



MALTA
INSTITUTE
OF TAXATION



MALTESE TAX LAW UPDATE

(Update 30)







EDITOR'S NOTE

The most interesting developments registered in this quarter took the form of a number of VAT legal notices implementing amendments to the VAT Directive and a number of judgments.

The CJEU's pronouncements must be monitored carefully. Arguably, the judgment in Viking Motors paves the way for a digital tax. The judgment in Case C-416/17 European Commission v French Republic could leave a long-term impact too.

Robert Attard
12/10/2018

1. LEGISLATIVE CHANGES

1.1
ACTS OF
PARLIAMENT

There were no legislative changes in the quarter under review.



L.N. 297 of 2018 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax Act (Amendment of Third Schedule) Regulations, 2018

L.N. 297 implements Council Directive (EU) 2017/2455. The amendments shall come into force on the 1st January 2019.

Item 10 in Part Two of the Schedule is being substituted by the following:

10.(1) The place of supply of the following services to a non-taxable person shall be the place where that person is established, has his permanent address or usually resides:

- a. telecommunications services;
- b. radio and television broadcasting services;
- c. electronically supplied services, in particular services relating to website supply, web-hosting, distance maintenance of programmes and equipment, supply of software and updating thereof, supply of images, text and information and making available of databases, supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific and entertainment broadcasts and events, and supply of distance teaching. Where the supplier of a service and the customer communicate via electronic mail, that shall not of itself mean that the service supplied is an electronically supplied service.

(2) Paragraph (1) shall not apply where the following conditions are met:

- a. the supplier is established or, in the absence of an establishment, has his permanent address or usually resides in Malta only; and
- b. services are supplied to non-taxable persons who are established, have their permanent address or usually reside in any Member State other than Malta; and
- c. the total value, exclusive of VAT, of the supplies referred to in sub-paragraph (b) does not in the current calendar year exceed EUR 10,000 and did not do so in the course of the preceding calendar year.

(3) Where, during a calendar year, the threshold referred to in paragraph (2)(c) is exceeded, paragraph (1) shall apply as of that time.

(4) The Commissioner shall grant to those suppliers referred to in paragraph (2) the right to opt for the place of supply to be determined in accordance with paragraph (1), which shall in any event cover two calendar years:

Provided that, a valid election for this purpose shall be made by means of a notice in writing to the Commissioner on a form acceptable to the Commissioner specifying the date from which it applies, not being earlier than thirty days from the date on which it is furnished.

L.N. 298 of 2018 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax Act (Amendment of Twelfth Schedule) Regulations, 2018

L.N. 298 implements the provisions of article 1 of Council Directive (EU) 2017/2455 and Directive 2009/132/ EC. L.N. 298 comes into force on the 1st January 2019 and deals with invoicing.

L.N. 298 prescribes that invoicing shall be subject to the rules applying in the Member State in which the supply of goods or services is deemed to be made, in accordance with the provisions of the Third Schedule.

By way of derogation from the rule above, invoicing shall be subject to the following rules:

(i) the rules applying in the Member State in which the supplier has established his business or has a fixed establishment from which the supply is made or, in the absence of such place of establishment or fixed establishment, the Member State where the supplier has his permanent address or usually resides, where:

A. the supplier is not established in the Member State in which the supply of goods or services is deemed to be made, in accordance with the provisions of the Third Schedule, or his establishment in that Member State does not intervene in the supply within the meaning of the proviso to article 20(2) of the Act, and the person liable for the payment of the VAT is the person to whom the goods or services are supplied unless the customer issues the invoice (self-billing);

B. the supply of goods or services is deemed not to be made within the Community, in accordance with the provisions of the Third Schedule;

(ii) the rules applying in the Member State where the supplier making use of one of the special schemes referred to Parts Seven and Eight of the Fourteenth Schedule is identified.

L.N. 299 of 2018 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax Act (Amendment of Fourteenth Schedule) Regulations, 2018

This L.N implement the provisions of article 1 of Council Directive (EU) 2017/2455 and comes into force on the 1st January 2019.

L.N. 299 substitutes paragraph (a) in item 1 of Part Seven of the Schedule.2 introducing a new definition of the term 'taxable person not established within the Community'. The new definition provides that taxable person not established within the Community' means a taxable person who has not established his business in the territory of the Community and who has no fixed establishment there. The introduction of the new definition brought about consequential amendments to item 4 of Part Seven of the Schedule too.

L.N. 321 of 2018 INCOME TAX ACT (CAP. 123) Donations (Community Chest Fund) (Amendment) Rules, 2018

L.N. 321 prescribes that the rules shall apply with respect to donations made up to the 31st December 2018.

L.N. 322 of 2018 INCOME TAX ACT (CAP.123) Deduction for Wear and Tear of Plant and Machinery (Amendment) Rules, 2018

As from year of assessment 2018 and with respect to aircraft acquired on or after the 1 January 2018, wear and tear allowance over Aircraft airframe, aircraft engines, Aircraft engine or airframe overhaul and Aircraft interiors and other parts is to be taken over 4 years. Sub-Category 7 of the rules has been amended accordingly.

L.N. 320 of 2018 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) Duty on Donations of Marketable Securities and Immovable Property Used for Business (Exemption) (Amendment No. 2) Order, 2018

The temporal scope of the L.N. has been extended. The moratorium for transfers by gratuitous title previously applicable with respect to transfers entered into "on or after the 1st April 2017 but prior to 1st October 2018" has been extended to transfers occurring "on or after the 1st April 2017 but prior to 1st January 2019." The deadline for the submission of the relevant form has been extended from "on or before 30th September 2018" to "on or before 31st December 2018."

No bills had been published during the quarter under review.



Rikors Nru. 59/17VG Ines Vella Vs Il-Kummissarju tat-Taxxi

The ART dismissed an Income Tax appeal because the appeal referred to an estimate incorporated in a demand note and not a proper assessment. The ART contended that its jurisdiction was limited to decisions over assessments. The ART disagreed with the taxpayer that the appeal was to be treated as an attempt to impugn an administrative act falling under the remit of the Administrative Justice Act.

3.2.1 Constitutional Jurisdiction

None that we are aware of.

3.2.2 Civil Cases

None that we are aware of.

None that we are aware of.

Appell Nru:- 57/2015/1

This reference VAT appeal was filed by a company secretary who petitioned the ART to declare that he was not personally liable for the company's VAT omissions. The company secretary was neither a shareholder nor a director of the company. Although appellant brought evidence proving that he was not aware of the company's wrongdoings and that he was not vested with the power to manage and control the company's funds, the Court of Appeal held that appellant should be held personally for the company's VAT debts nonetheless because it held that appellant had acted as a mere 'spectator' failing to take an active interest in the company's compliance matters. Arguably, the Court of Appeal applied a high standard in its application of the notion of good faith equating 'good faith' with the concept of due diligence. Conversely, taxpayer had argued that good faith is the opposite of bad faith, a state of mind comporting malice to some degree.

**Appell numru:- 176/2011/1 Schembri & Sons Limited
Vs Kummissarju tat-Taxxi Interni**

The Court of Appeal upheld an appeal application filed by the CfR from a decision of the ART that referred to an assessment to duty. The Court of Appeal held that although the onus of proof was on the taxpayer, taxpayer had in reality failed to prove its case.

Case C-16/17 TGE Gas Engineering GmbH — Sucursal em Portugal v Autoridade Tributária e Aduaneira

The CJEU held that Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, and the principle of neutrality must be interpreted as precluding the tax authority of a Member State from regarding a company which has its headquarters in another Member State and the branch which it has in the first of those States as constituting two separate taxable entities on the ground that each of those entities has a tax identification number, and, for that reason, from refusing that branch the right to deduct value added tax (VAT) on the debit notes issued by an economic interest group of which that company, and not its branch, is a member.

Case C-475/17 Viking Motors and Other, TKM Beauty Eesti OÜ, TKM King AS, Kaubamaja AS, Selver AS v Tallinna linn Maksu- ja Tolliamet

The CJEU held that Article 401 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 it does not preclude the maintenance or introduction of an Estonian Sales Tax of 1% on the value, in the sale price, of the goods and services sold in the territory of the municipality or city by the taxpayer.

The CJEU motivated its decision as follows:

- a. the legislation governing the sales tax at issue in the main proceedings did not require taxpayers to add the amount of that tax to the sale price or to indicate separately on the invoice delivered to the purchaser the amount of the tax to be paid. Thus, the passing-on of that tax to the final consumer was a possibility and not an obligation for the retailers who could at any time choose to bear that tax themselves, without increasing the prices of the goods and services provided.
- b. Therefore, it cannot be certain that the burden of the sales tax at issue in the main proceedings was ultimately borne by the final consumer in a way similar to a tax on consumption such as VAT.
- c. A tax levied on production in such a way that it

is not certain that it will be borne, like a tax on consumption such as VAT, by the final consumer is likely to fall outside the scope of Article 401 of the VAT Directive.

- d. Whereas, through the mechanism of the deduction of VAT, that tax is charged only to the final consumer and is completely neutral as regards the taxable persons involved in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved, that is not the case with a tax such as the sales tax.
- e. The fact that the application to the sale price of the tax at issue in the main proceedings depends on the sellers who may or may not decide to transfer the burden of the tax to the purchaser, it must be pointed out that only the conduct of the seller can determine the difference in his tax treatment compared with a competitor and the possible differences in price borne by consumers compared with others. Consequently, the neutrality of the common system of VAT is not liable to be jeopardised.

Case C-69/17 Siemens Gamesa Renewable Energy România SRL, formerly Gamesa Wind România SRL, V Agenția Națională de Administrare Fiscală

The CJEU held that Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, in particular Articles 213, 214 and 273 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which it is permissible for the tax authorities to refuse, on account of a failure to submit tax returns, a taxable person which has made acquisitions in the period during which its value added tax identification number was revoked the right to deduct value added tax on those acquisitions using value added tax returns filed — or invoices issued — after the reactivation of its identification number, on the sole ground that those acquisitions took place in the period during which its value added tax identification number was de-activated and where the substantive requirements have been satisfied and the right of deduction is not being invoked fraudulently or abusively.

**Case C-416/17 European Commission
v French Republic**

In a case involving discriminatory taxation, the CJEU declared that:

1. By refusing to take into account, in order to calculate the reimbursement of the advance payment made by a resident company in respect of the distribution of dividends paid by a non-resident company via a non-resident subsidiary, the tax incurred by that second company on the profits underlying those dividends, even though the national mechanism for the avoidance of economic double taxation allows, in the case of a purely domestic chain of interests, the tax levied on the dividends distributed by a company at every level of that chain of interests to be offset, the French Republic has failed to fulfil its obligations under Articles 49 and 63 TFEU;

2. Since the Conseil d'État (Council of State, France) failed to make a reference to the Court of Justice of the European Union, in accordance with the procedure provided for in the third paragraph of Article 267 TFEU, in order to determine whether it was necessary to refuse to take into account, for the purpose of calculating the reimbursement of the advance payment made by a resident company in respect of the distribution of dividends paid by a non-resident company via a non-resident subsidiary, the tax incurred by that second company on the profits underlying those dividends, even though its interpretation of the provisions of EU law in the judgments of 10 December 2012, *Rhodia* (FR:CESSR:2012:317074.20121210), and of 10 December 2012, *Accor* (FR:CE SR:2012:317075.20121210), was not so obvious as to leave no scope for doubt, the French Republic failed to fulfil its obligations under the third paragraph of Article 267 TFEU.

4. OTHER

4.1 MAP Peer Review Report, Malta

In July 2018, the OECD published a report entitled Making Dispute Resolution More Effective – MAP Peer Review Report, Malta (Stage 1). The main conclusions of the report were the following:

- Two out of Malta's 76 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015).
- Malta should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015) in those two treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force.
- Malta is in theory able to extend bilateral APAs to previous fiscal years. Even though Malta received a request for roll-back of a bilateral APA during the Review Period, this request is still under consideration. It was therefore not possible at this stage to evaluate the effective implementation of this element in practice.
- Malta should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) in those treaties that currently do not contain such equivalent. This concerns both a provision that is equivalent to Article 25(1), first sentence of the OECD Model Tax Convention (OECD, 2015a) either a. as amended in the final report of Action 14 (OECD, 2015b); or b. as it read prior to the adoption of final report of Action 14 (OECD, 2015b), thereby including the full sentence of such provision; and a provision that allows taxpayers to submit a MAP request within a period of no less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.

For the remaining treaties that will not be modified by the Multilateral Instrument following its entry into force to include such equivalent, Malta should follow up on its stated intention to request the inclusion of the required provision in the envisaged bilateral negotiations. In addition, Malta should maintain its stated intention to include the required provision in all future tax treaties.

- Malta reported it will give access to MAP in transfer pricing cases. Its competent authority, however, did not receive any MAP requests of this kind from taxpayers during the Review Period. Malta is therefore recommended to follow its policy and grant access to MAP in such cases.
- Malta reported it will give access to MAP in cases concerning whether the conditions for the application of a treaty anti-abuse provision have been met or whether the application of a domestic law antiabuse provision is in conflict with the provisions of a treaty. Its competent authority, however, did not receive any MAP requests of this kind from taxpayers during the Review Period. Malta is therefore recommended to follow its policy and grant access to MAP in such cases.
- Malta reported it will give access to MAP in cases where the tax authority and the taxpayer have entered into an audit settlement. Its competent authority, however, did not receive any MAP requests of this kind from taxpayers during the Review Period. Malta is therefore recommended to follow its policy and grant access to MAP in such cases.
- As Malta has thus far not limited access to MAP in eligible cases when taxpayers have complied with Malta's information and documentation requirements for MAP requests, it should continue this practice.
- As Malta did not receive any post-2015 MAP case during the Review Period it was therefore at this stage not appropriate to evaluate whether Malta's competent authority is adequately resourced.

4.2 VAT 'Quick Fixes'

On 28 September 2018, the Council agreed on the following short-term improvements (i.e. "quick-fixes") to the current system:

- i. simplification and harmonisation of rules regarding call-off stock arrangement;
- ii. the VAT identification number of the customer becomes a substantive condition for exempting the intra-Community supply of goods;
- iii. simplification of chain transactions in order to enhance legal certainty; and
- iv. harmonisation and simplification of the rules for proving the intra-Community transport of goods for the purposes of applying the VAT exemption.

The Council is expected adopt the necessary instruments after the European Parliament gives its opinion.



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