



MALTA TAX LAW UPDATE

Update 22

EDITOR'S NOTE

On 17 October 2016, the Minister of Finance delivered his budget speech in Parliament. The Minister announced a number of tax related measures. He also spoke of the future of the financial services industry.

On October 25, 2016 the European Commission published the Corporate Tax Reform Package incorporating 3 new proposals:

- (a) A Common Consolidated Corporate Tax Base;
- (b) An improved system to resolve double taxation disputes in the EU;
- (c) A proposal to extend the rules against hybrid mismatches.

The Administrative Review Tribunal delivered another 10 judgments (mostly on points of fact) but the CJEU delivered a number of judgments which are relevant to local industries. Lastly, the Constitutional Court delivered another non *bis in idem* judgment based on the principles established in the Angelo Zahra Case.

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INDEX

1.	LEGISLATIVE CHANGES	PAGE 3
1.1	ACTS OF PARLIAMENT	PAGE 3
1.2	LEGAL NOTICES	PAGE 3
2	BILLS	PAGE 5
3	JUDICIAL DECISIONS	PAGE 6
3.1	JUDGMENTS OF THE ART	PAGE 6
3.2	JUDGMENTS OF THE FIRST HALL CIVIL COURT	PAGE 7
3.3	JUDGMENTS OF THE CONSTITUTIONAL COURT	PAGE 7
3.4	JUDGMENTS OF THE COURT OF APPEAL	PAGE 7
3.5	JUDGMENTS OF THE CJEU	PAGE 8
4	OTHER	PAGE 9

1. LEGISLATIVE CHANGES

1.1 Acts of Parliament

None

1.2 Legal Notices

L.N. 316 of 2016 INCOME TAX ACT (CAP. 123) Tax Credit (Women Returning to Employment) (Amendment) Rules, 2016

This LN provides that, with effect from year of assessment 2018, the benefit previously available to women will become available to men too. References to the word "woman" have been substituted by the word "person".

L.N. 349 of 2016 INCOME TAX ACT (CAP. 123) Industrial Buildings and Structures (Capital Allowances) Rules, 2016

This LN incorporates rules allowing office premises to be treated as 'Industrial Buildings and Structures' subject to capital allowances.

Office premises are subject to capital allowances if:

- (a) They are first used and occupied on or after the 1st January 2016;
- (b) They are a number of units suitably furnished and equipped, with a total office space area of more than two thousand five hundred square meters;
- (c) They are to be used exclusively for offices, provided that such units are grouped together and have in common ancillary services and amenities within a single and defined parcel of land and are operated by a common management for the use by the owner or tenants, in the course of their trade or business against payment.

Capital allowances (namely wear and tear and initial deduction) shall be available only to the owner of the office business centre.

If the owner of an industrial building or structure is a person that acquired the property by means of a transfer that was not subject to tax in virtue of the exemption provisions the said owner shall be deemed to have acquired the property:

- (a) at a cost equivalent to the actual consideration for that acquisition or the consideration for the original transfer, whichever is the lower, increased by any construction costs incurred by it after the acquisition; and
- (b) on the date of the original transfer,

Capital expenditure on an industrial building and structure shall not include the cost of the land on which it is constructed.

When an industrial building or structure forms part of a building that comprises other premises, the land on which it is constructed shall be deemed to be a portion of the total area of the land occupied by the whole building that is proportionate to the surface area of the industrial building or structure.

When the ownership of an industrial building or structure includes any real right over the airspace, the value to be attributed to the cost of the land over which it is constructed shall include the value of that real right.

The cost of the land on which an industrial building or structure is constructed is, unless otherwise identified, be deemed to be equivalent to the market value of the land at the time of the construction or acquisition of the property.

In any dispute over the market value of property to which these rules refer, an architect's valuation that has been confirmed on oath and that includes a declaration that the provisions of these rules have been taken into account shall be admissible as evidence. When different valuations are produced in the proceedings in the Administrative Review Tribunal, the Tribunal shall, unless the parties otherwise agree, appoint another architect to report on the value after examining the valuations that have been produced and inspecting the property, and the Tribunal shall decide the matter after taking into account the said report and any other consideration that it may consider appropriate.

When a person claims, for a year of assessment, a deduction in terms of the Deduction of Expenses in respect of Immovable Property Rules in respect of property consisting of offices, that person may not claim deductions initial allowance and wear and tear allowance.

When, for any year of assessment, the tax on rental income derived by a person from property consisting of offices as defined in the rules is subject to 15%, that person shall not be entitled to claim deductions for wear and tear allowance and initial deduction in respect of that property for that year or for any subsequent year.

L.N. 383 of 2016 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax Act (Amendment of Fifth Schedule) (Amendment No. 2) Regulations, 2016

This LN clarifies definitions in the proviso to item 3 (6) of the Financial Services Exemption (exempt without Credit – management of investment schemes, limited to core activities) in Part II of the Fifth schedule.

Previously the proviso used to read:

““Provided further that investment schemes shall refer to "collective investment schemes" as defined under the Investment Services Act and "retirement schemes" as defined under the Special Funds (Regulation) Act.””

Henceforth the proviso will read:

““Provided further that investment schemes shall refer to:

"collective investment scheme" as defined under the Investment Services Act;

"retirement scheme" as defined under the Retirement Pensions Act;

"securitisation vehicle" as defined under the Securitisation Act; and

"authorised reinsurance special purpose vehicle" as defined in the Re-Insurance Special Purpose Vehicle Regulations.”.”

L.N. 384 of 2016 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) Exemption of Duty in terms of article 23 (Amendment) Order, 2016

This LN implements a Budget Measure (reduced rate of duty on Gozo residential properties) via an addition of an Article, (Article 4), to the Exemption Order.

Article 4 provides that in the case of a transfer:

- (a) inter vivos; of
- (b) residential property;
- (c) situated in Gozo

the duty shall be chargeable at the rate of two euro (€2.00) for every one hundred euro (€100.00) or part thereof of the amount or value of the consideration for the transfer of the property or the

value of the property, whichever is the higher.

The following conditions must be satisfied:

(a) The notice of the **promise of sale agreement** in relation to such transfer is given to the Commissioner for Revenue **on or after the 18th October 2016 but before the 1st January 2018**;

(b) Notice of the **final deed** in relation to such transfer is given to the Commissioner for Revenue by the **31st December 2018**;

(c) **No relief is claimed under article 32C** (donations to descendants) of the Duty on Documents and Transfers Act

(d) the acquisition of property is **not made for the purpose of demolition and the construction** of more than one unit, or to acquisitions of property in the course of a trade or business:

(e) it is *not* an acquisitions **made by a body of persons**:

'Residential property' is defined as including a garage attached to or underlying such residence or a garage situated in the same block of residential apartments of which the residence forms part or a garage of not more than thirty (30) square metres situated within five hundred (500) metres of such residence or block of apartments, and acquired together with such residence on the same deed.

In the case of a transfer of land, the relief granted under Article 4 shall only apply if one residential unit is to be built thereon, and such relief shall be forfeited in the case of a breach of this condition.

2. Bills

Bill 174 of 2016 – Budget Measures Implementation Act, 2016

The bill incorporates a number of proposed changes to the Duty on Documents and Transfers Act.

The first proposed amendment refers to Article 32 (4) (a) which incorporates the regime known as the first time buyers regime. The amendment consists in the addition of a paragraph that clarifies that, the regime applies only to persons who do not need an AIP permit. The proposal plugs a loophole by explaining that a person who would have required an AIP permit had the property not been in a special designated area cannot benefit from the special regime.

The second change refers to the exemption from duty which governs shares of an undivided share of a dwelling house held in co-ownership by individuals. The new proviso provides for compliance obligations including notarial declarations.

Article 35 (2) referring to a reduced rate of duty (3.5%) applicable to certain transfers causa mortis (transfers of dwelling houses being ordinary residences) may be changed too. The bill refers to an increase in the thresholds subject to the reduced rate (the bracket subject to the rate will be almost doubled).

3. JUDICIAL DECISIONS

3.1 Judgments of the ART

Rikors Nru. 39/09VG Christef Company Limited, Stoneland Limited u Vella Estates Limited Vs Kummissarju tat-Taxxi

This case involved an assessment to duty. The Tribunal abated an administrative penalty because it felt that the CfR had not proven that the consideration for the transfer of the property was not at market value. Nonetheless, the Tribunal upheld that the party of the penalty which was charged because the consideration was less than 15% of the value determined by the CfR.

Rikors Nru. 159/13VG xxx Vs Id-Direttur Generali (Taxxa fuq il-Valur Mizjud)

The ART held that an appeal was not null and void and had been filed within the time-period stipulated by law. The ART disagreed with the VAT Department with respect to the date of notification of an assessment. The ART held that local rules on notification were clear; a refusal of a notification was not tantamount to a notification.

Rikors Nru. 201/11VG Godwin Darmanin, Maurice Darmanin, Maria Elena sive Marlene Tonna u Josephine sive Joyce Formosa Vs Il-Kummissarju tat-Taxxi

In a case involving a transfer of property by Court Order, the CfR had issued an assessment to duty on documents and transfers. According to the CfR the consideration was not at market value. The taxpayer contended that, because the price had been fixed by the Court, he should not be made to pay any additional tax. The ART disagreed, upholding the assessment. Regardless of who had fixed the consideration, if consideration was significantly below market value, additional tax was payable.

Rikors Nru. 212/11VG Oliver u Gracelynn konjugi Attard Vs Il-Kummissarju tat-Taxxi

This case involved an assessment to duty on documents. After the objection was filed, the assessment was re-examined by the same Architect that was responsible for the issuance of the original assessment. Nonetheless, the appeal was rejected because the Tribunal's valuation happened to be very close to that done by the Government's Architect.

Rikors Nru. 271/12VG XXX Vs Il-Kummissarju tat-Taxxa fuq il-Valur Mizjud

The ART found for the tax authorities because the taxpayer had failed to bring evidence of input VAT incurred. Taxpayer had brought contradictory evidence relating to the loss of crucial documentation. The ART referred to taxpayer's obligation to keep proper books and records in terms of Article 48 VAT adding that, in archiving books and records, a taxpayer had to exercise the due diligence of a bonus pater familias as required by Article 1032 of the Civil Code.

Rikors Nru. 188/12VG xxx Vs Il-Kummissarju tat-Taxxa fuq il-Valur Mizjud

The ART dismissed an appeal because taxpayer failed to bring evidence articulating why the VAT assessment was wrong.

Rikors Nru. 126/12VG XXX Vs Kummissarju tat-Taxxa fuq il-Valur Mizjud

The ART dismissed an appeal because taxpayer failed to bring evidence articulating why the VAT assessment was wrong.

Rikors Nru. 101/12VG XXX Vs Il-Kummissarju tat-Taxxa fuq il-Valur Mizjud

The ART dismissed an appeal that had been submitted late. The ART held that the deadline starts running from the date of notification of the assessment and not the date of notification of the demand note.

3.2 Judgments of the First Hall Civil Court

Rikors Numru: 99/15 LM Fl-atti tal-Ittra Uffiċjali Numru 2635/2014 Direttur Ġenerali (Taxxa fuq il-Valur Miżjud) vs. Carmelo Meli (Karta tal-Identità bin-numru 461747M)

Taxpayer's attempt to impugn an executive title issued by the Department of VAT failed because taxpayer had not employed the correct procedural mechanism.

Rikors Numru : 1080/2013 JPG HSBC Bank Malta plc (C.3177) -VS- Id-Direttur Ġenerali tat-Taxxa fuq il-Valur Mizjud u Kuraturi

This case involved a ranking of creditors. The VAT Department registered a special privilege that took precedence over the bank's claim. According to the bank, the asset in respect of which the claim was registered was entirely unrelated to the VAT claim. Accordingly, it requested the Court to impugn the privilege. It transpired that the VAT claim subject to the privilege referred to a liability due by a company in which a particular individual had served as director. The VAT Department assumed that, because a director is personally responsible, jointly and severally, for VAT due by the company in which he has served in, VAT due by the company is collectible from a director and may be enforced by special privilege. The Court disagreed. It held that a distinction had to be drawn between the director and the company, ordering a cancellation of the special privilege.

Rik. Nru. 6/16JRM Oliver AĠIUS vs L-ONOREVOLI PRIMINISTRU, l-Avukat Ġenerali, il-Kummissarju tat-Taxxi

Taxpayer contested the legal validity of Article 31 (7) ITMA, an article which grants the Commissioner the power to raise an assessment after the peremptory five year period. The challenge was brought in the course of proceedings at the ART. The First Hall Civil Court chose to decline to exercise its constitutional powers on the basis that the outcome of the appeal was still open. Taxpayer appealed the judgment.

Rif. Nru. 59/12JRM Fl-Atti tar-Riferenza tat-13 ta' Lulju, 2012, mill-Qorti tal-Maġistrati (Malta) Bħala Qorti ta' Ġudikatura Kriminali fil-kawża fl-ismijiet: IL-PULIZIJA (Spettur Anthony Aġius) vs Jean Pierre BORĠ

This judgment follows a constitutional reference from the Court of Magistrates sitting as a Court of Criminal Judicature. Accused alleged a violation of his right to a fair hearing because of the length of time taken to initiate criminal proceedings. The Court dismissed the allegation. The case continues.

3.3 Judgments of the Constitutional Court

Rikors Numru 14/11 JZM Robert Ciantar v. L-Onorevoli Prim Ministru;

The legal issues discussed in this case are almost identical to those determined in the David Mifsud Case analysed in a previous update. The case involved a violation of the double jeopardy rule. In brief, Article 83 (3) of the VAT Act allowing a criminal prosecution for an act previously punished with an administrative penalty was ruled unconstitutional. The Constitutional Court has been quite clear:

'Din il-Qorti tirribadixxi li l-Artikolu 83(3) tal-Kap. 406 tal-Ligijiet ta' Malta¹⁵ huwa inkonsistenti mal-Artikolu 4 tas-7 Protokoll tal-Konvenzjoni, in kwantu dak is-subinciz jipprospetta proprju sitwazzjoni bħal dik odjerna fejn persuna, oltre l-impozizzjoni ta' multa amministrattiva sostanzjali, tigi sottoposta wkoll għal proceduri penali quddiem il-Qorti tal-Maġistrati dwar l-istess nuqqas.'

3.4 Judgments of the Court of Appeal

Appell Civili numru:- Rikors maħluf numru 156/2010 JZM Joseph Mary Farrell v. Il-Kummissarju tat-Taxxa fuq il-Valur Miżjud, illum Kummissarju għat-Taxxi

This case involved an attempt to impugn an executive title against taxpayer. The Court of Appeal did not impugn the executive title but noted that, contrary to what had been held, a demand note cannot be considered to be jure et de jure evidence of its contents.

3.5 Judgments of the CJEU

In Case C-432/15 Odvolací finanční ředitelství v Pavlína Baštová

The CJEU held that the supply of a horse by its owner, who is a taxable person for value added tax purposes, to the organiser of a horse race for the purpose of the horse's participation in that race does not constitute a supply of services for consideration where it does not give rise to a payment awarded for participation or any other direct remuneration and where only the owners of horses which are placed in the race receive a prize, even if that prize is determined in advance. On the other hand, such a supply of a horse for the purposes of its participation in the race constitutes a supply of services for consideration where it gives rise to the payment, by the organiser, of remuneration irrespective of whether or not the horse in question is placed in the race.

The CJEU added that a taxable person, who breeds and trains his own race horses and those of other owners, has the right to deduct input value added tax on the transactions relating to the preparation for horse races of his own horses and the participation of his own horses in races, on the ground that the costs pertaining to those transactions are part of the general costs linked to his economic activity, provided that the costs incurred in each of those transactions have a direct and immediate link with that overall activity. That may be the case if the costs thus incurred pertain to race horses actually intended for sale or if the participation of those horses in races is, from an objective point of view, a means of promoting the economic activity, this being a matter for the referring court to determine.

In a situation where such a right to deduct exists, any prize won by the taxable person on account of the placing of one of his horses in a race is not to be included in the taxable amount for value added tax purposes.

Finally, the CJEU held that the reduced rate of value added tax may not be applied to a single composite supply of services, made up of several components relating, inter alia, to the training of horses, the use of sporting facilities and the stabling, feeding and other care provided to the horses where the use of the sporting facilities.

Case C-576/159 Maya Marinova ET v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Veliko Tarnovo pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

The CJEU held that the principle of fiscal neutrality must be interpreted as not precluding national legislation, under which, where goods are not in the warehouse of the taxable person to whom they have been supplied and the tax documents of relevance to those goods have not been recorded in the accounts of that taxable person, tax authorities may presume that the taxable person subsequently sold those goods to third parties and determine the taxable amount of the sale of those goods according to the factual information at hand pursuant to rules not provided for in that directive. It is, however, for the referring court to ascertain whether the provisions of the national legislation go further than is necessary to ensure the correct collection of VAT and to prevent evasion.

Case C-412/15 TMD Gesellschaft für transfusionsmedizinische Dienste mbH v Finanzamt Kassel II – Hofgeismar

The CJEU held that supplies of human blood which Member States are required to exempt do not include supplies of plasma obtained from human blood where that plasma is intended to be used, not for direct therapeutic purposes, but exclusively for the manufacture of medicinal products.

Case C-518/14 Senatex GmbH v Finanzamt Hannover-Nord

The CJEU held that the VAT Directive must be interpreted as precluding national legislation under which the correction of an invoice in relation to a detail which must be mentioned, namely the value added tax identification number, does not have retroactive effect, so that the right to deduct value added tax exercised on the basis of the corrected invoice relates not to the year in which the invoice was originally drawn up but to the year in which it was corrected.

Case C-516/14 Barlis 06 — Investimentos Imobiliários e Turísticos SA v Autoridade Tributária e Aduaneira

The CJEU held that invoices mentioning only 'legal services rendered from [a date] until the present date' do not a priori comply with the requirements of the Directive.

The Court added that the national tax authorities are precluded from refusing the right to deduct value added tax solely because the taxable person holds an invoice which does not satisfy certain conditions, even though those authorities have available all the necessary information for ascertaining whether the substantive conditions for the exercise of that right are satisfied.

Case C-267/15 Gemeente Woerden v Staatsecretaris van Financiën

The CJEU held that the VAT Directive must be interpreted as meaning that when a taxable person has had a building constructed and has sold that building for a price less than the cost of constructing it, that taxable person is entitled to deduct all of the value added tax paid in respect of the construction of that building, and not only a part of that tax in proportion to the parts of the building which its purchaser uses for economic activities. The fact that that purchaser allows the building at issue to be used without charge is of no importance in that regard.

Case C-332/14 Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR v Finanzamt Krefeld

The CJEU held that the VAT Directive must be interpreted as meaning that, where a building is used in order to carry out certain output transactions in respect of which value added tax is deductible and others in respect of which it is not, the Member States are not required to prescribe that the input goods and services used for the construction, acquisition, use, conservation or maintenance of that building must, in a first stage, be assigned to those various transactions when such assignation is difficult to carry out, in order that, in a second stage, only the deduction entitlement due in respect of those of the goods and services which are used both for certain transactions in respect of which value added tax is deductible and for others in respect of which it is not is determined by applying a turnover-based allocation key or, provided that this method guarantees a more precise determination of the deductible proportion, on the basis of floor area.

4. Other

On 17 October 2016, the Minister of Finance delivered his budget speech in Parliament. The Minister announced a number of changes including some new tax exemptions and concessions. Rental agreements will become registrable. He also spoke of the future of the financial services industry. This Update covers the Budget Bill, the contents of the Budget Act will be discussed in a future Update.

On October 25, 2016 the European Commission published the Corporate Tax Reform Package incorporating 3 new proposals:

- (a) A Common Consolidated Corporate Tax Base
- (b) An improved system to resolve double taxation disputes in the EU;
- (c) A proposal to extend the rules against hybrid mismatches.

A draft CCCTB directive and draft amendments to the Anti-Avoidance Directive were released.

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