



MALTA
INSTITUTE
OF TAXATION



MALTESE TAX LAW UPDATE

(Update 31)







EDITOR'S NOTE

Quarter 31 witnessed an unprecedented number of developments. On the international front, the EU Code of Conduct Group concluded that Malta's NID regime is 'overall not harmful'. The EU Council adopted 3 legislative acts aimed at adjusting the EU's VAT rules.

In December, the Economic and Financial Affairs Council published a press release announcing that a number of delegations did not accept the text of the proposed digital tax directive. The CJEU delivered over 10 tax judgments (the judgment in *Sofina SA* on discriminatory dividend tax must be singled out). The Grand Chamber of the ECtHR delivered its much awaited judgment in *Lekic v. Slovenia*, a judgment that, in the long-term, should impact on vicarious liability regimes.

On the local front, the Budget Speech was followed by a number of major developments. ATAD 1 was transposed in December and a Budget Bill was published in November. The purview of certain duty on documents concessions was extended by legal notice. The CfR published important guidelines (the VAT Grouping Guideline and the 3 DLT Guidelines).

Robert Attard
04/1/19

1. LEGISLATIVE CHANGES

1.1
ACTS OF
PARLIAMENT

There were no legislative changes in the quarter under review.

L.N. 411 of 2018 INCOME TAX ACT (CAP. 123) European Union Anti-Tax Avoidance Directives Implementation Regulations, 2018

In December 2018, the Minister for Finance transposed the provisions of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax practices that directly affect the functioning of the internal market (ATAD 1) by L.N. 411 of 2018 (L.N. 411).

ATAD 1 put forth some major tax policy changes to Maltese law. It provides for structured mandatory controlled foreign company (CFC) rules (to deter profit shifting to a low/no tax country) and exit taxation (to prevent companies from avoiding tax when re-locating assets). In addition, ATAD 1 introduced interest limitation rules (to discourage artificial debt arrangements designed to minimize taxes) and a general anti-abuse rule (GAAR) (to counteract aggressive tax planning).

The provisions of L.N. 411 shall apply from 1 January 2019 (and from 1 January 2020 in the case of exit taxes) to all companies as well as other entities, trusts and similar arrangements that are subject to tax in Malta in the same manner as companies. This includes entities that are not resident in Malta but have a permanent establishment (PE) in Malta provided that they are subject to tax in Malta as companies (taxpayers).

Rules on exit taxation are addressed in Art. 5 of the ATAD 1 and have been transposed in regulation 5 of L.N. 411. The rules provide for an imputed taxable gain that is triggered whenever certain transfers occur.

ATAD 1 provides that a taxpayer shall be subject to tax at an amount equal to the market value of the transferred assets, at the time of exit of the assets, less their value for tax purposes, in any of the following circumstances:

- (a)** a taxpayer transfers assets from its head office in Malta to its PE in another Member State or in a third country in so far as Malta no longer has the right to tax the transferred assets due to the transfer;
- (b)** a taxpayer transfers assets from its PE in Malta to its head office or another PE in another Member State or in a third country in so far as Malta no longer has the right to tax the transferred assets due to the transfer;
- (c)** a taxpayer transfers its tax residence from Malta to another Member State or to a third country, except for those assets which remain effectively connected with a PE in Malta;
- (d)** a taxpayer transfers the business carried on by its PE from Malta to another Member State or to a third country in so far as Malta no longer has the right to tax the transferred assets due to the transfer.

Regulation 5(2) of L.N. 411 prescribes that a taxpayer shall be given the right to defer the payment of exit tax by paying it in instalments over five years, in any of the following circumstances:

- (a)** a taxpayer transfers assets from its head office in Malta to its PE in another Member State or in a third country that is party to the Agreement on the European Economic Area (EEA Agreement);
- (b)** a taxpayer transfers assets from its PE in Malta to its head office or another PE in another Member State or a third country that is party to the EEA Agreement;
- (c)** a taxpayer transfers its tax residence from Malta to another Member State or to a third country that is party to the EEA Agreement;
- (d)** a taxpayer transfers the business carried on by its PE in Malta to another Member State or a third country that is party to the EEA Agreement.

Malta has applied the option presented by para. 3 of Art. 5 of ATAD 1. To this effect, if a taxpayer defers payment of exit tax, interest shall be charged and if there is a demonstrable and actual risk of non-recovery, taxpayers may also be required to provide a guarantee as a condition for deferring the payment. In certain cases, the deferral of payment is discontinued and the tax debt becomes recoverable immediately.

Art. 7 of the ATAD 1 puts forward a CFC rule, which has been transposed via regulation 7 of L.N. 411. This provides that an entity, or a PE of which the profits are not subject to tax or are exempt from tax, shall be treated as a CFC where the following conditions are met:

- (a) in the case of an entity, the taxpayer itself, or together with its associated enterprises holds a direct or indirect participation of more than 50% of voting rights, or owns directly or indirectly more than 50% of capital or is entitled to receive more than 50% of the profits of that entity; and
- (b) the actual corporate tax paid on its profits by the entity or PE is lower than the difference between the corporate tax that would have been charged on the entity or PE under the ITA and the actual corporate tax paid on its profits by the entity or PE. The corporate tax that would have been charged in Malta means the tax as computed according to the ITA.

Where an entity or PE is treated as a CFC, ATAD 1 provides Member States with two options for CFC taxation. Malta has opted for option B, i.e. CFC taxation of non-distributed income of the entity or PE arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.

An arrangement or a series thereof shall be regarded as non-genuine to the extent that the entity or PE would not own the assets or would not have undertaken the risks which generate all, or part of, its income if it were not controlled by a company where the significant people functions, which are relevant to those assets and risks, are carried out and are instrumental in generating the controlled company's income, provided that the said company is the taxpayer and the said significant people functions are carried out in Malta.

Malta has applied for the option in ATAD 1 allowing a Member State to exclude from the scope of CFC taxation, an entity or PE with:

- (a) accounting profits less than, or equal to, €750,000 and non-trading income of less than, or equal to, €75,000; or
- (b) accounting profits less than, or equal to, 10% of its operating costs;

In computing CFC income, the income to be included in the tax base of the taxpayer must be limited to amounts generated through assets and risks which are linked to significant people functions carried out by the controlling company. The attribution of CFC income shall be calculated in accordance with the arm's length principle.

Regulation 4 of L.N. 411 draws heavily from Art. 4 of ATAD 1 prescribing that: exceeding borrowing costs shall be deductible in the tax period in which they are incurred only up to 30% of the taxpayer's EBITDA.

For the purpose of applying the interest limitation rule, in accordance with guidelines which are to be issued by the CfR, Malta may also treat as a taxpayer:

- (a) an entity which is permitted or required to apply the rules on behalf of a group, as recognized for the purposes of Maltese tax law;
- (b) an entity in a group, as recognized for the purposes of Maltese tax law, which does not consolidate the results of its members for tax purposes.

In such circumstances, exceeding borrowing costs and EBITDA may be calculated at the level of the group and comprise the results of all its members.

By derogation from para. 1 of ATAD 1, Malta has exercised the option to allow taxpayers the right:

- (a) to deduct exceeding borrowing costs up to €3,000,000; and
- (b) to fully deduct exceeding borrowing costs if the taxpayer is a standalone entity.

Similarly, Malta has exercised the option under ATAD 1, allowing Member States to exclude from the scope of the interest limitation rule exceeding borrowing costs incurred on:

- (a) loans which were concluded before 17 June 2016, but the exclusion shall not extend to any subsequent modification of such loans;
- (b) loans used to fund a long-term public infrastructure project where the project operator, borrowing costs, assets and income are all in the EU.

Whilst exercising the option, Malta has added the following condition to (b):

- where the CfR is satisfied that the financing arrangements for the project have special features which justify such treatment with regards to other financing arrangements subject to the provisions of L.N. 411.

Where the taxpayer is a member of a consolidated group for financial accounting purposes, Malta applied option (a) in paragraph 5 of Article 4 of the ATAD 1. To this effect, the taxpayer has been given the right to fully deduct its exceeding borrowing costs if it can demonstrate that the ratio of its equity over its total assets is equal to or higher than the equivalent ratio of the group and subject to the following conditions:

- (a) the ratio of the taxpayer's equity over its total assets is considered to be equal to the equivalent ratio of the group if the ratio of the taxpayer's equity over its total assets is lower by up to two percentage points; and
- (b) all assets and liabilities are valued using the same method as in the consolidated financial statements.

In the case of para. 6 of Art. 4 of ATAD 1, Malta applied option (c). To this effect, the taxpayer has been given the right to carry forward, without time limitation, exceeding borrowing costs and, for a maximum of five years, unused interest capacity, which cannot be deducted in the current tax period under para. 1 to 5 of regulation 4.

Para. 7 of Art. 4 of ATAD 1 presents the option to exclude financial undertakings from the scope of the interest deduction limitation rules, including where such financial undertakings are part of a consolidated group for financial accounting purposes. Malta has applied this option.

Art. 6 of ATAD 1 puts forward a new anti-avoidance provision that significantly overlaps with Art. 51 ITA.

The GAAR added by the Directive and transposed in regulation 6 of L.N. 411 prescribes that, for the purposes of calculating the corporate tax liability, there shall be ignored an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances.

An arrangement or a series thereof is regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

L.N. 412 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. 3) Order, 2018

In Rule 3 of the principal Order, the words “prior to 1st January 2019.” shall be substituted by the words “prior to 1st January 2020.” This means that the principal Order will apply to a transfers by gratuitous title done on or after the 1st April 2017 but prior to 1st January 2020.

In Rule 4(1) of the principal Order, the words “on or before 31st December 2018.” shall be substituted by the words “on or before 31st December 2019” extending the remit of the Order.

L.N. 413 of 2018 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) Duty on Transfers (Exemption No. 2) (Amendment) Order, 2018

Rule 3 of the principal Order will be amended. In para. (a) thereof, the words “before the 1st January 2019” shall be substituted by the words “before the 1st January 2020” implying that the principal Order applies to a transfer inter vivos of immovable property when –

- the transfer is made on or after the 10th October, 2017 but before the 1st January 2020 to a person who does not require a permit by the Minister for the purposes of the Immovable Property (Acquisition by Non-Residents) Act;

In para. (d) thereof, the words “on or before 28th February 2019;” shall be substituted by the words “on or before 28th February 2020;” implying that the principal Order applies to a transfer inter vivos of immovable property when –

- the notice referred to in Art. 51 of the Duty on Documents and Transfers Act, shall be submitted to the Commissioner for Revenue on or before 28th February 2020;

L.N. 414 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 No. 2) Order, 2018

Rule 6 of the principal Order will be amended as follows; the words “up to 31st December 2018” thereof shall be substituted by the words “up to 31st December 2019” and the words “on or before 28th February 2019” thereof shall be substituted by the words “on or before 28th February 2020.” implying that the principal Order shall apply to acquisitions affected from 10th October 2017 up to 31st December 2019, and the form contained in the First Schedule of the Duty on Documents and Transfers Rules has been delivered to the CfR on or before 28th February 2020.

L.N. 415 of 2018 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) Exemption of Duty in Terms of Article 23 (Amendment No. 2) Order, 2018

Rule 3 of the principal Order shall be amended as follows; the words “before the 1st January 2019,” thereof, shall be substituted by the words “before the 1st January 2020” implying that in respect of transfers of property, made on or after 5th November 2013 but before the 1st January 2020, which qualify for relief of duty under Art. 32(4) of the Duty on Documents and Transfers Act, no duty shall be chargeable on the first €150,000 of the aggregate value of the consideration paid for the acquisition of such property by a person.

Rule 3 of the principal Order shall be amended as follows; in the second proviso thereof, the words “on or before 28th February 2019;” shall be substituted by the words “on or before 28th February 2020;” implying that there shall be submitted to the CfR legal evidence that no other immovable property had ever been purchased before, and that the said form has been delivered to the CfR on or before 28th February 2020.

Rule 4(1)(b) of the principal Order shall be amended as follows; the words “by the 31st December 2018” shall be substituted by the words “by the 31st December 2019”, and the words “by the 28th February 2019;” shall be substituted by the words “by the 28th February 2020;” extending the remit of the exemption.

L.N. 434 of 2018 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax Act (Eighth Schedule Amendment) Regulations, 2018

This L.N. shall come into force on 1st January 2019. It amends the Eight Schedule (Reduced Rate of VAT). Item 5 providing for reduced rates of VAT on printed matter has been changed. Paragraph (c) will read as follows:

"(c) audio books, books and similar printed matter, other than books and similar printed matter referred to in paragraphs (a) and (b), supplied on all physical means of support which include, but not limited to, a CD, DVD, SD-card and USB, but which excludes publications wholly or predominantly devoted to advertising and excluding also publications wholly or predominantly consisting of video content or audible music;"

And the following paragraph (d) has been added:

"(d) audio books, books and similar printed matter, other than books and similar printed matter referred to in paragraphs(a) and (b), supplied electronically but which excludes publications wholly or predominantly devoted to advertising and excluding also publications wholly or predominantly consisting of video content or audible music."

2. BILLS

Bill 65 of 2018 (Budget Bill)

The Budget Bill was published a day after the Minister delivered his Budget Speech in Parliament. The Budget Bill contemplates a number of measures announced in the Budget Bill as well as a number of other measures.

According to the Bill, Art. 5A(5)(b) ITA will be amended to allow transferors to elect not to be taxed at a rate of 12% on the excess, if any, of the transfer value over the acquisition value with respect to transfers of immovable property which had been:

- inherited by them after 24 November 1992; or
- donated to them more than five years prior to the transfer in question.

According to the Budget Bill, the existing third proviso to Art. 12(1)(u)(1) ITA, which provides that the participation exemption will only apply with respect to capital gains for participating holdings resident in Malta, will be replaced with the below:

The new proviso to art. 12(1)(u)(1) ITA contemplated in the Bill will provide that the participation exemption will only apply with respect to capital gains (and not with respect to dividends) for:

- Participating holdings which are resident in Malta; and
- Participating holdings which hold, directly or indirectly, shares or other interests in a company, partnership, EEIG, other body of persons or CIS referred to in the first proviso to the definition of 'participating holding' in art. 2(1) ITA

and only when the beneficial owner of the participating holding (not being a Maltese company) would have been eligible to exempt any such capital gains in terms of art. 12(1)(c)(ii) ITA (the non-resident exemption), i.e. only when the beneficial owner is a non-resident.

2. BILLS

The new proviso contemplated in the Bill will further provide that:

- when there are multiple beneficial owners, and only some (not all) of the beneficial owners could have benefitted from the non-resident exemption, the participation exemption shall only apply to that part of the capital gain to which the exempt beneficial owner is entitled.
- when a company has claimed the participation exemption as per the new proviso and a person who would not be eligible to claim the non-resident exemption becomes beneficially entitled to all or any of these exempted profits (even before the profits are distributed), such untaxed capital gains will be taxed at the rate of 35% in the hands of the company in the year of assessment when such ineligible person becomes entitled to such profits (even before the profits are distributed).

The deeming provision previously contained in art. 43(6)(c) ITA with respect to profits which had been exempted in terms of the participation exemption will be removed. It appears that these changes aim to restrict the use of the participation exemption in structures beneficially owned by individuals who reside in Malta (whether or not these individuals have Maltese domicile). These changes would become effective from year of assessment 2020 (basis year 2019).

In line with the Minister's Budget Speech, deductions for school fees paid in respect of children attending a registered private kindergarten or a school named by the Minister will be increased as follows:

- €2,600 (from €2,300) in respect of each child who attended any such secondary school;
- €1,900 (from €1,600) in respect of each child who attended any such primary school; and
- €1,600 (from €1,300) in respect of each child who attended such a kindergarten

This change should become effective from year of assessment 2020 (basis year 2019).

According to the Bill, paragraph (ii) of art. 56(27) ITA will be amended to clarify that the remittance base charge will apply to any non-domiciled individuals who derive income amounting to not less than €35,000 arising outside Malta and this income is not received or not fully received in Malta.

Para. (ii) of art. 56(27) will also be amended to clarify that, in determining whether the remittance base charge is due, any tax paid on income from transfers of immovable property that are chargeable in terms of article 5A shall be ignored.

This change should become effective from the date that the Budget Measures Implementation Act is enacted in law.

According to the Bill, Art. 41 ITMA will be amended to remove the previously existent specific reference to the Commissioner for Revenue having discretion to halt collection of taxes in dispute. The amended art. 41 ITMA will now provide that where notice of objection or appeal against an assessment has been given, the tax assessed thereunder which is in dispute may be kept in abeyance. This is a change from the previously applicable rule which provided the Commissioner for Revenue with the discretion to take this decision with respect to 90% of the tax in dispute. This change should become effective from the date that the Budget Measures Implementation Act is enacted in law.

Para. (b) of art. 44(1) and para. (c) of art. 44(2A) will both be amended to extend the time period between the date when the Commissioner serves a demand note upon the assessed person and the date on which, if payment has not been made the Commissioner may proceed to enforce payment. This time period will be increased from fifteen days to thirty days. This change should become effective from the date that the Budget Measures Implementation Act is enacted in law.

3. JUDICIAL DECISIONS

3.1

JUDGMENTS OF THE ART

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Rikors Nru. 98/11VG

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The ART rejected an appeal from an Income Tax assessment largely over points of fact because the ART was unconvinced by the evidence brought forward by the taxpayers.

3.2

JUDGMENTS OF THE
FIRST HALL CIVIL COURT

Rikors Numru 935/18 TA Kummissarju tat-Taxxi vs Norman James Elliott (K.I. Nru: 81644A)

The Maltese Courts acceded to a request for the issuance of an executive title under the Mutual Assistance Directive because defendant failed to reply to the CfR's application.

3.3

JUDGMENTS OF THE
CONSTITUTIONAL COURT

None that we are aware of.



3.4 Judgments of the Court of Appeal

Appell numru: 198/11/1 Peter Martin I.D. 233164M u Carmen maghrufa bhala Charmaine Martin I.D. 223466M vs Kummissarju tat-Taxxi

The Court of Appeal dismissed Commissioner's appeal from an ART judgment acceding to an appeal to an assessment to duty because, in essence, the ART's conclusion relating to the value of the property were broadly correct.

Appell numru: 327/2013/1 David Muscat vs Direttur Generali (Taxxa fuq il-Valur Mizjud)

Although the Court of Appeal disagreed with the ART's legal considerations relating to the rules governing cancellation of provisional assessments, the Court concluded that in the case in front of it the Commissioner had failed to prove that the new assessment had been issued after the cancellation of the previous (provisional) assessment.

Appell numru:- 96/2011 Gaetano Attard Vs Kummissarju tat-Taxxi Interni

The Court of Appeal rejected taxpayer's appeal from a judgment of the ART refuting an income tax appeal filed by a taxpayer because the appeal was essentially based on a point of fact.

None that we are aware of.

Case C-575/17 Sofina SA et v Ministre de l'Action et des Comptes publics

The CJEU ruled that Articles 63 and 65 TFEU must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, pursuant to which the dividends paid by a resident company are subject to a withholding tax when they are received by a non-resident company, whereas, when such dividends are received by a resident company, under the general corporation tax rules they are subject to taxation at the end of the financial year in which they were received only if the latter company was profitable in that financial year, and such taxation may, where applicable, never be levied if that company ceases trading without becoming profitable after receiving those dividends.

Case C-648/16 Fortunata Silvia Fontana v Agenzia delle Entrate — Direzione provinciale di Reggio Calabria

The CJEU ruled that the the common system of value added tax, and the principles of fiscal neutrality and proportionality, must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which authorises tax authorities, in the event of serious differences between declared revenue and revenue estimated on the basis of sector studies, to use extrapolation, based on such sector studies, in order to determine the amount of turnover achieved by a taxable person and, consequently, to carry out a tax adjustment requiring the payment of additional value added tax (VAT), provided that that legislation and its application enable the taxable person, in compliance with the principles of fiscal neutrality, proportionality and the right of defence, to challenge the results obtained by that method, on the basis of all of the evidence to the contrary available to him, and to exercise his right of deduction in accordance with the provisions in Title X of Directive 2006/2012, which it is for the referring court to verify.

Case C-664/16 Lucrețiu Hadrian Vădan v Agenția Națională de Administrare Fiscală — Direcția Generală de Soluționare a Contestațiilor

The CJEU held that the common system of value added tax, in particular Articles 167, 168, 178(a) and 179, and the principles of the neutrality of value added tax (VAT) and proportionality, must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a taxable person who is unable to provide evidence of the amount of input VAT he has paid, by producing invoices or any other document, cannot benefit from a right to deduct VAT solely on the basis of an assessment resulting from an expert report commissioned by a national court.

Case C-510/16 Carrefour Hypermarchés SAS et v. Ministre des Finances et des Comptes publics

The CJEU held that an increase in the revenue from taxes financing several authorised aid schemes in comparison with the projections notified to the European Commission, such as that at issue in the main proceedings, constitutes an alteration to existing aid, within the meaning of Article 1(c) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] and of the first sentence of Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation No 659/1999, read in the light of Article 108(3) TFEU, unless that increase remains below the 20 % threshold laid down in the second sentence of Article 4(1) of that latter regulation. That threshold must be assessed, in a situation such as that at issue in the main proceedings, in relation to the revenue assigned to the aid schemes concerned and not in relation to the aid actually allocated.

Cases T-207/10 *Deutsche Telekom v Commission*, T-227/10 *Banco Santander v Commission*, T-239/11 *Sigma Alimentos Exterior v Commission*, T-405/11 *Axa Mediterranean v Commission*, T-406/11 *Prosegur Compañía de Seguridad v Commission*, T-219/10 *RENV World Duty Free Group v Commission* and T-399/11 *RENV Banco Santander and Santusa v Commission*

The CJEU issued PRESS RELEASE No 175/18 in respect of the cases above. In brief, the General Court had to decide again whether or not the Spanish Regime relating to the amortisation of goodwill is selective, since selectivity is one of the necessary and cumulative criteria required to classify a national measure as State aid.

The General Court held that a measure is selective if it favours certain undertakings over other undertakings, excluding the latter from the benefit it confers or, according to the three-step method, whose importance was pointed out by the Court in its judgment of 2016, where it differentiates between undertakings which are in comparable situations and that differentiation is not justified. According to that method, in order to classify a national tax measure as 'selective', the Commission must identify the ordinary or 'normal' tax system applicable in the Member State concerned, and demonstrate that the tax measure at issue is a derogation from that ordinary system. The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part.

Applying the three-step method, the General Court concluded that the measure at issue is selective, even though the advantage which it provides for is accessible to all undertakings liable for corporation tax in Spain. In this connection, the General Court observed in particular that undertakings liable for corporation tax in Spain, where they acquire shareholdings in companies tax resident in Spain, may not obtain the benefit which the deduction arrangement in question provides for in respect of those transactions, unlike undertakings acquiring shareholdings abroad. The General Court inferred that a national tax measures such as the measure at issue, which grants an advantage upon satisfaction of the condition that an economic transaction is performed, may be selective including where, having regard to the characteristics of the transaction concerned, any undertaking may freely choose whether to perform that transaction.

According to the Court of Justice, a measure may be selective even where the resulting difference in treatment is based on the distinction between undertakings which choose to perform certain transactions and other undertakings which choose not to perform them, and not on the distinction between the undertakings from the perspective of their specific characteristics.

In finding that the tax measure at issue is selective, the General Court considered, like the Commission, that it introduces differences in treatment between undertakings which are not justified by the nature or general structure of the Spanish system for taxing goodwill.

The General Court therefore upheld the Commission's decisions.

Case C-502/17 *C&D Foods Acquisition ApS v Skatteministeriet*

The CJEU held that Articles 2, 9 and 168 of the VAT Directive must be interpreted as meaning that a share disposal transaction, envisaged but not carried out, such as that at issue in the main proceedings, for which the direct and exclusive reason does not lie in the taxable economic activity of the company concerned, or which does not constitute the direct, permanent and necessary extension of that economic activity, does not come within the scope of value added tax.

Joined Cases C-622/16 P to C-624/16 P Scuola Elementare Maria Montessori Srl v. European Commission and the Italian Republic

In this long-winded judgment the Grand Chamber annulled Decision 2013/284 to the extent that the European Commission did not order recovery of the unlawful aid granted by means of the exemption from the Imposta comunale sugli immobili (municipal tax on real property).

Case T-68/15, HH Ferries I/S et v European Commission

The CJEU annulled decision C(2014) 7358 of the European Commission of 15 October 2014 in so far as it decided not to raise any objection with respect to the tax aid relating to depreciation of assets and the carrying forward of losses granted to Øresundsbros Konsortiet by the Kingdom of Denmark and with respect to guarantees granted to Øresundsbros Konsortiet by the Kingdom of Denmark and the Kingdom of Sweden.

Case C-528/17 Milan Božičević Ježovnik v Republika Slovenija

The CJEU held that Article 143(1)(d) of the VAT Directive must be interpreted to the effect that, in circumstances where the taxable importer and supplier benefitted from an exemption from import value added tax on the basis of an authorisation issued after a prior examination by the competent customs authorities in the light of the evidence provided by that taxable person, the latter is not required to pay value added tax after the event where it is revealed, during a subsequent examination, that the substantive conditions for the exemption had not been met, except where it is established, in the light of objective evidence, that that taxable person knew, or should have known, that the supplies subsequent to the imports at issue were involved in fraud committed by the customer and that he did not take all reasonable steps in his power to avoid that fraud, which is a matter for the referring court to determine.

Case C-602/17 Benoît Sauvage, Kristel Lejeune v État belge

The CJEU held that Article 45 TFEU must be interpreted as meaning that it does not preclude a tax scheme of a Member State under a tax convention for the avoidance of double taxation, such as that at issue in the main proceedings, which makes the exemption of the income of a resident which arises in another Member State and relates to employment in that State subject to the condition that the activity in respect of which the income is paid is actually performed in that State.

Case C-249/17 Ryanair Ltd v The Revenue Commissioners

The CJEU held that Articles 4 and 17 of the VAT Directive must be interpreted as conferring on a company, such as that at issue in the main proceedings, which intends to acquire all the shares of another company in order to pursue an economic activity consisting in the provision of management services subject to value added tax (VAT) to that other company, the right to deduct, in full, input VAT paid on expenditure relating to consultancy services provided in the context of a takeover bid, even if ultimately that economic activity was not carried out, provided that the exclusive reason for that expenditure is to be found in the intended economic activity.

Case C-153/17 Commissioners for Her Majesty's Revenue and Customs v Volkswagen Financial Services (UK) Ltd

The CJEU held that Article 168 and Article 173(2)(c) of the VAT Directive must be interpreted as meaning that, first, even where the general costs relating to supplies of moveable goods by hire purchase, such as the supplies at issue in the main proceedings, are passed on not in the amount due by the customer in respect of the supply of the goods concerned, that is to say the taxable part of the transaction, but in the amount of the interest due in respect of the 'finance' part of the transaction, that is to say the exempt part thereof, those general costs must nonetheless be considered, for the purposes of value added tax (VAT), to be a component of the price of that supply and, second, Member States may not apply a method of apportionment which does not take account of the initial value of the goods concerned when they are supplied, since that method is not capable of ensuring a more precise apportionment than that which would arise from the application of the turnover-based allocation key.

Case C-416/17 European Commission v French Republic

In this case the CJEU:

1. Declared that, 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. Declared that, 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:CESSR: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.

Case C-672/17 Tratave — Tratamento de Águas Residuais do Ave SA v Autoridade Tributária e Aduaneira

The CJEU held that the principle of neutrality and the VAT directive must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that the reduction of the taxable amount for value added tax (VAT), in the event of non-payment, cannot be made by the taxable person until it has given prior notice of its intention to cancel all or part of the VAT to the purchaser of goods or services, if that purchaser is a taxable person, for the purposes of correcting the deduction of VAT that the latter has made.

CASE OF LEKIĆ v. SLOVENIA (Application no. 36480/07)

This important Grand Chamber Judgment is the ECtHR's leading case on vicarious responsibility and the lifting of the corporate veil. Although the facts in issue did not involve taxation, the legal infrastructure challenged in this Slovenian case is comparable to legal provisions providing for personal liability contained in local tax laws. Slovenian laws providing for personal liability of officers for the unpaid debts of companies they served in were challenged on the basis of the right to property. The ECtHR found no violation but in delivering judgment observed that Slovenian law did not create a disproportionate interference with the right to property because it distinguished between passive and active officers.

CASE OF ERDURAN AND EM EXPORT DIŞ TİC. A.Ş. v. TURKEY (Applications nos. 25707/05 and 28614/06)

This judgment involved allegations of violations of the rights to privacy and property. In brief, the Court held that there had not been any violation. Having regard to the circumstances of the case as a whole, the Court held that the search measure complained of was carried out in accordance with the relevant law and that the domestic authorities, acting within their margin of appreciation, struck a fair balance between the applicant company's right to respect for its "home" and the legitimate aim pursued by means of the search and seizure of its documents for tax assessment purposes.

The allegation that there had been a violation of the right to property was dismissed too the Court observed that the taxation procedure against the applicant company, which led to the imposition of substantial amounts of taxes and penalties on it had followed proceedings which complied with Article 6 of the Convention. The applicant company had an opportunity to challenge before the courts both the procedure leading up to the imposition of those taxes and penalties, and their calculation. The courts eventually delivered decisions partially in applicant's favour by reducing the amount of the penalties. The Court observed that the applicant company did not substantiate the complaints it raised in the second application regarding the calculation of the penalties.

4. OTHER

4.1 Budget Speech

In the 2018 Budget Speech, the Minister of Finance announced a number of measures that should result in amendments to tax laws.

Income Tax Measures

- Individuals earning less than €60,000 p.a. will benefit from a reduction in tax. Individuals whose income falls within the tax free bracket will also benefit from such deduction.
- Persons receiving earned income who pay tax according to the single computation, whose employment income is derived from part-time employment which exceeds the ceiling of €9,100 but does not exceed the minimum wage, will not be subject to tax.
- The tax deduction for independent schools will be increased.
- The tax exemption on pension income has been increased from €13,200 to €13,434.
- Another change relates to the tax exemption on income from certain financial investments. The investment amount generating the exempt revenue is subject to applying a capping. The applicable capping has been increased to €2,000 p.a. Moreover, employees and employers paying contributions to a qualifying scheme will now benefit from a tax credit of 25% which marks an increase of 10% over the existing rate.
- A new Patent Box Regime compliant with the EU Code of Conduct (Business Taxation) and OECD proposals on the Modified Nexus Approach is being developed.
- The Minister spoke at length of the transposition of ATAD.

VAT Measures

- A new VAT refund scheme will be introduced on the purchase of domestic reverse osmosis systems, with the VAT refund capped at €70. The VAT refund scheme associated with wedding related expenses as per Government Notice No. 965 dated 23 September 2014 published in the Government Gazette No. 19,314 will be amended whereby the VAT Refund capping will be increased by €250 to €2,500. The VAT refund scheme associated with the acquisition of Bicycles and Pedelec Bicycles as per Government Notice No. 1,231 dated 15 December 2015 published in Government Gazette No. 19,512 will be extended for another year.
- During 2019, VAT will be refunded to those who registered their vehicle in 2008.

4.2 Paradise Papers: Commission follows up on illegal tax breaks for yachts and aircraft

On 8 November 2018 the Commission issued Press Release IP/18/6265 reporting that the Commission stepped up its agenda to tackle tax avoidance in the yacht and aircraft sectors by implementing infringement proceedings on tax breaks being applied in the pleasure craft industries of Italy and the Isle of Man. These provisions can generate major distortions of competition, as highlighted by last year's 'Paradise Papers' leaks.

In light of its subsequent investigations into these matters and contacts with the Member States concerned, the Commission decided to send a letter of formal notice to Italy for not levying the correct amount of VAT on the leasing of yachts. The Commission also decided to send a reasoned opinion to Italy because of its illegal system of exemptions for fuel used to power chartered yachts in EU waters. Finally, a letter of formal notice was sent to the UK concerning the Isle of Man's abusive VAT practices with regard to supplies and leasing of aircraft.

Pierre Moscovici, Commissioner for Economic and Financial Affairs, Taxation and Customs Union, said "It's simply not fair that some individuals and companies can get away with not paying the correct amount of VAT on products like yachts and aircraft. Favourable tax treatment for private boats and aircraft is clearly at odds with our commonly agreed tax rules and heavily distorts competition in the maritime and aviation sectors. With this in mind, the Commission is taking action to clamp down on rules that try to circumvent EU law in these areas."

4. OTHER

In detail, the infringement procedures concern:

- A reduced VAT base for the lease of yachts offered in the tax law of Italy. Current EU VAT rules allow Member States not to tax services when the effective use and enjoyment of the product is outside the EU. But the rules do not allow for a general flat-rate reduction without proof of where the service is actually used. Italy has established VAT guidelines according to which the larger the boat is, the less the lease is estimated to take place in EU waters. As a consequence, such rule greatly reduces the applicable VAT rate.
- Excise duty rules for fuel in motor boats in Italy. Current EU excise duty rules allow Member States not to tax fuel used by a navigation company for commercial purposes, i.e. the sale of sea navigation services. However, an exemption should only apply if the person leasing the boat sells such services to others. In breach of EU rules, Italy allows chartered pleasure crafts such as yachts to qualify as 'commercial' even when being enjoyed for personal use, which may allow them to benefit from excise duty exemption on fuel used to power its engines.
- Abusive VAT practices in the Isle of Man. VAT is only deductible for business use. Supplies of aircraft, including leasing services, meant expressly for private use should not be VAT-exempt.

The Commission believes that the UK has not taken sufficient action against abusive VAT practices in the Isle of Man with regard to the supplies and leasing of aircraft. The Paradise Papers revealed widespread VAT evasion in the yacht and aviation sectors, facilitated by national rules which do not comply with EU law. These infringements follow a first package of infringements launched against Cyprus, Malta and Greece on reduced VAT basis for the lease of yachts and for which the Commission received assurance from all these Member States that the legislation would be amended.

In addition to the infringement procedures launched today by the Commission, the European Parliament has recently indicated that its TAX3 committee following up on the Paradise Papers would also look at this issue. The committee is due to visit the Isle of Man in November.

Italy and the UK now were given two months to respond to the arguments put forward by the Commission regarding VAT on yachts and aircraft, respectively. If they do not act within those two months, the Commission may send a reasoned opinion to their authorities.

If Italy does not act within the two month term on the reasoned opinion adopted today on excise duty, the Commission may decide to bring the case before the Court of Justice of the EU.

4.3 Competent Authority Agreement under the Ireland-Malta Double Taxation Convention 2008

The Competent Authorities of Ireland and Malta entered into an agreement under the Convention Between Ireland and Malta for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income signed in Rome on the 14 November 2008. The agreement concerns certain companies incorporated in Ireland that are managed and controlled in Malta. The Agreement is entered into under Article 24 (Mutual Agreement Procedure) of the Treaty.

The parties agreed that from the coming into effect of the MLI as respects the DTC between Ireland and Malta (the "Contracting States" in relation to that DTC), where–

- for the purpose of avoiding double taxation, under paragraph 3 of Article 4 of the Ireland-Malta DTC a company would be deemed to be only resident in one of the Contracting States, but in the circumstances concerned–
 - there is no double taxation to be avoided, and it is reasonable to conclude that an opportunity for double non-taxation would otherwise arise,
- then any such deeming of the company to be resident only in one of the Contracting States shall not be for the purposes of the Ireland-Malta DTC– as it would serve no such purposes. It would be superfluous to, and redundant for, those purposes.

4. OTHER

4.4 Malta's Notion Interest Deduction Regime (NID) – Code of Conduct Report

On 15 November 2018, the EU Code of Conduct Group published a report relating to Malta's NID. The report incorporates a detailed description of Malta's NID rules and an overall assessment. On page 16, the report remarks that 'The NID regime is therefore potentially harmful within the meaning of paragraph A of the Code' but, more importantly, in its overall assessment on page 21 the report concludes that 'The regime is considered as overall not harmful.'

4.5 Digital Taxation

On 4 December 2018 the Economic and Financial Affairs Council published a press release announcing that a number of delegations cannot accept the text of the proposed digital tax, while a few others are not satisfied yet with some specific points in the text. That text did not gain the necessary support and was not discussed in detail.

Ministers examined a joint declaration by the French and German delegations. The presidency recommended that the Council working group continues working on the basis of the latest Presidency compromise text and the elements proposed by France and Germany, with the aim of reaching an agreement as soon as possible.

4.6 VAT Quick Fixes

On 4 December 2018 the EU Council adopted three short legislative acts aimed at adjusting some of the EU's VAT rules in order to fix four specific issues pending the introduction of a new VAT system.

These relate to:

- call-off stock. The text provides for a simplified and uniform treatment for call-off stock arrangements, where a vendor transfers stock to a warehouse at the disposal of a known acquirer in another member state;
- the VAT identification number. To benefit from a VAT exemption for the intra-EU supply of goods, the identification number of the customer will become an additional condition;
- chain transactions. To enhance legal certainty in determining the VAT treatment of chain transactions, the texts establish uniform criteria;
- proof of intra-EU supply. A common framework is established for the documentary evidence required to claim a VAT exemption for intra-EU supplies.

These adjustments are due to apply from 1 January 2020. In parallel, discussions are ongoing on a definitive VAT system to replace the current 'transitional' VAT arrangements, applied since 1993. Pending introduction of the new system, four short-term 'quick fixes' are proposed.

4.7 VAT Grouping

On November 30, 2018 the CfR issued a guideline relating to VAT grouping. The guideline is being reproduced hereunder:

As per Subsidiary Legislation 406.21, any two or more legal persons established in Malta who are closely bound to one another by financial, economical, and organisational links can be registered as a single taxable person, namely, a VAT group.

At least one of the applicants must be a taxable person who is licensed or recognised under one of the following Acts:

4. OTHER

The Banking Act
The Financial Institutions Act
The Gaming Act
The Insurance Business Act
The Insurance Distribution Act
The Investment Services Act
The Lotteries and Other Games Act
The Retirement Pensions Act
The Securitisation Act

Furthermore, at time of application all applicants must have submitted all their VAT and Income Tax Returns, and settled any amounts of tax, interest and administrative penalties due.

Applicants must be registered with the VAT department. In case where a legal person does not have a VAT number it shall apply for a VAT Identification number.

This VAT Identification number shall be used solely for VAT grouping purposes.

Once the VAT group is formed all members' individual VAT numbers will be deactivated and a Group VAT Number will be issued.

4.8 DLT Guidelines

On 1 November 2018 the CfR published 3 guidelines namely:

- Guidelines on Income Tax Treatment in Relation to Distributed Ledger Technology (DLT);
- Guidelines for the purpose of the Duty on Documents & Transfers in Relation to DLT;
- Guidelines on VAT Treatment in Relation to Distributed Ledger Technology (DLT)

Relevant extracts from the guidelines are being reproduced hereunder.

Income Tax Guidelines

The income tax treatment in relation to any transaction involving DLT assets is regulated by the current provisions of the Income Tax Acts, taking into account jurisprudence and established principles. Each transaction needs to be analysed in the same way as any other transaction, i.e. by reference to the nature of the activities, the status of the parties and the specific facts and circumstances of the particular case.

The amount of profits, value of transferred assets, value of the consideration and any other tax-relevant value in transactions that involve DLT assets will be determined by reference to the market value of the DLT asset in question. The market value may be determined by reference to the rate established by the relevant Maltese authority, and where such is not available by reference to the average quoted price on reputable exchanges, on the date of the relevant transaction or event, or such other methodology to the satisfaction of the CfR.

Any obligation under the Income Tax Acts to keep proper records applies to transactions involving DLT assets. Values expressed in a cryptocurrency will need to be translated to the reporting currency in which the taxpayer presents its financial statements. Applicable sanctions in terms of the said Acts shall apply where proper records are not kept and where there is failure to report and pay any liability to tax.

When a payment is made or received in a cryptocurrency, it is treated like a payment in any other currency for income tax purposes. Accordingly, for businesses which accept payment for goods or services in cryptocurrency, there is no change to when revenue is recognised or the manner in which taxable profits are calculated. The same applies to payments of remuneration, such as salaries or wages, and therefore such should be regarded as taxable in terms of the general principles. When a payment is made by means of the transfer of a financial or a utility token, it will be treated like any other payment in kind.

4. OTHER

Duty on Documents and Transfers

The duty treatment in relation to any transaction involving DLT assets shall be in accordance with current tax provisions, jurisprudence and principles. Transactions that are subject to duty need to be analysed in the same way as any other transaction i.e. by reference to the nature of the activities, the status of the parties and the specific facts and circumstances of the particular case.

Any obligation under the Duty on Documents and Transfers Act (DDTA) to keep proper records shall apply to transactions involving DLT assets. The equivalent value in fiat currency may be determined by reference to the rate established by the relevant Maltese authority, and where such is not available by reference to the average quoted price on three reputable exchanges, on the date of the relevant transaction or event, or such other methodology to the satisfaction of the CfR. Applicable penalties may apply where proper records are not kept and where there is failure to report and pay any liability to tax.

The provisions of article 3(2) DDTA are pertinent in the case of DLT assets. Consequently, one needs to look at the intrinsic nature and effects of a particular transaction to which the DDTA refers without regard to the apparent title or form. Hence where transfers involve DLT assets that have the same characteristics as “marketable securities” as defined in the Act, they shall be subject to duty in accordance with the applicable provisions of the DDTA.

VAT

The tax treatment of any transaction involving DLT assets shall be in accordance to existing provisions, jurisprudence and principles. Transactions that are subject to VAT need to be analysed in the same way as any other transaction, i.e. by reference to the nature of the activities, the status of the parties and the specific facts and circumstances of the particular case. Accordingly, the CfR shall apply the rules and principles applicable in terms of the VAT Act (Chapter 406, Laws of Malta), the EU VAT Directive (2006/112/EC) and relevant regulations and any relevant case-law of the Court of Justice of the European Union (CJEU), applicable according to the specific transactions.

For VAT purposes, before any tax is applied, the place of supply of the good or service being made must always be considered. Where according to the rules the place of supply is not in Malta, the rules of the other relevant jurisdiction would apply.

In this regard, in the case of supplies of electronically supplied services rendered to non-taxable customers established in other Member States, being services taking place where the customer is established and where the reverse charge mechanism is not applicable, the supplier may opt to register and account for VAT of the other Member State under the Mini One-Stop-Shop system (MOSS) in terms of Part Eight of the 14th Schedule to the VAT Act.

In terms of relevant case-law of the CJEU (C-264/14 – Skatterverket vs David Hedqvist), the court has ruled that instruments whose purpose is none other than to serve as means of payment accepted by certain operators must, for VAT purposes be treated like traditional currency used as legal tender. Accordingly, the exemptions provided for transactions in currency and related services in terms item 3(4), Part Two, 5th Schedule to the VAT Act would likewise apply to “transactions, including negotiation” in cryptocurrencies where these have as their sole purpose to serve as a means of payment as an alternative to legal tender. The exchange of cryptocurrencies for other cryptocurrencies or for fiat money where such exchange constitutes a supply of services for consideration would be covered by said exemptions.

4. OTHER

Given that financial tokens could give rise to dividends, interest payments or other rights, one needs to examine whether such instruments would fall within scope of VAT in the first place and where such would be the case, whether they would qualify for the exemptions provided for under item 3, Part Two, 5th Schedule to the VAT Act: Credit, banking and other services, as 'security transactions', that is, "transactions, including negotiation, excluding management and safekeeping, in shares, interest in companies or associations, debentures and other securities, excluding documents establishing title to goods".

Where a financial token is issued simply to raise capital the issue would not give rise to VAT implications in the hands of the issuer, because the raising of finance does not constitute a supply of services or goods for consideration and falls outside scope of VAT. Services supplied by exchange platforms to buyers and sellers of financial tokens would have VAT implications as explained above under the heading "Coins – Exchange Platforms".

Where a token issued against consideration carries an obligation to be accepted as consideration or part consideration for a supply of goods or services and where the goods or services to be supplied or the identity of the supplier is known, such token would have the characteristics of a voucher and would have to be treated in terms of Part Nine of the 14th Schedule to the VAT Act. The consideration paid for a utility token to the issuer shall be deemed to be gross of VAT due (if any).

A chargeable event would arise where a supply of goods or services is made for a consideration by a taxable person acting as such. Also, as established by case-law, there must be a direct link between the consideration payable and the supply made, and where, there is a reciprocal performance between the supplier and the recipient of the good or service. Accordingly, where in the case of certain Initial Coin Offerings (ICO's) or token generation events, investors place their money at the ICO stage against tokens that are issued as a means of collecting funds for the development of a future project, such initial offering may not necessarily constitute a chargeable event for VAT purposes. It may be that at such point, no specific good or service is identified, nor a corresponding price for a supply could be fixed, nor would it be possible to determine whether the project undertaken would be realised whereby the investors could receive a return. Such transactions would be out of scope of VAT. Similarly, there would be no transaction in the scope of VAT if the money placed by the investor would serve to acquire a security (equity, debenture, etc.) in the issuer. Where, on the other hand, the tokens issued would give rights to identified goods or services for a specified consideration a chargeable event for VAT purposes could arise and its proper VAT treatment would have to be examined in that context such as in the case of utility tokens.

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