



MALTA TAX LAW UPDATE

Update 23

EDITOR'S NOTE

The Commissioner for Revenue published two guidelines which are important to financial services practitioners; the first relates to the concept of 'business interests outside Malta' and the second refers to MAP. Meanwhile, the Minister prescribed 10 tax legal notices, the most important of which is undoubtedly L.N. 400 of 2016 Cooperation with Other Jurisdictions on Tax Matters (Amendments) Regulations.

The Administrative Review Tribunal has delivered 7 tax judgments. The most important income decision delivered this quarter is subject to appeal and will be discussed in greater depth when the Court of Appeal eventually pronounces itself. In cases involving Duty on Documents the Tribunal is being quite critical of work undertaken by some architects appointed by the Department.

Lastly, the First Hall Civil Court presided by Mr. J.R. Micallef deserves to be commended for its well-written judgment on the interpretation of tax law. The outcome of the case was predictable but it is refreshing to have so many principles of interpretation neatly placed 'all under one roof'.

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1. LEGISLATIVE CHANGES

1.1 Acts of Parliament

None.

1.2 Legal Notices

L.N. 399 of 2016 INCOME TAX ACT (CAP. 123) Donations (Sports and Culture) (Amendment No. 2) Rules, 2016

L.N. 399 substitutes sub-rule 1 of Rule 3 incorporating references to the recently created institution named 'SportMalta' and definitions of the terms 'international sports event', 'national sports event' and 'sports person'.

The amended rules provide that where, in any year of assessment, a company proves to the satisfaction of the Commissioner that it has made a cash donation to a sports person participating in a national sports event or an international sports event, such donation may be claimed as a deduction against income for the year of assessment in which it is made, provided that a certificate is issued in this respect by SportMalta thereby certifying recognition of the event and registration of the sports person.

Such deduction may only be claimed if the said sports person is not in any way related to the said donor company.

"international sports event" is defined as meaning any form of event having a competitive element, being organized by an international governing body recognized by SportMalta, in which local sports persons can participate

"national sports event" is defined as meaning any league, knock-out competition or other form of local competition taking place in the territory of Malta intended for local sports persons, recognized as such by SportMalta.

"sports person" is defined as meaning an athlete, club, association, federation, foundation or any other sports organisation registered under any other category as established by SportMalta which is deemed to be a "not for-profit" sports entity and is registered in the Register of Persons kept by SportMalta as required by the Sports Act.

L.N. 400 of 2016 Cooperation with Other Jurisdictions on Tax Matters (Amendments) Regulations

On 25 November 2016, the Minister of Finance transposed into local law the European EU Council Directive 2016/881 through L.N. 400 of 2016 Cooperation with Other Jurisdictions on Tax Matters (Amendments) Regulations ("The Regulations").

The Regulations, inter alia, require:

- the Commissioner for Revenue ("CfR") to automatically exchange information relating to Advance Cross-Border Rulings (ACBRs) and Advance Pricing Arrangements (APAs); and
- ultimate parent entities ("UPE") of Multi National Entity Group ("MNE") which are resident in Malta or certain Constituent Entities ("CE") resident in Malta to file with the CfR a Country-by-Country Report ("CbCR").

The Regulations introduce a requirement on the CfR to automatically exchange information to other Competent Authorities of all EU Member States in respect of ACBRs or APAs that have been issued, amended or renewed after 31 December 2016. In certain instances, the CfR shall also exchange such information with the European Commission. In line with the Regulations, the automatic exchange of information (“AEoI”) pursuant to this provision must take place “within three months following the end of the half of the calendar year during which the ACBRs or APAs have been issued, amended or renewed”.

The CfR is also required to exchange information with all other EU Member States in relation to ACBRs or APAs that have been issued, amended or renewed within a period beginning five years before 1 January 2017. Certain exceptions however, apply. Indeed, if the ACBRs and APAs have been issued, amended or renewed between 1 January 2012 and 31 December 2013, the relevant AEoI shall only take place if such ACBRs or APAs were still valid as at 1 January 2014. Furthermore any information relating to ACBRs or APAs which have been issued, amended or renewed prior to 1 April 2016 to any person/group of persons deriving a group-wide annual net turnover of less than Euro 40,000,000 in the relevant fiscal year (excluding those carrying out financial or investment activities), shall not be exchanged.

Additionally, the Regulations provide that if the arrangements under which the APAs were negotiated exclude the disclosure of information to third parties, bilateral or multilateral APAs with third countries shall be excluded from the scope of AEoI. The law however adds that where the arrangements under which APAs were negotiated permit disclosure, such bilateral or multilateral APAs shall be exchanged under Regulation 14 of Cooperation with Other Jurisdictions on Tax Matters Regulations.

The Regulations also require Maltese tax resident UPEs of MNE Groups and CE which have been appointed as the Surrogate Parent Entity (“SPE”) to file with the CfR a CbCR in respect of Reporting Fiscal Years starting from 1 January 2016.

The Regulations also seem to cater for the so-called ‘secondary mechanism’, whereby a CE which is tax resident in Malta and which is not the UPE will be required to submit the CbCR itself if the following conditions are satisfied:

- (a) the entity is resident for tax purposes in Malta;
- (b) one of the following conditions applies:
 - (i) the UPE of the MNE Group is not obligated to file a CbCR in its jurisdiction of tax residence;
 - (ii) the jurisdiction in which the UPE is resident for tax purposes has a current International Agreement to which Malta is a party but does not have a Qualifying Competent Authority Agreement in effect to which Malta is a party by the time specified in regulation 13(4)(a) for filing the CbCR for the Reporting Fiscal Year;
 - (iii) there has been a Systematic Failure of the jurisdiction of tax residence of the UPE that has been notified by Malta to the CE resident for tax purposes in Malta.

This secondary mechanism will apply as from periods commencing on or after 1 January 2017, unless the CE has been appointed as the SPE.

In accordance with the Regulations, the CbCR would only be deemed complete if the following information is disclosed with respect to the MNE Group:

- (i) aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE Group operates;
- (ii) an identification of each CE of the MNE Group setting out the jurisdiction of tax residence of such CE, and where different from such jurisdiction of tax residence, the jurisdiction under the laws of which such CE is organized, and the nature of the main business activity or activities of such CE.

The CbCR needs to be submitted by the Maltese UPE, SPE or CE, where applicable, within nine months from the last day of the fiscal year of the MNE Group.

The information collected by the CfR from the CbCRs must be automatically exchanged to any other EU Member State in which one or more CE of the MNE group is either tax resident or subject to tax by virtue of a permanent establishment created therein at prescribed intervals.

A notification requirement applies for all CEs which are tax resident in Malta. CEs which are either UPEs or SPEs must indicate their status to the CfR, whereas the other (i.e. non-UPE and non-SPE) must indicate who is the UPE or SPE. In any case, the notification must be submitted annually by not later than the last day for filing of a tax return of that CE for the preceding fiscal year. Furthermore, penalties for non-compliance apply.

L.N. 1 of 2017 INCOME TAX ACT (CAP. 123) Qualifying Employment in Aviation (Personal Tax) (Amendment) Rules, 2017

This LN adds sub-rule (4) to rule 6 providing that notwithstanding anything to the contrary contained in the rules any for a one-time extension of five years or four years respectively to a qualifying period, subject to the continued adherence to the other provisions of these rules.

Eligibility under the rules shall not exceed a consecutive period of ten years commencing from the year preceding the first year of assessment in which that person is first liable to tax under the provisions of the Act.

L.N. 2 of 2017 INCOME TAX ACT (CAP. 123) Donations (Community Chest Fund) (Amendment) Rules, 2017

The amendment prescribes that the rules shall apply only with respect to donations made up to the 31st December 2016.

L.N. 3 of 2017 DUTY ON DOCUMENTS AND TRANSFERS ACT (Cap. 364) Duty on Transfers (Exemption) Order (Amendment), 2017

This amendment refers to the exemption colloquially referred to as 'the Urban Conservation Area' concession (reduced duty of 2% on the disposal of scheduled property/UCA property). In paragraph (a) of Article 3, the words "on or after the 1st January 2016 but before the 1st January 2017", have been substituted by the words "on or after the 1st January 2016 but before the 1st July 2017" implying that the scheme has been extended by a few months.

The notice of the promise of sale agreement relating to such transfer must be given to the Commissioner before the 1st January 2017.

L.N. 7 of 2017 INCOME TAX ACT (CAP. 123) Highly Qualified Persons (Amendment) Rules, 2017

This LN clarifies the sunset clause introduced previously. The ten year period applies as a consecutive period of ten years commencing from the year preceding the first year of assessment in which that person is first liable to tax under the provisions of the Act (as opposed to 10 years of assessment).

L.N. 36 of 2017 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) Duty on Documents and Transfers (Amendment) Rules, 2017

L.N. 36 refers to the valuation report prepared by Architects and the principal amendments consists in a schedule to the Act laying down the form of the report. Sub-rule (4) of rule 8 as amended prescribes that the transferee in any transfer of residential property shall submit to the Commissioner the information required on the form prescribed in the Eighth Schedule, duly filled and certified by a 'perit' in possession of a warrant issued under article 5 of the Periti Act, to be attached to the notice mentioned in article 51 of the Act and to which the First Schedule refers.

L.N. 42 of 2017 INCOME TAX ACT (CAP. 123) Tax Rebate (Pensioners) Rules, 2017

L.N. 43 of 2017 INCOME TAX ACT (CAP. 123) Deduction (Income from Employment or Pension) (Amendment) Rules, 2017

L.N. 42 implements a budget measure relating to pensioners; contemplating a special tax rebate.

The benefit contemplated in the rules applies to individuals who are in receipt of income from any pension chargeable to tax under article 4(1)(d) ITA, and who were at least 61 years of age in the year when such pension was received.

In the case of an individual who is chargeable to tax at the rates specified in article 56(1)(b) ITA, but not at the rates specified in the provisos thereto, a tax rebate shall be allowed as a setoff against the tax on his chargeable income, as follows:

Tax rebate = (pensions income less 9,100) multiplied by 15% (in any case, the rebate shall not exceed €210).

In the case of an individual who is chargeable to tax at the rates specified in the second proviso to article 56(1)(b) of the Act, a tax rebate shall be allowed as a set-off against the tax on his chargeable income, as follows:

Tax rebate = (pensions income less 10,500) multiplied by 15% (in any case, the rebate shall not exceed €150).

In the case of an individual who is chargeable to tax at the rates specified in article 56(1)(a) ITA a tax rebate shall be allowed as a set-off against the tax on his chargeable income, as follows:

Tax rebate = (pensions income less 12,700) multiplied by 15% (capping applies, the rebate shall not exceed €45). In addition, a further tax rebate shall be allowed against the tax on chargeable income, as follows:

Tax rebate = [(chargeable income less 12,700) multiplied by 15%] less the rebate above (the rebate shall not exceed €75).

Rebates may not give rise to a refund or be available to be carried forward

L.N. 43 removes references to 'pensions' from the main regulations implying that the special deduction contemplated in the main rules no longer applies with respect to pension income. This change must be read in conjunction with the changes brought about by L.N. 42 introducing a new tax rebate for pensioners.

2 Bills

None that we are aware of.

3 Judicial Decisions

3.1 Judgments of the ART

Rikors Nru. 20/12VG Krigar Developments Ltd. Vs Il-Kummissarju tat-Taxxi Interni

Case 20 involved an assessment to duty on documents. Interestingly, the party filing the objection and the appeal was the vendor and not the buyer. The main point at issue was the value of the property and the valuation carried out by the Government's Architect. The Tribunal was quite critical of the manner the Government Architect had valued the property. The Architect had failed to consider that airspace had not been included in the transfer. The Tribunal upheld the appeal confirming vendor's right to contest an assessment even in the absence of a contestation from buyer.

Rikors Nru. 26/12VG Joseph Pace u Winifred Georgina Pace Vs Il-Kummissarju tat-Taxxi Interni

The Tribunal agreed to reduce an assessment to duty because the Tribunal found that the Government's valuation of the property transferred was partly based on speculation and was excessive.

Rikors Nru. 32/09 Maria Dolores sive Doris Debono u b'Digriet tal-21 ta' Jannar 2011 l-atti gew trasfuzi f'isem David Debono, Francis sive Frank Debono u Charles Debono stante l-mewt ta' Maria Dolores sive Doris Debono fl-20 ta' April 2009 Vs Il-Kummissarju tat-Taxxi

This case involved an assessment to duty with respect to property transferred in 1997. Whilst contesting the assessment on the merits, appellant raised the plea of prescription. He also said that the interval of time between the date of transfer and the date of issuance of the assessment was too long; resulting in a violation of his right to justice within a reasonable time. The Tribunal rejected the plea of prescription concluding that the assessment had been raised in terms of law. The Tribunal refused to express itself with respect to issues concerning human rights. On the merits, the Tribunal accepted the appeal, cancelling the assessment on the basis that the tax authorities had failed to prove that the value declared in the deed was not the correct value.

Rikors Nru. 15/12 XXX Vs Il-Kummissarju tat-Taxxi

This case involved a request for a refund of income tax allegedly over-paid under the Final Settlement System. The main point at issue was whether important adjustment forms had been filed on time. According to the Revenue the request for the refund had been submitted via adjustment forms that had been filed late. The Tribunal agreed observing that the time-limit relating to the submission of adjustment forms was a peremptory time-limit not subject to extension.

Rikors Nru. 16/12VG XXX Vs Il-Kummissarju tat-Taxxi

This appeal application relating to an assessment to tax due under the FSS was dismissed because the tax due had been established by virtue of a settlement agreement bearing appellant's signature. The Tribunal held that appellant was expected to honour the contract he had entered into with the Revenue.

Rikors Nru. 53/11VG XXX Vs Kummissarju tat-Taxxi Interni

This appeal involved an assessment to income tax and was one of several appeals (some of which were won by the taxpayer because assessments had been raised after the prescribed term). In brief, the Tribunal held that taxpayer had failed to prove his case on the merits. The Tribunal held that the Revenue's conclusion that appellant had been receiving bank interest was justified. Interestingly, on the matter of onus of proof and degree of proof, the Tribunal referred judgments of the Criminal Courts. Appellant filed an appeal application.

3.2 Judgments of the First Hall Civil Court

Rik. Nru. 21/14JRM Christine BORDA vs ID-DIRETTUR (TAXXI INTERNI) u llum maghruf bħala il-Kummissarju tat -Taxxi

This case involving a dispute with respect to an exemption to duty on documents and transfers is important for a number of reasons; it is bound to become a leading judgment on the interpretation of fiscal law and the principle of non-retrospectivity. Furthermore, it is a rare case filed under Article 469A dealing with judicial review of administrative action. The conclusions reached are predictable but it strengthens some major principles of taxpayer protection.

The case involved an interpretation of an article providing for an exemption from duty on documents (transfers occurring consequent to a consensual separation). Taxpayer contended that the transfer was exempt but the Tax Department held that the transfer was not tax exempt because it had occurred by judicial auction. It transpired that the Maltese text of the law and the English text of the law were not in sync. The Maltese text favoured taxpayer's interpretation but the English text strengthened the Department's interpretation. The Court referred to the Constitution of Malta providing that the Maltese text prevails over the English text. The Court applied the Maltese text concluding that the transfer was tax exempt. In addition, the Court refused to apply an amendment to the Maltese text which was passed after the case was filed. The Court held that, in the circumstances, for the purposes of Article 469A, the Department had acted ultra vires. The Court quashed the Department's decision refuting the tax exemption.

3.3 Judgments of the Constitutional Court

None that we are aware of.

3.4 Judgments of the Court of Appeal

None that we are aware of.

3.5 Judgments of the CJEU and ECtHR

3.5.1 CJEU

Case C-453/15 (A,B, Generalbundesanwalt beim Bundesgerichtshof)

The CJEU held that Article 56(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the 'similar rights' mentioned in that provision include the greenhouse gas emission allowances defined in Article 3(a) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

Case C-208/15 Stock '94 Szolgáltató Zrt. V Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága

The CJEU held that Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that:

- an integrated agricultural cooperation providing that an economic operator delivers goods to a farmer and grants him a loan intended for purchasing those goods constitutes a single transaction for the purposes of that directive, in which the supply of the goods is the principal supply. The taxable amount of that single transaction is made up of both the price of those goods and the interest paid on the loans granted to the farmers;
- the fact that an integrator may provide the farmers with additional services or buy their agricultural production has no bearing on the categorisation of the transaction at issue as a single transaction, for the purposes of Directive 2006/112.

3.5.2 ECtHR

CASE OF LINDSTRAND PARTNERS ADVOKATBYRÅ AB v. SWEDEN (Application no. 18700/09)

Applicant filed a case because he argued that a tax investigation had breached his right to privacy. The tax investigation had involved a search in a lawyer's office, a search at an apartment and the seizure of computer hardware. The ECtHR held that the search at the legal offices interfered with the right to home and correspondence under Article 8 but that the search at a flat which was used as business premises did not constitute an interference. The Court held that the decision to search applicant's offices was thoroughly reasoned and the enforcement proceedings had been properly documented implying that the investigation had been conducted in accordance with law. Having regard to the fact that private information subject to professional secrecy had, by court intervention, not been made available for examination by the Tax Agency, the Court held that investigative measures had not been disproportionate. The Court added that the seizure of the computer hardware and the damage to applicant's professional reputation arising from the investigation did not amount to a violation of the right to property. Similarly coercive measures used in the course of the investigation did not breach the right to a fair hearing because they did not involve the determination of a criminal charge. The ECtHR held that the fact that applicant had been denied the right to a judicial remedy challenging coercive measures used in the course of the proceedings amounted to a violation of his right to an effective remedy. The ECtHR awarded damages of EUR5,000 to applicant.

CASE OF POLIMERKONTEYNER, TOV v. UKRAINE (Application no. 23620/05)

Applicant company alleged a violation of its right to property caused by the fact that it had been regularly forced to pay the wrong customs tariff. The customs office had adopted an irregular practice of assigning the wrong classification code to its goods contrary to numerous final judicial decisions in that regard. The ECtHR attached a lot of weight to statements of the domestic courts condemning the tax authorities' practice that undermined both the finality of their judgments and the courts' authority in general. The ECtHR held that the customs authorities acted in an arbitrary manner and that, effectively, applicant company had been left without mechanisms for putting an end to that practice. The ECtHR noted that it examined a somewhat comparable situation in the case of *Intersplav v. Ukraine*, where the applicant company had been obliged to institute judicial proceedings in respect of numerous instances of the authorities' failure to confirm the VAT-refund amounts payable to it. The Court had found that the systematic nature of the failings of the State authorities had resulted in an excessive burden being imposed on the applicant company. The ECtHR held that the same criticism held true for the present case. Like in the cited case, the applicant company had to go through rounds of judicial proceedings to recover the overpaid customs duty. Furthermore, during those proceedings it could not use the imported goods belonging to it, which had been impounded and were held until a resolution in the case. Court held that there had been an interference with the peaceful enjoyment of the applicant company's possessions, which, as confirmed by the domestic courts on several occasions, was unlawful. The ECtHR concluded that there had been a violation of Article 1 of Protocol No. 1.

4. Other

Tax Guideline – articles 42(1) and 47 of the duty on documents and transfers act

On December 1 2016, the Commissioner for Revenue published the above-captioned guide-line. The Commissioner has clarified that for the purposes of sub-article (1) of article 42 of the Act and of article 47 of the Act, the following shall NOT be considered to constitute business interests outside Malta whether they are carried on by the applicant company or by any company or partnership of which it holds at least 25% of the capital, voting rights and rights to profits available for distribution to shareholders or partners as the case may be:

(a) turnover derived from any activities carried on with customers/clients who are resident in Malta and who do not fall within the purport of sub-article (3) of article 47 of the Act;

(b) turnover derived from any activities carried on directly or indirectly with customers/ clients who are not resident in Malta but who operate in Malta through a permanent establishment situated in Malta, where the particular business activities are effectively connected with such permanent establishment and where such persons do not fall within the purport of sub-article (3) of article 47 of the Act;

(c) turnover derived from any retail, catering, on-land entertainment, manufacturing and other related productive activities, transport, agricultural or fishing activities which are carried on in Malta or any activities the income derived from which is referred to in paragraph (3) of Rule 5 of the Tax Accounts (Income Tax) Rules, irrespective of the residence status of the particular customer/ client.

The above are without prejudice to the powers of the Commissioner to determine other activities not to constitute business interests outside Malta whether on a general basis or on the basis of the circumstances of any specific fact pattern.

Applicants for determinations in terms of sub-article (9) of article 47 of the Act shall disclose to the Commissioner in a clear manner the nature of the activities of the applicant company so as to enable the Commissioner to determine the location of the particular business interests.

Any determinations made by the Commissioner in terms of paragraphs (d) or (e) of sub-article 3 of article 47 of the Act before 1 December 2016 shall continue to be valid for a further period of three years from the date of publication of these guidelines on the Inland Revenue Department website.

Determinations made on or after 1 December 2016 shall be valid for a period of three years from the date of the determination.

A determination made by the Commissioner may, at the option of the applicant, be renewed for further periods of three years.

Mutual Agreement Procedure ('MAP')

Guidelines issued under the provisions of Article 96(2) of the Income Tax Act

In December 2016, the Commissioner for Revenue released the above-captioned guideline. The Guideline explains the MAP process explaining that, in Malta, an MAP is possible under the provisions of a MAP article in –

- (a) A Double Taxation Agreement;
- (b) The Convention of 23 July 1990 on the elimination of double taxation in connection

with the adjustment of profits of associated enterprises (90/463/EEC) - the EU Arbitration Convention.

The Guidelines relate to a MAP under any Convention because MAPs under the EU Arbitration Convention are governed by the Recommendations found in the Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (2009/C 322/01).

The Malta Competent Authority is the Minister responsible for finance or his authorised representative. The Malta Competent Authority is charged with the responsibility to interact with its counterparts in any matters arising between Malta and other Contracting States/Parties pertaining to the interpretation or the application of a Convention, and to resolve any international tax disputes that might arise.

Access to MAP is provided with regard to any of the following matters:

- (a) transfer pricing adjustments;
- (b) attribution of profits of a permanent establishment;
- (c) dual residence of individuals and persons other than individuals;
- (d) bona fide taxpayer-initiated foreign adjustments
- (e) withholding tax levied beyond what is permitted by the applicable Convention;
- (f) whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty; and any other case in which a person considers that the taxation is not in accordance with the applicable Convention.

The Guidelines lay down the minimum requirement for an MAP request and the procedure to be followed.

New FATCA schema

On January 11, 2017 the CfR announced that all FATCA Reports (new, corrected, void and amended) must be created using the FATCA XML schema version 2.0. The new changes may be accessed via the following link https://ird.gov.mt/downloads/fatca/FATCAXML_V2.0_changes.pdf.

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