;
- (ii) any undertaking engaging the particular individual for work on board any ship, excluding ships operating on regular services as well as ships whose use or operation requires certification in terms of the Commercial Vessels Regulations and which are berthed or anchored within the territorial waters of Malta or any port in Malta for at least a period of one month over a calendar year;
- (iii) any undertaking which carries on mainly a trade or business consisting in the Servicing of the offshore oil and gas and ancillary services industry.

The minimum income threshold under these rules is of EUR65,000.

L.N. 141 of 2018 INCOME TAX ACT (CAP. 123) Highly Qualified Persons (Amendment) Rules, 2018

The list of eligible offices for the beneficial 15% tax rate has been extended to Employment in the Assisted Reproductive Technology sector consisting in employment as:

- (a) Embryologist;
- (b) Responsible Person;
- (c) Lead Quality Manager.

L.N. 142 of 2018 INCOME TAX ACT (CAP. 123) Multilateral Convention (Implementing Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting) Order, 2018

This L.N. transposes the Multilateral Convention (Implementing Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting) providing for an effective mechanism for the implementation of agreed changes in a synchronised and efficient manner across Malta's entire tax treaty network.

The First Schedule to L.N. reproduces the contents of Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. Malta's reservations and notifications are set out in Schedule 2.

L.N. 148 of 2018 INCOME TAX MANAGEMENT ACT (CAP. 372) Final Settlement System (FSS) (Amendment) Rules, 2018

This L.N. provides for new penalties and rules governing interest on late payment of tax.

L.N. 162 of 2018 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax (Registration as a Single Taxable Person) Regulations, 2018

L.N. 162 provides for VAT grouping. Rule 3 of this important L.N. prescribes that two or more persons established in Malta may apply to the Commissioner to be registered as a single taxable person for the purposes of the Act if the following conditions are satisfied:

- (a) at least one of the applicants is a taxable person who is licensed or recognised in terms of the legislation listed in the Schedule;
- (b) each of the applicants is bound to each of the others by financial links, organisational links and economic links; and
- (c) at the time of application, all the applicants have submitted all returns and notices due under articles 27 and 30 of the Act, and all returns of income due in terms of the Income Tax Management Act, and have settled in full any and all amounts due by way of tax declared in the aforementioned returns and notices, as well as any interest and administrative penalties due pursuant to the Act and the Income Tax Act and Income Tax Management Act
(an exception to this rule is made with respect to tax under objection);

The Schedule refers to the Banking Act, the Financial Institutions Act, the Gaming Act, the Insurance Business Act, the Insurance Intermediaries Act, the Investment Services Act, the Lotteries and Other Games Act, the Retirement Pensions Act, and the Securitisation Act, Chapter 484 of the Laws of Malta.

The required financial links are deemed to exist where any two or more of the following are, directly or indirectly, held as to more than 90% by the same person or persons (whether a legal person or an individual):

- (i) the voting rights or equivalent interests;
- (ii) the entitlement to profits available for distribution;
- (iii) the entitlement to surplus assets available for distribution on a winding up or equivalent event;

The required Organisational links are deemed to exist where the applicants have a shared management structure, whether in whole or in part.

The required Economic Links shall be deemed to exist where the activity of each of the applicants is of the same nature or within the same industry, or where the activities of the applicants are interdependent or complementary, or where one member of the group carries out activities which are wholly or substantially to the benefit of any one or more of the other members. For the purposes of determining whether the required economic links exist, the Commissioner may request such additional information and documentation as may be required to evidence such links, and the decision of the Commissioner shall be final and conclusive.

If the Commissioner accepts an application under Rule 3, the persons applying to be treated as a single taxable person are treated as a VAT Group under Rule 5.

In brief, forming part of a VAT Group implies that:

- (a) In terms of Rule 4, the members of a VAT Group shall nominate from amongst themselves the Group Reporting Entity, which shall exercise any and all rights and discharge any and all obligations arising to the VAT Group under the Act;
- (b) Any supply made by a member of a VAT Group shall be treated, for the purposes of the Act, as a supply made by the Group Reporting Entity;
- (c) Any supply falling within the scope of article 4 of the Act made to a member of a VAT Group shall be treated, for the purposes of the Act, as a supply made to the Group Reporting Entity;
- (d) Any intra-community acquisition falling within the scope of article 4 of the Act made by a member of a VAT Group shall be treated, for the purposes of the Act, as an intra-community acquisition;
- (e) In terms of Rule 6, any supply of goods or supply of services made by one member of a VAT Group to another member of that VAT Group shall be disregarded;
- (f) In terms of Rule 6, the supplies made by a member of the VAT Group to another member of the VAT Group shall be treated, for the purposes of the Act, as supplies made by the Group Reporting Entity to itself;
- (g) In terms of Rule 10, where the assets of the economic activity of any of the applicants for membership of a VAT Group or for admission to an existing VAT Group include capital goods, in respect of which the period of reference for the purposes of determining the adjustment of the initial deduction has already started to run, the said period of reference shall continue to run subsequent to the date of notification of group treatment;

(h) In terms of Rule 11, each member of a VAT Group shall be jointly and severally liable for the payment of any tax, administrative penalties and interest arising under the Act, which have become due and payable by the Group Reporting Entity;

(i) In terms of Rule 13, Group Reporting Entity shall, in addition, be required to keep consolidated records of all transactions which, are treated as carried out by the Group Reporting Entity.

L.N. 163 of 2018 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax Act (Amendment of Sixth Schedule) Regulations, 2018

As anticipated in a previous update, the thresholds contemplated for small businesses have been made higher, rendering eligibility less stringent than it used to be.

L.N. 163 implements the provisions of Council Implementing Decision (EU) 2018/279 of the 20th February 2018 allowing Malta, until the 31st December 2020, 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 €20,000.

The regulations came into force on 1st July 2018 and shall, unless renewed, will cease to apply on 31st December 2020.

In the Table at the end of Part One of the Schedule, in the Second Column of row C, the figure "14,000" has been substituted with the figure "20,000" and, in the Third Column of the said row C of the same Table, the figure "12,000" has been substituted with the figure "17,000".

L.N. 182 of 2018 INCOME TAX ACT (CAP. 123) Double Taxation Relief (Taxes on Income) (The Federal Democratic Republic of Ethiopia) Order, 2018

The above-captioned LN transposes Malta's Tax Treaty with Ethiopia. Articles in the Treaty worthy of note include especially:

(a) The PE definition refers both to 'a commercial warehouse (in relation to a person carrying on business in the field of storage)' and 'a farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on'. Nonetheless the subsequent article excludes from the definition certain forms of storage activities.

(b) In certain cases, insuring risks situated in a contracting state through an dependent agent may create a PE for the insurer. A specific carve-out for re-insurance business is contemplated;

(c) In certain cases, activities of an agent carried out on an exclusive basis which are not at arm's length may constitute a PE;

(d) Article 8 on International Traffic allocates taxing rights to the place of effective management and control. Paragraph 2 adds that if the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship is a resident;

(e) The Treaty still features Article 14 dealing with Independent Personal Services;

(f) Article 21 dealing with 'Professors and Researchers' prescribes that an individual who is or was a resident of a Contracting State immediately before making a visit to the other Contracting State and who, at the invitation of any university, college, school or other similar non-profitable educational institution, which is recognized by the Government of that other Contracting State, is present in that other State for a period not exceeding two years from the date of his first arrival in that other Contracting State, solely for the purpose of teaching/researching a project in the public interest, at such educational institution shall be exempt from tax in that other Contracting State on his remuneration for teaching or research.

L.N. 193 of 2018 INCOME TAX ACT (CAP. 123) Double Taxation Relief (Taxes on Income) (The Republic of Botswana) Order, 2018

The above-captioned LN transposes Malta's Tax Treaty with Botswana. Articles in the Treaty worthy of note include especially:

- (a) The PE definition includes a Services PE of two forms;
- (b) The first Services PE takes the form of the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by an enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the Contracting State for a period or periods aggregating more than six months within any twelve-month period;
- (c) The second Services PE takes the form of the performance of professional services or other activities of an independent character by an individual, but only where those services or activities continue within a Contracting State for a period or periods exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned.
- (d) Article 7 dealing with Business Profits is curious too. Paragraph 3 incorporates detailed rules relating to deductions.
- (e) Article 8 dealing with International Transport prescribes that profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State.
- (f) In certain cases, Botswana dividend withholding taxes of 5% or 6% are imposed;
- (g) In certain cases, withholding taxes of 5% and 7.5% are charged on royalties;
- (h) Article 20 refers to 'Technical Fees'.

L.N. 202 of 2018 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) Duty on Documents and Transfers (Amendment) Rules, 2018

This L.N. deletes Rule 6 of the principal rules. Rule 6 used to provide for the requirement to keep a Memorandum in Auction sales.

L.N. 209 of 2018 INCOME TAX ACT (CAP. 123) Tax Credit (Construction Waste Recycling) Rules, 2018

This L.N. contemplates a new tax credit equivalent to 25% of the gross fees paid. The credit is payable to authorised persons for qualifying activities.

"authorised person" is defined as meaning a person who is in possession of a permit issued by the Environment and Resources Authority for the acceptance in his quarry of construction and demolition material from third parties.

"qualifying services" is defined as meaning the acceptance by an authorised person of construction and demolition material from third parties at a fee not exceeding five euro and fifty cents (€5.50) per tonne.

L.N. 223 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) (Amendment) Order, 2018

The L.N. creates a new moratorium for claims for refunds (the new term is after six months from the date of the last contract or from the 2nd February, 2018 whichever is the latest).

L.N. 224 of 2018 INCOME TAX ACT (CAP. 123) Income Tax Exemption (Philanthropic Work) Notice, 2018

The Minister for Finance named the following organisations as being engaged in philanthropic work, and thus exempt from income tax –

- (a) Happy Paws Charity Organisation;
- (b) Fondazzjoni Kenn u Tama;
- (c) Karl Vella Foundation.

2. BILLS

No bills had been published during the quarter under review.

3. JUDICIAL DECISIONS

3.1 JUDGMENTS OF THE ART

Rikors Nru. 8/11VG Philip Alamango Vs Kummissarju tat-Taxxi

The ART dismissed an appeal from an assessment to duty because all relevant issues relevant for the purposes of determination to duty had been taken into consideration by the Government's Architect.

Rikors Nru. 132/12VG XXX Vs Kummissarju tat-Taxxa fuq il-Valur Mizjud

The ART dismissed an appeal from an assessment to VAT on the basis that the assessment was based on a thorough arithmetical exercise.

Rikors Nru. 154/11VG XXX Vs Kummissarju tat-Taxxi Interni

The ART dismissed an assessment to Income Tax. The judgment is quite long because appellant received income from several sources. From a purely technical perspective, the main issues debated in the case may be summarised as follows:

- (a) Whether profits received constituted trading income;
- (b) Whether taxpayer was entitled to submit, in the course of the appeal, evidence that had not been submitted at investigation stage;
- (c) The interpretation of the Fringe Benefit Rules.

The ART held for the tax authorities on all grounds. According to the ART, the appellant had failed to prove its case, inter alia, failing to justify unexplained deposits and disbursements. In certain respects, taxpayer had failed to submit adequate books and records too. The ART did not believe that a particular property was not held for resale. According to the ART circumstances indicated that taxpayer was trading in property.

It held that taxpayer failed to bring a reasonable excuse articulating why crucial documentation had not been produced at investigation stage.

On the issue of Fringe Benefits, the ART observed that appellant had established an offshore company and that his company owned a pleasure yacht that he was using. The Revenue imputed (through a *juris tantum* presumption) a fringe benefit on the use of the yacht. Taxpayer argued that the yacht owning company did not exercise an economic activity implying that a fringe benefit could not be imputed. The ART disagreed referring to a rule in the Fringe Benefit Rules imputing a fringe benefit in circumstances such as those in the proceedings.

Rikors Nru. 169/11VG XXX Vs Kummissarju tat-Taxxi Interni

Case 169 was an income tax appeal and the point in issue was the interpretation of the Industrial Development Act 1988 ('IDA') but the ART's analysis is relevant for the purposes of badges of trade too. The ART held that the wording of the law was clear – the benefits applied to specific activities when carried out on their own and in the absence of any other activity (even ancillary activities were excluded). The ART held that benefits under the law could not apply to profits from property deals. The ART determined the company's intended use of the property it owned (i.e. whether the property was being held for resale) on the basis of what the company had declared in its accounts. Given that the company had listed certain properties as its 'current assets' the ART concluded that the company was trading in property, exercising an activity that was incompatible with its eligibility to benefit from the IDA benefits it was claiming. Company's intention to trade in property was confirmed by the contents of development planning applications. Furthermore, the ART pinpointed inconsistencies in taxpayer's evidence. Interestingly, the ART referred to Court of Appeal judgments of the 1950s relating to presumptions of trade. Taxpayer's appeal was rejected but penalties were revised because of an oversight contained in the original notice of refusal.

Rikors Nru. 176/12VG XXX Vs Il-Kummissarju tat-Taxxa fuq il-Valur Mizjud

The ART rejected an appeal from an assessment to VAT because it held that the assessment had been based on documentation provided by taxpayer himself.

Rikors Nru. 311/12VG XXX Vs Kummissarju tat-Taxxa fuq il-Valur Mizjud

The ART confirmed an assessment to VAT based inter alia on items subject to the capital goods scheme. The points of contention were essentially points of fact (interval of time between acquisition and transfer and contents of VAT invoices).

Rikors Nru. 147/13VG Sicily Real Estate Limited Vs Direttur Generali (Taxxi Interni)

The ART dismissed an assessment to duty on documents on the basis that the Government Architect tasked with the valuation of the property had taken all material circumstances into consideration.

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

The ART dismissed a VAT appeal relating to a taxpayer's right to avail himself of the tax amnesty because it transpired that taxpayer was misinterpreting the rules governing the amnesty (namely the date by which taxpayer was meant to secure compliance with the law).

3.2.1 Constitutional Jurisdiction

Rikors Nru. 68/2017 Angelo Zahra vs L-Avukat Generali, il-Kummissarju tat-Taxxi, il-Kummissarju tal-Pulizija

This is Mr. Zahra's third successful constitutional case. This case is not to be confused with Mr. Zahra's earlier Constitutional cases (the first of which referred to non bis in idem in FSS and the second of which referred to non bis in idem in VAT). Mr. Zahra's third case consisted in a challenge of the 1998 penalty regime based on the Constitutional Court's earlier judgment in Anthony Farrugia v. PM. Predictably, Mr. Zahra won this case too but what renders this judgment particularly interesting are its guidelines relating to tax penalties and the Court's remedy to problems created by the penalty regime.

3.2.1 Civil Cases

Rikors Numru 5/2018LM Il-Kummissarju tat-Taxxi vs. Sascha Clemens Labudda (K.I. 72672A)

The Court upheld the Revenue's application for the issue of an executive title to be issued in terms of 2010/24/EU.

Rikors Numru 1120/17TA Il-Kummissarju tat-Taxxi vs Onbrand Contact Limited (C68088)

The Court upheld the Revenue's application for the issue of an executive title to be issued in terms of 2010/24/EU.

None that we are aware of.

Appell numru:- 236/2012 Kirton & Co. Limited (C 180) Vs Kummissarju tat-Taxxa fuq il-Valur Miżjud

The Court of Appeal dismissed taxpayer's appeal confirming a judgment of the ART involving a tax ruling. Although the Court decided against the taxpayer, the Court acknowledged important principles of taxpayer protection. Although the case failed on the merits the Court of Appeal (like the ART before) agreed that the revocation of tax rulings could not occur retrospectively. In addition, the Court observed that a ruling providing for a tax exemption that went beyond what was allowed by the directive was null and unenforceable. The Court did not express itself with respect to issues relating to human rights (especially the right to legitimate expectations, reserving the matter to another court).

Appell Nru: 17 / 2017 Il-Pulizja Spettur Colin Sheldon Vs Vanessa Petroni

The Court of Criminal Appeal confirmed a judgment of the Court of Magistrates holding a director of a limited liability company liable for minor VAT compliance infringements. Unlike other Courts, the Court (rightly so) was prepared to listen to arguments relating to accused's lack of knowledge of the compliance default and her exercise of due diligence. Her case failed on the merits because of her failure to produce evidence required by the Court. The Court confirmed that, in principle, in cases involving companies with multiple directors, personal liability rested with all directors and could not be shifted on any single director.

Appell Numru: 323/2016 Il-Pulizija (Spettur Ramon Mercieca) vs Reuben Buttigieg

The Court acquitted a director for a company's failures to abide by its VAT obligations because the director had successfully proved that he had done his best to ensure the company's compliance with the law. Non-compliance was entirely due circumstances beyond the director's control (mainly to absence of adequate communication between the director and persons within the company who had access to the company's records). The Court found that the director had effectively been divested with the power to ensure full compliance with the law. Consequently, the Court of Appeal reversed the judgment of the Court of Magistrates.

Case C-480/16, Fidelity Funds, Fidelity Investment Funds, Fidelity Institutional Funds v Skatteministeret,

The JEU held that Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which the dividends distributed by a company resident in that Member State to a non-resident undertaking for collective investment in transferable securities (UCITS) are subject to withholding tax, while dividends distributed to a UCITS resident in that same Member State are exempt from such tax, provided that that undertaking makes a minimum distribution to its members, or technically calculates a minimum distribution, and withholds on that actual or notional distribution the tax payable by its members.

Case C-108/17, UAB ‘Enteco Baltic’ v Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos,

The CJEU held that:

1. Article 143(1)(d) and Article 143(2)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/69/EC of 25 June 2009, must be interpreted as precluding the competent authorities of a Member State from refusing exemption from value added tax on importation on the sole ground that, following a change of circumstances after the importation, the goods in question have been supplied to a taxable person other than the person whose value added tax identification number was stated in the import declaration, where the importer has communicated all the information on the identity of the new purchaser to the competent authorities of the Member State of import, provided that it is shown that the substantive conditions for the exemption of the subsequent intra-Community supply are actually satisfied.
2. Article 143(1)(d) in conjunction with Article 138 and Article 143(2)(c) of Directive 2006/112, as amended by Directive 2009/69, must be interpreted as meaning that:
 - documents which confirm the transport of goods from a tax warehouse in the Member State of import, not to the purchaser but to a tax warehouse in another Member State, may be regarded as sufficient evidence of dispatch or transport of the goods to another Member State;
 - documents such as consignment notes on the basis of the Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva on 19 May 1956, as amended by the Protocol of 5 July 1978, and electronic administrative documents accompanying movements under suspension of excise duty may be taken into account to show that, at the time of importation into a Member State, the goods concerned are intended to be dispatched or transported to another Member State within the meaning of Article 143(2)(c) of Directive 2006/112, as amended, provided that the documents are submitted at that time and include all the necessary information. Those documents, as also the electronic confirmations of the supply of the goods and the report of receipt issued following a movement under suspension of excise duty, are capable of showing that the goods have actually been dispatched or transported to another Member State in accordance with Article 138(1) of Directive 2006/112, as amended.
3. Article 143(1)(d) of Directive 2006/112, as amended by Directive 2009/69, must be interpreted as precluding the authorities of a Member State from refusing an importer the right to the exemption from value added tax laid down in that provision for imports of goods into that Member State carried out by him and followed by intra-Community supplies on the ground that the goods were not transferred directly to the purchaser but were handled by transport undertakings and tax warehouses designated by the purchaser, where the power to dispose of the goods as owner was transferred to the purchaser by the importer. In this context, the concept of ‘supply of goods’ within the meaning of Article 14(1) of that directive, as amended, must be interpreted in the same way as in the context of Article 167 of the directive, as amended.

4. Article 143(1)(d) of Directive 2006/112, as amended by Directive 2009/69, must be interpreted as precluding an administrative practice under which, in circumstances such as those of the dispute in the main proceedings, an importer acting in good faith is refused the right to the exemption from value added tax on importation where the conditions for the exemption of the subsequent intra-Community supply are not satisfied, because of tax evasion on the part of the purchaser, unless it is shown that the importer knew or ought to have known that the transaction was involved in tax evasion committed by the purchaser and did not take all reasonable steps in his power to avoid participation in the evasion. The mere fact that the importer and the purchaser communicated by electronic means of communication cannot allow it to be presumed that the importer knew or could have known that he was participating in tax evasion.

5. Article 143(1)(d) of Directive 2006/112, as amended by Directive 2009/69, must be interpreted as meaning that the competent national authorities are not obliged, when examining the transfer of the power to dispose of goods as owner, to collect information to which only the public authorities have access.

Cases C-234/16 and C-235/16, Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Consejería de Economía y Hacienda del Principado de Asturias (C-234/16)

The CJEU held that:

1. Articles 49 and 54 TFEU must be interpreted as not precluding a tax levied on large retail establishments, such as that at issue in the main proceedings.
2. A tax such as that at issue in the main proceedings imposed on large distribution establishments according, in essence, to their display and sales area does not constitute State aid within the meaning of Article 107(1) TFEU to the extent that it exempts establishments whose sales area is less than 4 000 m². Nor, in so far as that tax exempts establishments which pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies and whose sales area does not exceed 10 000 m², does it constitute State aid within the meaning of Article 107(1) TFEU, provided that those establishments do not have as significant an adverse effect on the environment and on town and country planning as the others, which it is for the referring court to ascertain.

Case C-566/16, Dávid Vámos v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,

The CJEU held that:

EU law must be interpreted as not precluding national legislation which excludes a special value added tax taxation scheme providing for an exemption for small enterprises — that scheme having been adopted in accordance with the provisions of Section 2 of Chapter I of Title XII of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax — from being applied to a taxable person who fulfils all the material conditions but did not exercise the right to opt for the application of that scheme at the same time as he declared the commencement of his economic activities to the tax authority.

Case C-382/16, Hornbach-Baumarkt AG v Finanzamt Landau

The CJEU held that Article 43 EC (now Article 49 TFEU), in conjunction with Article 48 EC (now Article 54 TFEU), must be interpreted as, in principle, not precluding national legislation, such as that at issue in the main proceedings, pursuant to which the income of a company resident in a Member State which granted to a company established in another Member State with which it has a relationship of interdependence advantages under terms that depart from those that would have been agreed on by unrelated third parties under the same or similar circumstances, must be calculated as it would have been if the terms which would have been agreed with unrelated third parties had been applicable, and be corrected, despite the fact that such a correction is not made in respect of taxable income when the same advantages are granted by a resident company to another resident company with which it has a relationship of interdependence. However, it is for the national court to determine whether the legislation at issue in the main proceedings affords the resident taxpayer the opportunity to prove that the terms were agreed on for commercial reasons resulting from its status as a shareholder of the non-resident company.

Case C-544/16, *Marcandi Ltd, v. Commissioners for Her Majesty's Revenue and Customs*,

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 that the issue of 'credits', such as those at issue in the main proceedings, which allow an operator's clients to bid in the auctions that it organises, are a supply of services for consideration, for which the consideration is the amount paid in return for those 'credits'.
2. Article 73 of Directive 2006/112 must be interpreted as meaning that, in circumstances such as those in the main proceedings, the value of 'credits' used in order to bid is not included in the consideration received by the taxable person in return for the supplies of goods that it makes for the benefit of users who won an auction organised by it, or users who purchased a product using the 'buy now' or 'earned discount' features.
3. When interpreting the relevant provisions of EU and national law, courts of a Member State that find that the same transaction has been the object of a different tax treatment for the purposes of VAT in another Member State have the power, or even — depending on whether there is a judicial remedy under national law against its decisions — an obligation, to refer a request for a preliminary ruling to the Court.

Case C-320/17, *Marle Participations SARL v Ministre de l'Économie et des Finances*,

The CJEU held that:

1. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the letting of a building by a holding company to its subsidiary amounts to 'involvement in the management' of that subsidiary, which must be considered to be an economic activity, within the meaning of Article 9(1) of that directive, giving rise to the right to deduct the value added tax (VAT) on the expenditure incurred by the company for the purpose of acquiring shares in that subsidiary, where that supply of services is made on a continuing basis, is carried out for consideration and is taxed, meaning that the letting is not exempt, and there is a direct link between the service rendered by the supplier and the consideration received from the beneficiary. Expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the subsidiaries' management by letting them a building and which, on that basis, carries out an economic activity has to be regarded as belonging to its general expenditure and the VAT paid on that expenditure must, in principle, be capable of being deducted in full.
2. Expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the management of only some of those subsidiaries and which, with regard to the others, does not, by contrast, carry out an economic activity must be regarded as only partially belonging to its general expenditure, so that the VAT paid on that expenditure may be deducted only in proportion to the expenditure which is inherent in the economic activity, in accordance with the apportionment criteria defined by the Member States, which, when exercising that power, must have regard to the aims and broad logic of that directive and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to economic and to non-economic activity, which it is for the national courts to ascertain.

Case C-28/17, NN A/S v Skatteministeriet,

The CJEU held that:

Article 49 TFEU must be interpreted as not precluding, in principle, national legislation, such as that at issue in the main proceedings, pursuant to which the resident companies in a group are permitted to deduct, from their group profits, the losses sustained by a resident permanent establishment of a non-resident subsidiary of that group only in the case where the rules applicable in the Member State in which that subsidiary has its registered office do not permit those losses to be deducted from the latter's profits, when the application of that legislation is combined with that of a convention preventing double taxation allowing, in the latter Member State, the deduction from the income tax payable by the subsidiary of a sum corresponding to the income tax paid, in the Member State on the territory of which that permanent establishment is situated, in respect of the latter's activity. However, Article 49 TFEU must be interpreted as precluding such legislation in the case where the effect of its application is to deprive that group of any effective possibility of deducting those losses from the group's overall profits, where it is not possible to set off those losses against that subsidiary's profits in the Member State on the territory of which that subsidiary is established, these being matters for the referring court to verify.

Case C-154/17 SIA 'E LATS' v Valsts ieņēmumu dienests

The CJEU held that Article 311(1)(1) 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 concept of 'second-hand goods' does not cover used goods containing precious metals or precious stones if those goods are no longer capable of performing their initial function and have retained only the functionalities inherent in those metals and stones, which is for the national court to determine taking into account all the objective circumstances relevant in each individual case.

4. OTHER

4.1 Commission Recommendation on the 2018 National Reform Programme of Malta

On 23 May 2018 the European Commission published its Recommendation for a COUNCIL RECOMMENDATION on the 2018 National Reform Programme of Malta and delivering a Council opinion on the 2018 Stability Programme of Malta.

The following 'tax-related' comments have been noted:

- 'The absence of withholding taxes on outbound (i.e. from EU residents to third country residents) dividends, interest and royalty payments made by Malta based companies may lead to those payments avoiding tax altogether, if they are also not subject to tax in the recipient country.'
- 'While Malta's new Notional Interest Deduction regime will help to reduce the debt equity bias, insufficient anti-abuse rules, combined with a relatively high rate and a stock-based regime, may provide opportunities for tax avoidance.'
- 'The existence of some provisions in bilateral tax treaties between Malta and other EU Member States, coupled with Malta's tax system, where a company that is resident but not domiciled in Malta is taxed on source and remittance basis, may be used by companies to engage in tax avoidance practices.'
- 'The Commission takes note of Malta's commitment to fight against taxpayers aggressive tax planning. Based on recent exchanges, the Commission will continue its constructive dialogue to fight against taxpayers aggressive planning strategies.'

4.2 EU Mandatory Transparency Rules

On 3 July, the European Commission published a document dated 27 September 2017 clarifying Hallmarks under DAC6. The document clarifies the meaning of certain hallmarks. It must be noted that the clarifications do not refer to the text of final draft that had been adopted. Nonetheless, the document remains an important interpretative tool explaining how the hallmarks were drawn from Action 12 of the BEPs Action Plan and the positions of a number of states.

4.3 SUPREME COURT OF THE UNITED STATES SOUTH DAKOTA v. WAYFAIR, INC., ET AL. CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

On June 21, 2018, the US Supreme Court issued its much-awaited ruling in South Dakota v. Wayfair. In brief, the majority of the Judges held that previous judgments linking the right to assert jurisdiction to sales tax to a physical presence is both 'unsound and incorrect'. It is feared that this controversial judgment will influence the current debate on the taxation of the digital economy (the introduction of the concept of virtual PE especially). An extract from the lengthy judgment follows:

"(2) When the day-to-day functions of marketing and distribution in the modern economy are considered, it becomes evident that Quill's physical presence rule is artificial, not just "at its edges," 504 U. S. at 315, but in its entirety. Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in Quill. And the Court should not maintain a rule that ignores substantial virtual connections to the State. Pp. 14–15...

The Internet's prevalence and power have changed the dynamics of the national economy... The argument, moreover, that the physical presence rule is clear and easy to apply is unsound. Attempts to apply the physical presence rule to online retail sales are proving unworkable."

DISCLAIMER

The information herein is provided without any express or implied warranties. The authors shall not be responsible for omissions, errors or mistakes. In the preparation of this presentation, the authors tried to offer correct information. However, the information is intended solely to provide very general knowledge. The authors make no claims, promises, undertakings or guarantees about accuracy, completeness, or adequacy of the contents of this presentation. This document was written with the understanding that the authors will not be responsible for the result of any actions taken on the basis of information in this presentation. The authors are not attempting to provide advice, and the information in this document should be used as a research tool only. The information contained in this presentation includes information from different sources and, as far as possible, specific individuals or bodies of persons are credited as a source. Descriptions of guidelines tend to incorporate extracts drawn from such guidelines. Law reports may incorporate excerpts from official press releases.

