



MALTA
INSTITUTE
OF TAXATION



MALTESE TAX LAW UPDATE

(Update 32)







EDITOR'S NOTE

Tax Law Update (Update 32)

Editor's Note

The most interesting development registered this quarter is the enactment of Act VII of 2019, the Budget Act; a rather short legislative instrument that incorporates major tax policy changes. Notable amendments include the extension of the participation exemption, the abolition of Article 83 (3) of the VAT Act and a change to Article 41 (1) ITMA. The latter two changes were inspired by judgments of the Constitutional Court and it is interesting to see jurisprudence moulding tax policy. The CJEU delivered many judgments relating to VAT. The judgment in Morgan Stanley is particularly interesting. Meanwhile, the Commissioner has issued new Yacht Leasing Guidelines and the IMF published a tax policy paper that will influence the ongoing debate relating to tax harmonisation.

Robert Attard

25/3/19

Act No. VII of 2019 (the Budget Act)

The Budget Act amends the Income Tax Act, the Income Tax Management Act and the VAT Act.

Important changes to the Income Tax Act include:

- The addition of a proviso to 5A (5) (b) ITA allowing taxpayers to elect out of the paragraph. 5A (5) (b) ITA provides for a 12% tax (levied on the difference, if any, between the transfer value and the acquisition value of the property) on transfers of property of property that was either acquired causa mortis after 24/11/92 or in terms of a donation made more than 5 years before date of transfer.
- The Retirement Fund/Scheme Exemption in 12 (1) (d) ITA has been extended to include 'income derived by a company from long term contracts of insurance that are treated as qualifying personal retirement schemes or qualifying occupational retirement schemes in terms of the provisions of such rules as may be prescribed'.
- Even the Participation Exemption has been tweaked. The 'short' third proviso to 12 (1) (u) ITA has been substituted with a longer proviso which extends the remit of the participation exemption. After the entry into force of the amendment, the participation exemption may be applied on gains derived on the transfers certain resident entities when 12 (1) (c) (iii) ITA would have applied had the transfer of the holding been made by the beneficial owner of the transferor company (i.e. a person not resident in Malta or a non-resident person owned and controlled by persons who are neither ordinarily resident nor domiciled in Malta). The amendment provides for 'mixed' companies (companies with exempt and non-exempt beneficial owners) allowing the exemption to the part of the exemption the beneficial owner is beneficially entitled to. An anti-abuse provision has been added.
- The capped amounts in Article 14B (deduction for School Fees) have been increased. The new cappings are EUR2,600 for Secondary Schools, EUR1,900 for primary schools and EUR1,600 for Kindergartens.
- In 43 (6) (c) ITA (Deemed Distribution Orders Participation Exemption/NID) references to the participation exemption have been removed. To a certain extent, this amendment is consequential to the third proviso to 12 (1) (u) ITA extending the participation exemption to 'mixed' companies.
- The sub-article providing for a minimum tax for certain non-domiciled individuals, 56 (27) ITA, has been slightly amended to include certain clarifications on the conditions to the applicability of the minimum tax and the exclusion as income (for the purposes of this rule) of gains arising from the transfer of immovable property situated in Malta.
- An amendment to 57 (1) (a) ITA prescribes that the 15% rate applicable to personal retirement schemes may be substituted with another rate established by the Minister (with respect to Article 57 ITA it is to be noted that the present version of the ITA contemplates two article 57s. The amendment refers to the first Article 57 ITA).

Important changes to the Income Tax Management Act include:

- An amendment to 10 (2) (c) (iii) ITMA which replaces a reference to YOA 2015 with a reference to YOA 2010 (relating to the reporting and setting off of BPA tax credits in tax returns);
- An amendment to 41 (1) ITMA removing the CFR's discretion to collect tax in dispute.
- Amendments to Article 44 ITMA extending the time period within which enforcement proceedings for unpaid tax may be pursued (the time-limit has been extended from 15 days to 30 days).
- In 48 (1A) ITMA, the right to receive a tax refund has, understandably, been made conditional to full FSS compliance.

Important changes to the VAT Act include:

- The possibility of notifying certain notices by e-mail.
- The abolition of 83 (3) VATA, providing for simultaneous criminal and administrative penalties (previously ruled by our Constitutional Court to be unconstitutional).

Important changes to the Commissioner for Revenue Act.

- The addition of 5A prescribing that 5A providing that the Commissioner may remit in whole or in part any penalties and interest imposed under the revenue acts in such circumstances and subject to such conditions as the Minister may prescribe by means of rules. The Minister may delegate to the Commissioner the power to prescribe the circumstances in which and the conditions under which penalties and interest may be remitted and may at any time amend or revoke any such delegation.

L.N. 47 of 2019 INCOME TAX ACT (CAP. 123) Tax Credit (Construction Waste Recycling) (Amendment) Rules, 2019

In the definition "qualifying services" in rule 2 of the principal rules, the words "five euro and fifty cents (€5.50) per tonne" shall be substituted by the words "eight euro (€8) per tonne".

L.N. 11 of 2019 INCOME TAX ACT (CAP. 123) Tax Rebate (Pensioners) (Amendment) Rules, 2019

The capped amounts in the calculations of the rebates in rule 3 of the principal rules have been increased in the following manner:

- Rebate of €650 for individuals who are chargeable to tax at the single rates;
- Rebate of €440 for individuals who are chargeable to tax at the parent rates;
- Rebate of €110 (not including the further tax rebate) for individuals who are chargeable to tax at the married rates.

None that we are aware of.



Rikors Nru. 46/12VG XXX Vs Il-Kummissarju tat-Taxxa fuq il-Valur Miżjud

This case involved an assessment to VAT on a property rental and involved the interpretation of Part II of the Fifth Schedule (Exemption without Credit) the namely:

“(d) the letting of property by a limited liability company to a person registered under article 10 for the purpose of the economic activity of that other person;”

Appellant, a Limited Liability Company, had not charged VAT on rents charged to, its tenant, a public authority. According to the VAT Department, appellant should have charged VAT on the rent because the rent in issue was not covered by the exemption on letting.

Given that appellant had proven that tenant had not been using the premises in question for the purposes of its economic activity, the Tribunal held for appellant concluding that appellant had been justified in not charging rent to his tenant. Interestingly, the Tribunal observed that the onus of proof with respect to the taxability of a transaction falls on the tax authorities and not vice versa:

“Għalkemm a tenur tal-partita 2(2) tad-Disa’ Skeda tal-Kap.406 tal-Liġijiet ta’ Malta huwa dmir ta’ l-appellant li jgħib prova li xi valur taxxabbli li ssir stima dwaru mill-Kummissarju jkun eċċessiv jew li xi kreditu li ssir stima dwaru mill-Kummissarju ma jkunx suffiċjenti, huwa prinċipju ġuridiku assodat fil-kuntest ta’ stimi/Likwidazzjonijiet ta’ Taxxa maħruġa mill-Kummissarju tat-Taxxi li fejn il-Kummissarju jallega li aġir jew operat partikolari jagħti lok għall-imposizzjoni ta’ taxxa, allura l-oneru tal-prova ta’ dik l-allegazzjoni jinkombi fuqu”

Rikors Nru. 47/12VG XXX Vs Il-Kummissarju tat-Taxxa fuq il-Valur Miżjud

Rik. 47 was connected with Rik. 46 but involved a secondary issue, namely appellant’s right to credit for input VAT. The VAT Department had issued an assessment based on the fact that the Company was not entitled for VAT refunds on expenses related to the purchasing and selling of property. The Tribunal agreed with the Department for a number of reasons, including especially, the fact that the lease in issue was VAT exempt. The Tribunal observed that it was clear that appellant’s lease agreement was VAT exempt because appellant’s tenant was a public authority acting as such:

“Fil-każ in eżami tali konsiderazzjoni - ossia l-użu li qed isir millproprietà mikrija - jassumi ferm iktar importanza stante li essendo l-inkwilin in kwistjoni Awtorità Pubblika, ai termini tal-Liġi l-eżerċizzju da parte ta’ dik l-Awtorità tal-funzjonijiet tagħha konferiti lilha bil-Ligi kostituttiva ma għandhomx jitqiesu li jkunu attivitajiet ekonomiċi hlief fiċ-ċirkostanzi speċifikatament previsti fil-Liġi, ċirkostanzi dawn li fil-każ in eżami ma jissussistux.”

Consequently, it followed that appellant did not have a right to claim credit for input VAT.

Application No. 89/12VG xxx Vs Commissioner for Value Added Tax

The ART dismissed an appeal from an assessment to VAT on a point of fact. The ART held that from the records of the proceedings and evidence submitted it transpired that the Commissioner for Value Added Tax determined the deemed sales on the basis of purchases as declared by the Applicant and that Applicant’s acknowledged and accepted the methodology used by the Commissioner in order to determine the deemed sales and indeed applied a higher mark-up than that applied by the Commissioner. Once it was the Applicant who, against this scenario, claimed that the end result of deemed sales should not have applied in his case because of a number of reasons pertinent to his business, it follows that he had to prove to a satisfactory degree his claims and arguments against the deemed sales as determined by the Commissioner and the subsequent tax assessments as issued against him by the Commissioner. The Tribunal concluded that the Applicant did not manage to satisfy the onus of proof with which he was burdened in this case. Even though he claimed to have erroneously priced his goods he did not put forth any tangible proof of this. During the hearing of these proceedings the Applicant did not submit any evidence which satisfactorily disproves, contrasts or contradicts the observations made and conclusions reached by the Review Officer.

Rikors Nru. 178/11VG Darren Cuschieri Vs Kummissarju tat-Taxxi Interni

The ART dismissed an appeal from an assessment to duty because, contrary to taxpayer's submissions, the assessment had been properly motivated and the Government's architect's valuation had been sufficiently thorough.

Rikors Nru. 259/11VG Kenneth Saliba, Louise Anne Pulis u Elena Saliba Vs Kummissarju tat-Taxxi

The ART dismissed an appeal from an assessment to duty because, contrary to taxpayer's submissions, the Government's architect's valuation leading to the assessment had been properly carried out. The ART had the opportunity to reiterate that liability to penalties does not only arise when it transpires that the value declared in the deed of sale was not truthful. The ART explained that liability to penalties arises whenever the value declared in the deed does not reflect 85% of its market value.

Rikors Nru. 193/11VG Joseph Pizzuto kif awtorizzat minn ibnu Martin Pizzuto li jinsab imsiefer Vs Kummissarju tat-Taxxi

The ART reduced an assessment to duty because material factors had not been taken into consideration in the Government Architect's valuation.

3. JUDICIAL DECISIONS

**Rik. Nru. 532/2012 JRM Anthony MIGNECO vs KUMMISSARJU TAT-TAXXI qabel magħruf bħala
l-Kummissarju tat-Taxxa fuq il-Valur Miżjud**

The Court dismissed an application to impugn an executive act enforcing an executive title issued under the VAT Aact because, in the court's opinion, taxpayer had failed to bring evidence proving that the tax vaunted in the executive act was not due (according to the Court part of the tax bill resulted from taxpayer's own self-assessment).

None that we are aware of.



3. JUDICIAL DECISIONS

Appell numru: Sovereign Hotels Limited Vs Id-Direttur Ġenerali (Taxxa fuq il-Valur Miżjud)

The Court of Appeal confirmed a judgment of the ART wherein the ART had dismissed a VAT Appeal. The main point at issue was whether appellant was entitled to avail itself of the remission scheme. The Court confirmed the ART's findings that appellant had not satisfied all criteria for eligibility.

3. JUDICIAL DECISIONS

None that we are aware of.



3. JUDICIAL DECISIONS

Case C-278/18 Manuel Jorge Sequeira Mesquita v Fazenda Pública

The CJEU held that Article 13B(b) of the VAT Directive must be interpreted as meaning that the exemption from value added tax on the leasing or letting of immovable property provided for in that provision is applicable to a contract for transfer of the use of land comprising vineyards for agricultural purposes to a company engaged in viticulture, entered into for a period of one year, automatically renewable and under which rent is paid at the end of each year.

Case C-562/17 Nestrade SA v Agencia Estatal de la Administración Tributaria (AEAT)

The CJEU held that the provisions of the Thirteenth Council Directive 86/560/EEC of 17 November 1986, on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in Community territory, must be interpreted as not precluding a Member State from imposing a time limit on the possibility of rectifying incorrect invoices, for example by the rectification of the VAT identification number originally shown on the invoice, for the purposes of the exercise of the right to a VAT refund, provided that the principles of equivalence and effectiveness are respected, which it is for the referring court to verify.

Case C-531/17 Vetsch Int. Transporte GmbH

The CJEU held that Article 143(d) of the VAT Directive must be interpreted as meaning that the exemption from import value added tax laid down in those provisions may not be refused in respect of an importer designated or recognised as liable for payment of that tax, within the meaning of Article 201 of Directive 2006/112, in a situation, such as that in the main proceedings, in which, first, the recipient of the intra-Community transfer of goods effected after that import commits tax evasion in connection with a transaction which is subsequent to that transfer and is not linked to that transfer and, secondly, there is no evidence to support the conclusion that the importer knew or ought to have known that that subsequent transaction entailed tax evasion on the part of the recipient.

Case C-434/17 Human Operator Zrt. V Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

The CJEU held that European Union law precludes national legislation which provides for the application of a measure derogating from Article 193 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2013/43/EU of 22 July 2013, before the EU act authorising that derogation has been notified to the Member State which requested it, despite the fact that that EU act does not mention the date of its entry into force or the date from which it applies, even if that Member State has expressed the wish for that derogation to apply with retroactive effect.

Case C-51/18 European Commission v Republic of Austria

The Court declared that, by providing that the royalty payable to an author of an original work of art on the basis of the resale right is subject to value added tax, the Republic of Austria has failed to fulfil its obligations under Article 2(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

Case C-17/18) 1 Virgil Mailat, Delia Elena Mailat, Apcom Select SA

The Court held that the concept of ‘transfer of a totality of assets or part thereof’, within the meaning of Article 19 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as not covering the transaction by which an immovable property which was used for commercial purposes is let with all capital equipment and inventory items necessary for that use, even if the lessee pursues the activity of the lessor under the same name.

Article 135(1)(l) of Directive 2006/112 must be interpreted as meaning that a lease contract for an immovable property which was used for commercial purposes and for all capital equipment and inventory items necessary for that use constitutes a single supply in which the letting of the immovable property is the principal supply.

Case C-552/17) 1 Alpenchalets Resorts GmbH v. Finanzamt München Abteilung Körperschaften

The CJEU held that Articles 306 to 310 of the VAT Directive must be interpreted as meaning that the mere supply by a travel agent of holiday accommodation rented from other taxable persons or such a supply of a holiday residence combined with the supply of additional ancillary services, regardless of the importance of those ancillary services, each amount to a single service covered by the special scheme for travel agents.

Article 98(2) of Directive 2006/112 must be interpreted as meaning that the supply of travel agent services consisting of the supply of holiday accommodation, covered by Article 307 of that directive, cannot be subject to a reduced tax rate or one of the reduced rates set out in Article 98(2).

Case C-422/17) 1 Szeif Krajowej Administracji Skarbowej v. Skarpa Travel sp. z o.o.

The CJEU held that Articles 65 and 306 to 310 of the VAT Directive must be interpreted as meaning that, when a travel agent, subject to the special scheme laid down in Articles 306 to 310 of that directive, receives a payment on account for tourist services which it will provide to the traveller, the value added tax (VAT) is chargeable, in accordance with that Article 65, on receipt of that payment on account, provided that, at that time, the tourist services to be supplied are precisely designated.

Article 308 of Directive 2006/112, as amended by Directive 2010/45, must be interpreted as meaning that the margin of the travel agent, and, consequently, its taxable amount, corresponds to the difference between the total amount, exclusive of value added tax (VAT), to be paid by the traveller and the actual input cost incurred by the travel agent in respect of supplies of goods and services provided by other taxable persons, in so far as those transactions are for the direct benefit of the traveller. When the amount of the payment on account corresponds to the total price of the tourist service or to a significant part of that price, and the travel agent has not yet incurred any actual cost, or has incurred only a limited part of the individual total cost of that service, or even when the individual actual cost of the trip incurred by the travel agent cannot be determined at the time when the payment on account is made, the profit margin can be determined on the basis of an estimate of the total actual cost which it will ultimately have to incur. For the purpose of such an estimate, the travel agent must take into account, where relevant, the costs which it has already actually incurred at the time of receipt of the payment on account. For the purpose of the calculation of the margin, the estimated total actual cost is deducted from the total price of the trip and the taxable amount for VAT to be paid at the time of receipt of the payment on account is obtained by multiplying the amount of that payment on account by the percentage corresponding to the part of the total cost of the trip that the estimated profit margin, thus determined, represents.

Case C-414/17 AREX CZ a.s.v.Odvolací finanční ředitelství

The CJEU held that the VAT Directive must be interpreted as meaning that it applies to intra-Community acquisitions of excise goods, in respect of which the excise duty is chargeable in the Member State of destination of the dispatch or transport of those goods, carried out by a taxable person whose other acquisitions are not subject to value added tax pursuant to Article 3(1) of that directive.

Article 2(1)(b)(iii) of Directive 2006/112 must be interpreted as meaning that, in a chain of successive transactions which gave rise only to a single intra-Community transport of excise goods under an excise duty suspension arrangement, the acquisition carried out by the trader liable for payment of the excise duty in the Member State of destination of the dispatch or transport of those goods cannot be classified as an intra-Community acquisition subject to value added tax under that provision, where that transport cannot be ascribed to that acquisition.

Case C-414/17 AREX CZ a.s.v.Odvolací finanční ředitelství

Article 2(1)(b)(i) of Directive 2006/112 must be interpreted as meaning that, where there is a chain of successive acquisitions concerning the same excise goods and which gave rise only to a single intra-Community transport of those goods under an excise duty suspension arrangement, the fact that those goods are transported under that arrangement does not constitute a decisive factor in determining to which acquisition the transport is to be ascribed for the purposes of applying value added tax under that provision.

Case C-165/17 Morgan Stanley & Co International plc V Ministre de l'Économie et des Finances

The CJEU held that the VAT Directive must be interpreted as meaning that, in relation to the expenditure borne by a branch registered in a Member State, which is used, exclusively, both for transactions subject to value added tax and for transactions exempt from that tax, carried out by the principal establishment of that branch established in another Member State, it is necessary to apply a deductible proportion resulting from a fraction the denominator of which is formed by the turnover, exclusive of value added tax, made up of those transactions alone and the numerator of which is formed by the taxed transactions in respect of which value added tax which would also be deductible if they had been carried out in the Member State in which that branch is registered, including where that right to deduct stems from the exercise of an option, effected by that branch, consisting in making the transactions carried out in that State subject to value added tax.

The Court added that Article 17(2), (3) and (5) and Article 19(1) of the Directive must be interpreted as meaning that, in order to determine the deductible proportion applicable to the general costs of a branch registered in a Member State, which are used for both transactions of that branch in that State and transactions of the principal establishment of that branch established in another Member State, account must be taken, in the denominator of the fraction which makes up that deductible proportion, of the transactions carried out by both that branch and that principal establishment, it being specified that it is necessary that, in the numerator of that fraction, besides the taxed transactions carried out by that branch, solely the taxed transactions carried out by that principal establishment must appear, in respect of which value added tax would also be deductible if they had been carried out in the State in which the branch concerned is registered.

Case C-310/16 Petar Dzivev et

The CJEU held that Article 325(1) TFEU, and Article 1(1)(b) and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Luxembourg on 26 July 1995, read in conjunction with the Charter of Fundamental Rights of the European Union, must be interpreted to the effect that, in the light of the principle of effectiveness of the prosecution of value added tax (VAT) offences, they do not preclude a national court from applying a national provision excluding, from a prosecution, evidence such as the interception of telecommunications requiring prior judicial authorisation, where that authorisation was given by a court that lacked jurisdiction, in a situation in which that evidence alone is capable of proving that the offences in question were committed.

Case C-548/17 Finanzamt Goslar v. Baumgarten sports & more GmbH

The CJEU held that the VAT Directive must be interpreted as precluding the chargeable event and chargeability of a tax on the supply of agency services for professional football players by an agent, such as that at issue in the main proceedings, paid in conditional instalments over several years further to the placement, from being regarded as occurring or taking effect when the player is placed.

Case C-410/17 A Oy and Veronsaajien oikeudenvallontayksikkö

The CJEU held that the VAT Directive, must be interpreted as meaning that, where, pursuant to a demolition contract, the service provider, namely a demolition company, is required to carry out demolition works and may, in so far as the demolition waste contains scrap metal, resell that scrap metal, that contract consists of a supply of services for consideration, that is to say the performance of demolition works, and also a supply of goods for consideration, that is the supply of the scrap metal, if the purchaser, that is to say the demolition company, attributes a value to that supply of goods, which it factors in when calculating the price quoted for the performance of the demolition works, that supply of goods being, however, subject to value added tax only if it is made by a taxable person acting as such.

The Court added that Article 2(1)(a) and (c) of Directive 2006/112, read together with Article 14(1) and Article 24(1) thereof, must be interpreted as meaning that, where, pursuant to a purchase contract for dismantling, the purchaser, namely a demolition company, purchases goods to be dismantled and undertakes, subject to a contractual penalty, to demolish or dismantle and dispose of those goods and to dispose of the waste within a period fixed in the contract, that contract consists of a supply of goods for consideration, that is the supply of goods to be dismantled, which is subject to value added tax only if it is made by a taxable person acting as such, which is for the referring court to ascertain. In so far as the purchaser is required to demolish or dismantle and dispose of those goods and to dispose of the resulting waste, thereby specifically meeting the needs of the seller, which is for the referring court to ascertain, that contract also includes a supply of services for consideration, that is the performance of demolition works or dismantling and waste disposal, if that purchaser attributes a value to that supply of goods which it factors in to the price quoted as a factor reducing the purchase price of the goods to be dismantled, which is for the referring court to ascertain.

Case C-295/17 MEO — Serviços de Comunicações e Multimédia SA v. Autoridade Tributária e Aduaneira

The CJEU held that the VAT Directive must be interpreted as meaning that the predetermined amount received by an economic operator in the event of early termination by its client, or for a reason attributable to the latter, of a contract for the provision of services with a minimum commitment period, which amount corresponds to the amount that the operator would have received during the remainder of that period had it not been for such termination, this being a matter for the referring court to determine, must be regarded as consideration for a supply of services for consideration and, as such, must be regarded as being subject to VAT.

The fact that the objective of the lump sum is to dissuade customers from non-observance of the minimum commitment period and to make good the damage that the operator suffers in the event of failure to observe that period, the fact that the remuneration received by a commercial agent for the conclusion of contracts stipulating a minimum period of employment is higher than that provided for under contracts which do not stipulate such a period, and the fact that the amount invoiced is classified under national law as a penalty clause, are not decisive for the characterisation of the amount predetermined in the service contract which the customer is liable to pay in the event of early termination.

Case C-648/16 Fortunata Silvia Fontana v. Agenzia delle Entrate

The CJEU held that the VAT Directive must be interpreted as meaning that it does 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 2006/112, which it is for the referring court to verify.

3. JUDICIAL DECISIONS

Case C 115/16, N Luxembourg 1

Case C 118/16, X Denmark

Case C 119/16, C Danmark I

Case C 299/16, Z Denmark

The CJEU ruled that:

1. Cases C-115/16, C-118/16, C-119/16 and C-299/16 are joined for the purposes of the judgment.
2. Article 1(1) of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, read in conjunction with Article 1(4) thereof, must be interpreted as meaning that the exemption of interest payments from any taxes that is provided for by it is restricted solely to the beneficial owners of such interest, that is to say, the entities which actually benefit from that interest economically and accordingly have the power freely to determine the use to which it is put.

The general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends must be interpreted as meaning that, where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption of interest payments from any taxes that is provided for in Article 1(1) of Directive 2003/49, even if there are no domestic or agreement-based provisions providing for such a refusal.

3. Proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans. The fact that the Member State where the interest arises has concluded a convention with the third State in which the company that is the beneficial owner of the interest is resident has no bearing on any finding of an abuse of rights.
4. In order to refuse to accord a company the status of beneficial owner of interest, or to establish the existence of an abuse of rights, a national authority is not required to identify the entity or entities which it regards as being the beneficial owner(s) of that interest.

5. Article 3(a) of Directive 2003/49 must be interpreted as meaning that a société en commandite par actions (SCA) (limited partnership with share capital) authorised as a société d'investissement en capital à risque (SICAR) (risk capital investment company) governed by Luxembourg law cannot be classified as a company of a Member State, within the meaning of that directive, capable of being entitled to the exemption provided for in Article 1(1) of the directive if, a matter which is for the referring court to ascertain, the interest received by that SICAR, in a situation such as that at issue in the main proceedings, is exempt from impôt sur les revenus des collectivités (corporate income tax) in Luxembourg.

6. In a situation where the system, laid down by Directive 2003/49, of exemption from withholding tax on interest paid by a company resident in a Member State to a company resident in another Member State is not applicable because there is found to be fraud or abuse, within the meaning of Article 5 of that directive, application of the freedoms enshrined in the FEU Treaty cannot be relied on in order to call into question the legislation of the first Member State governing the taxation of that interest.

3. JUDICIAL DECISIONS

Outside such a situation, Article 63 TFEU must be interpreted as:

- not precluding, in principle, national legislation under which a resident company which pays interest to a non-resident company is required to withhold tax on that interest at source whilst such an obligation is not owed by that resident company when the company which receives the interest is also a resident company, but as precluding national legislation that prescribes such withholding of tax at source if interest is paid by a resident company to a non-resident company whilst a resident company that receives interest from another resident company is not subject to the obligation to make an advance payment of corporation tax during the first two tax years and is therefore not required to pay corporation tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source;
- precluding national legislation under which the resident company that owes the obligation to withhold tax at source on interest paid by it to a non-resident company is obliged, if the tax withheld is paid late, to pay default interest at a higher rate than the rate which is applicable in the event of late payment of corporation tax that is charged, inter alia, on interest received by a resident company from another resident company;
- precluding national legislation providing that, where a resident company is subject to an obligation to withhold tax at source on the interest which it pays to a non-resident company, account is not taken of the expenditure in the form of interest, directly related to the lending at issue, which the latter company has incurred whereas, under that national legislation, such expenditure may be deducted by a resident company which receives interest from another resident company for the purpose of establishing its taxable income.

3. JUDICIAL DECISIONS

None that we are aware of.

4. OTHER

4.1 Yacht Leasing Guidelines

On 28th February 2019, the CFR published two new guidelines relating to Yacht Leasing. The first guideline explain that the Commissioner for Revenue recognises that lessors of means of transport which are pleasure boats will not be able to assess, at the date of each chargeable event, the extent to which the pleasure boat is effectively used and enjoyed by the lessee within and outside EU territorial waters in those situations where lease payments are payable in advance by the lessee to the lessor.

Accordingly, and for the purposes of Item 12 of Part Two of the Third Schedule to the VAT Act, the Commissioner shall only consider the place of supply of the hiring of pleasure boats, if situated within Malta, as being situated outside EU territorial waters if the actual effective use and enjoyment of the services, in whole or in part, takes place outside EU territorial waters and as long as the conditions referred to in this Guideline are satisfied. This Guideline is the only guideline of the Commissioner which shall apply to leases commencing on or after the 1 November, 2018.

Upon the commencement of a new lease of a pleasure boat which is intended to be effectively used and enjoyed outside EU territorial waters, the lessor shall not take into account the expected effective use and enjoyment of the pleasure boat by the lessee and shall apply VAT as follows:

- (a) Where the lease commences at least 30 days prior to the end of the tax period in which the lease commencement date falls ("the first tax period"), the lessor shall charge the full VAT due on the consideration payable by the lessee for the said first tax period; and
- (b) Where the lease commences less than 30 days prior to the end of the first tax period, the lessor shall charge the full VAT on the consideration payable by the lessee for the first tax period and the subsequent tax period ("the second tax period").

Upon the lapse of the tax periods as referred to in Section 2(a) and 2(b) above, the lessor shall procure from the lessee such reasonable documentary and / or technological data to determine the actual effective use and enjoyment by the lessee of the pleasure boat within and outside EU territorial waters during the afore-said tax period or tax periods as applicable.

Based on such documentary and / or technological data, the lessor shall obtain a "Preliminary Ratio" of actual effective use and enjoyment in EU territorial waters by dividing the actual effective use and enjoyment of the pleasure boat in EU territorial waters by the total effective use and enjoyment in and outside EU territorial waters during the said tax period or tax periods as applicable.

The "Preliminary Ratio" referred to in section 3 shall be used by the lessor to provisionally determine the portion of the lease payments attributable to effective use and enjoyment in EU territorial waters for the subsequent tax periods after the ones referred to in Section 2(a) and 2(b) above. This "Preliminary Ratio" shall only be utilised up to the end of the tax periods in which the first twelve months of the lease fall, inclusive of the first tax period or first and second tax periods mentioned above (the "First Annual Period"). Where the duration of a lease is shorter, then the "Preliminary Ratio" would apply for the duration of the lease period.

A "Provisional Output Tax" shall be calculated by multiplying the taxable value of each supply by the "Preliminary Ratio" by the standard rate of VAT. Any difference that would result between the full output tax charged in accordance with section 2 above during the first and, if applicable, the second tax periods and the calculation of the "Provisional Output Tax" for those tax periods utilising the "Preliminary Ratio" in accordance with section 4 above shall represent tax overpaid by the lessor, which overpaid tax shall be adjusted for in the tax return for the tax period immediately following the first or the second tax period referred to in section 2, as applicable.

4. OTHER

Where a lease (whose duration does not exceed the First Annual Period) terminates after the second tax period, the difference between the total output tax charged for the lease term calculated provisionally in terms of sections 2, 3, 4 and 5 above and the definitive calculation of the output tax for the lease term on the basis of the actual effective use and enjoyment during the full lease term, shall be adjusted for in the tax return for the tax period subsequent to that in which the lease terminates.

For leases whose duration exceeds the First Annual Period, the chargeable output tax on the hiring of a pleasure boat which is covered by this Guideline shall be calculated as laid down hereunder. The term "Subsequent Annual Period" refers to every number of tax periods covering 12 months subsequent to the First Annual Period. The First Annual Period and the Subsequent Annual Periods are referred to individually as an "Annual Period" and collectively as the "Annual Periods".

- (a) After the end of the First Annual Period and after each Subsequent Annual Period, the lessor shall procure from the lessee such reasonable documentary and / or technological data to determine the ratio between actual effective use and enjoyment by the lessee of the pleasure boat within and outside EU territorial waters during the preceding Annual Period as applicable;
- (b) The actual effective use and enjoyment of the pleasure boat in EU territorial waters is divided by the total effective use and enjoyment of the pleasure boat in and outside EU territorial waters during the preceding Annual Period;
- (c) The result obtained under paragraph (b) shall be used as the "Actual Ratio" of effective use and enjoyment in EU territorial waters for the preceding Annual Period as referred to in that paragraph. It will also serve as a "Temporary Ratio" for determining the provisional effective use and enjoyment in EU territorial waters on which a "Provisional Output Tax" payment is to be made for the subsequent Annual Period/s or part thereof;
- (d) The output tax shall be calculated definitively for each previous Annual Period by multiplying the taxable value of the supplies by the Actual Ratio by the standard rate of VAT;
- (e) The Provisional Output Tax shall be calculated provisionally for each subsequent Annual Period by multiplying the taxable value of the supplies by the Actual Ratio by the standard rate of VAT;
- (f) Any difference between (i) the Provisional Output Tax for any Annual Period, or part thereof and calculated in accordance with paragraph (e) above or Section 4, and (ii) the total output tax calculated on the basis of the "Actual Ratio" for the Annual Period or part thereof in accordance with paragraph (d) above, shall represent tax due by that person or tax over paid by that person, as the case may be, which tax shall be accounted for in the tax return for the tax period following the end of the relevant Annual Period or in the tax return for the tax period following that in which the lease period terminates, whichever is the earlier.

The second guideline prescribes that the application of the guidelines issued by the Commissioner for the purposes of Item 12 of Part Two of the Third Schedule to the Value Added Tax Act is subject to the specific approval by the Commissioner. Such approval, if given, does not prejudice the Commissioner's rights as arising from the Value Added Tax Act, including the right to withdraw such approval and/or to raise an assessment in terms of article 32 of the Act, where the Commissioner reasonably considers that the calculations in terms of the said guidelines have not been properly effected by the taxable person.

4. OTHER

IMF POLICY PAPER CORPORATE TAXATION IN THE GLOBAL ECONOMY

On 8 March 2019, the IMF published the above-captioned paper. In brief, the Report made the following points:

- In the Executive Board Assessment, Directors welcomed the significant progress made in addressing corporate tax avoidance and enhancing multilateral cooperation, notably by the G-20/OECD project on Base Erosion and Profit Shifting, and the Inclusive Framework that has broadened the scope of cooperation to many non-OECD countries. At the same time, they noted that there remain shortcomings in current international tax arrangements, and that many countries face pressures to introduce unilateral action. Directors agreed that much remains to be done to find sustainable global solutions, building on the progress achieved so far to ensure fairness, inclusiveness, and broad consensus, although their views differed on the extent of needed reforms and the roles of relevant bodies.
- Many Directors saw the benefit of minimum taxation in dealing with harmful tax avoidance and profit shifting practices. The Report says that minimum taxes on outbound investment can offer significant though incomplete protection against profit shifting and tax competition and generate positive spillovers for other jurisdictions (other than those with low tax regimes).
- Schemes of residual profit allocation (RPA)—broadly, allocating a normal return to source countries, and sharing the residual on a formulaic basis can substantially reduce profit shifting, as would other unitary approaches, while retaining the familiarity of the arm's length principle for straightforward cases.
- Allocation of taxing rights to destination countries features in many proposals, including some residual profit allocation schemes: this is the most effective way to address tax competition and profit shifting. Among such schemes—and most remote from the current debate among policy makers—border adjusted taxes—combining value-added tax (VAT)-like treatment of trade with a wage subsidy—face potential World Trade Organization issues (because border adjustability resulting in imports and exports being taxed differentially is not currently permitted for (direct) corporate taxes) and may amplify refund problems that arise under the VAT; and unilateral adoption could have significant adverse spillover effects. They remain, nonetheless, the most complete solution to tax competition and profit shifting. To the extent that erosion of the corporate tax leads to increased reliance on the VAT moderated by a desire to keep labor taxes low, the default outcome in the absence of more deliberate reform may be implicit but imperfect taxation of this kind.

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