



MALTA TAX LAW UPDATE

Update 24

EDITOR'S NOTE

A record number of important judgments has been delivered recently. The Constitutional Court delivered its much awaited judgment in *Farrugia v. PM*. The Constitutional Court held that the 1998 VAT penalty regime was disproportionate and consequently incompatible with the right to property. The whole penalty system was found to constitute an excessive burden. Successful cases based on the right to property are very rare. The remedy ordered by the Court consisted in a significant mitigation of penalties and punitive interest as well as the cancellation of 12 judgments delivered by the Criminal Courts (including judgments ordering an effective prison term).

Meanwhile, the ART delivered 10 judgments. Case 278/11VG dealing with anti-avoidance was an important win for the Revenue.

The CJEU has delivered important judgments both in the area of direct tax as well as indirect tax. The CJEU's judgment in C-448/15 is important because it deals with the applicability of the Parent Subsidiary Directive to tax exempt collective investment schemes.

On the legislative side, Act XVI of 2017 implements the Budget measures amending most tax laws.

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1. LEGISLATIVE CHANGES

1.1 Acts of Parliament

ACT XVI of 2017

Act XVI of 2017 implements budget measures amending most tax laws as explained hereunder.

Amendments to the ITA

The budget amendments consist in the following amendments:

- (a) In Article 2, the definition of 'Collective Investment Scheme' has been enhanced to cover NAIFs. Previously the definition used to refer exclusively to schemes 'licensed under the Investment Services Act'. The new enhanced definition refers to schemes 'licensed under the Investment Services Act *or notified in terms of the Investment Services Act (List of Notified AIFs) Regulations*.'
- (b) In Article 5 (6) ITA regulating the tax exemption applicable to the transfer of listed shares, the tax exemption has been expanded to cover 'transfers of shares listed, *or in consequence of a listing*, on a stock exchange'. The Budget Act removes the 3 provisos to Article 5 (6) (b) ITA which previously used to incorporate restrictions to the application of the exemption.
- (c) An amendment to Article 5A (5) ITA clarifies that the 7% rate applies even when the transfer is by judicial auction.
- (d) A new proviso to 12 (1) (c) (iii) ITA establishes that the rule relating to the dividend exemption will not apply in the case of dividends arising out of shares listed on a stock exchange recognised under the FMA and distributed to an individual whose holding of such shares in a company represents less than 0.5% of the paid-up share capital of the said company.
- (e) The tax exemption in Article 12 (1) (w) ITA previously applicable to married women aged 40 and over returning to work will apply both to men as well as women.
- (f) An enabling provision providing for a new tax exemption has been added to 14 (1) (o) ITA. The new tax exemption will apply to sums in respect of risk capital as are aimed at approximating neutrality between debt and equity financing as the Minister may prescribe. This new deduction is linked to another amendment which triggers a deemed distribution order whenever an individual resident in Malta becomes beneficially entitled to the profits of a company which has applied the deduction in 14 (1) (o) ITA.
- (g) A new article, Article 31E has been added. Article 31E ITA applies to the rental of immovable property for at least 7 years under a Housing Authority Scheme. Final Tax is charged at 5% of gross rental income.
- (h) Article 56 (22) ITA (providing for a 15% rate of tax with respect to capital gains derived from the transfer of listed shares not being shares in a CIS which are tax exempt) has been deleted.

Amendments to the Duty on Documents and Transfers Act

The principal amendments to the DDTA consist in the following:

- (a) An amendment to 32 (4) (a) DDTA confirms that the concession to first-time buyers does not apply to persons who would normally require an AIP Permit;
- (b) The exemption applicable to transfers of dwelling houses occurring between co-owners apply to transfers from the heirs of the deceased co-owner to the other co-owners.
- (c) Thresholds relevant to reduced rates of duty applicable to transfers of dwelling houses to occupants have been improved (the maximum threshold has been highered from EUR70,000 to EUR150,000).
- (d) Recent guidelines relating to DDT10 applications (covered in a previous update) have been backed up by legislative changes. Article 47 will now refer to an intention to carry business interests in Malta. In addition determinations under Article 47 apply for 3 years.

Amendments to the Income Tax Management Act

A proviso has been added to Article 19 ITMA. An auditor's report shall not be required for the first 2 accounting periods of a newly registered company whose sole shareholders are graduates of a Post-Secondary Institution who have set up the new company within 3 years of graduating (subjections to conditions as may be prescribed).

Amendments to the VAT Act

None

1.2 Legal Notices

L.N. 65 of 2017 INCOME TAX ACT (CAP. 123) Income Tax Exemption (Philanthropic Work) Notice, 2017

By virtue of the powers vested in him by article 12(1)(e) of the Income Tax Act, the Minister for Finance named the organisations mentioned below as being engaged in philanthropic work, and thus exempt from income tax –

- Rehabilitation in Society Malta Foundation (RiSe)
- Ronald McDonald House Charities Foundation Malta (RHMC)
- Congregation Missionary Sisters of Jesus of Nazareth
- Reaching Cambodia Foundation
- Grace Association
- Malta House of Prayer Foundation (limitedly for the period 1/1/2017 to 31/12/2018)

The Minister has also acknowledged that the organisations SOS Albania, Welcome Home and Dar il-Wens, appearing on the list of philanthropic organisations, have changed their names to SOS Malta, Fondazzjoni Suret il-Bniedem and Fondazzjoni Wens respectively.

L.N. 131 of 2017 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) Duty on Donations of Marketable Securities and Immovable Property Used for Business (Exemption) Order, 2017

This L.N. creates a derogation from the main law. It provides for a reduced rate of duty applicable with respect to transfers of securities and immovable properties occurring within family businesses. Rule 2 of the LN prescribes that:

- (a) where an individual owns marketable securities issued by a company, the transfer of which marketable securities would be chargeable to duty, duty shall be chargeable at a rate (referred to as "the reduced rate") of one euro and fifty cents (€1.50) on every one hundred euro (€100.00) or par thereof of the real value of those marketable securities where those marketable securities are transferred by gratuitous title by the individual to persons referred to in article 5(2)(e)(i) of the Income Tax Act (close relatives);
- (b) where an individual transfers by gratuitous title immovable property being a commercial tenement as defined in article 1525 of the Civil Code (referred to as "business property"), that had been used in a family business as defined in the Family Business Act for a period of at least three(3) years preceding the transfer, in assessing the duty chargeable in terms of the Duty on Documents and Transfers Act, if any such duty is chargeable, it shall be charged at the reduced rate where that business property is transferred by gratuitous title by the individual to persons referred to in article 5(2)(e)(i) of the Income Tax Act (close relatives).

2. BILLS—3. JUDICIAL DECISIONS

When the reduced rate is applied on the transfer by gratuitous title of marketable securities or business property referred to in this rule, no other exemption or relief from duty shall apply to the said transfer.

The reduced rate applies to a transfer by gratuitous title made on or after the 1st April 2017 but prior to 1st April 2018. A number of compliance obligations apply.

In certain cases, the benefit is clawed back. Relief is forfeited and duty is paid at regular rates if the individual to whom the transfer by gratuitous title was made, transfers inter vivos the marketable securities or the business property, as the case may be, within a period of three (3) years immediately following the date of the transfer by gratuitous title. In the case of a business property, the relief granted shall also be forfeited and the regular rates of duty would apply if the business property is not used within a business carried on by the said individual, for a period of three (3) years immediately following the date of the transfer by gratuitous title.

L.N. 140 of 2017 MALTA ENTERPRISE ACT (CAP. 463) Tax Credits for Micro Enterprises and the Self-Employed (Amendment) Regulations, 2017

This amendment provides that as from year of assessment 2018, a family business may be granted a total amount of tax credits in terms of the regulations of €50,000 over any period of three consecutive years, under the terms and conditions specified in Guidelines.

2 Bills

None that we are aware of.

3 Judicial Decisions

3.1 Judgments of the ART

Rikors Nru. 131/11VG

This case involved an assessment to Income Tax where the main point at issue was a taxpayer's right to a credit under the full imputation system. The problem which arose was that taxpayer had opted to have his dividend taxed under the Investment Registration Scheme and the Revenue was not prepared to allow him a credit under the full imputation system. The ART agreed with the Revenue because it held that taxpayer's dividend had not been bought to charge in terms of the ordinary system but under the extraordinary regime contemplated in the Investment Registration Scheme.

Rikors Nru. 152/11VG

This case involved an assessment to income tax relating to undeclared Directors' Fees. The assessment was raised after the lapse of the ordinary peremptory term but the Revenue argued that it had acted within its administrative rights because the assessment was raised under the extraordinary circumstances contemplated in 31 (7) ITMA (providing that the ordinary peremptory term did not apply to materially incorrect returns tainted by evasion or fraud). Both parties seemed to agree that the onus of proving that the Revenue was justified in issuing the assessment under the extraordinary grounds contemplated in 31 (7) was on the Revenue. The ART agreed with the Revenue that, in such a case, all that was required from the Revenue was to bring only prima facie evidence of evasion or fraud. The ART held that because there was a serious discrepancy between the fee declared by a particular director and the fee declared by another director on the board (who was legally entitled to the same fee) was evidence of evasion or fraud to a degree required by law. Accordingly, the ART held for the Revenue.

Rikors Nru. 278/11VG

This case involved an assessment to income tax. The amounts at issue were highly material (over EUR1,000,000 excluding penalties and punitive interest). The main issue was tax avoidance. According to the Commissioner for Revenue taxpayer had entered into a number of transactions for the purposes of avoiding tax on the transfer of a property. According to the Revenue, taxpayer had created a group of companies with the sole or main purpose of availing himself of the intra-group transfer on a transfer of a property. As a matter of fact, in the space of a few months a property had changed hands without there being a tax charge. The ART agreed with the Revenue; concluding that the fact that a number of transactions occurred within a short time-span was a clear indication that the sole or main purpose of the transactions was the avoidance of tax. The ART found taxpayers' explanations unconvincing. The Tribunal found that the whole series of transactions leading to the tax exempt transfer were artificial and fictitious. With respect to points of law raised, the ART held that the CFR acted within the remit of his powers when his determination relating to tax avoidance took the form of an assessment (taxpayer had indicated that according to his reading of 51 ITA, the CFR was expected to issue some form of order that was not an assessment). The ART referred to British case-law on anti-avoidance (namely the judgments in *Furniss*, *Burmah Oil* and *Schofield*) commenting on the constitutive elements of tax avoidance (a pre-ordained series of transactions inserted in the absence of a commercial/business purpose). According to the Tribunal, references to Article 5 (9) ITA were misplaced because even if one had to set aside issues of avoidance, the transfer at issue was tantamount to a transfer of stock in trade that was governed by Article 4 ITA and not by 5 (9) ITA. The assessment was confirmed.

Rikors Nru. 36/14VG

From a procedural angle, the judgment above is quite important because it confirms that a taxpayer can lodge a VAT appeal limitedly to issues involving punitive measures. Taxpayer had received an assessment. He agreed with the assessment to tax but disputed penalties and interest. The VAT Department contended that his appeal was null because the law did not provide for 'partial' appeals. The Tribunal held for taxpayer establishing the principle hereunder:

'Il-Kummissarju tat-Taxxi donnu jgoggi fid-dubju kemm taxpayer jista' effettivament jappella mill-element ta' multa amministrattiva w imghax fi stima minghajr ma tigi kontestata wkoll it-taxxa likwidata f'dik l-istess stima. Fil-fehma tat-Tribunal ma hemm xejn x'zomm lil taxpayer milli jappella minn dawn l-elementi partikolari ta' stima mahruqa fil-konfront tiegħu, u dana b'mod partikolari in kwantu rigwarda l-multa amministrattiva. In effetti mill-Artikolu 32(3) tal-Kap.406 tal-Ligijiet ta' Malta, jirrizulta li l-multa amministrattiva imposta ai termini tal-provvedimenti tal-Kap. 406 tal-Ligijiet ta' Malta hija parti intrinsika mill-istima finali mahruqa fil-konfront ta' taxpayer u għalhekk, kif già ingħad, soggetta għal appell ai termini ta' l-Artikolu 43 tal-Kap.406 tal-Ligijiet ta' Malta. Apparte minn hekk, għad illi t-taxxa per se likwidata bl-istima ma tigi kontestata mit-taxpayer, huwa xorta wahda jista' jikkontesta l-imposizzjoni tal-multa amministrattiva a bazi ta' skuzanti ragonevoli kif provdut fl-Artikolu 42 tal-Kap.406 tal-Ligijiet ta' Malta.'

Rikors Nru. 274/12VG

This VAT appeal was a 'reference' appeal over a point of law. Taxpayer argued that he should not be held personally responsible for tax due by a company. The VAT Department argued that taxpayer's appeal was procedurally flawed suggesting that taxpayer had used an incorrect procedure. The Tribunal disagreed concluding that taxpayer was fully entitled to use the reference appeal to contest joint and several liability. The case continues on the merits.

Rikors Nru. 101/14VG

In this preliminary judgment the Tribunal held that taxpayer's plea relating to the late issuance of an assessment was unfounded both in terms of law and fact. According to the Tribunal, the assessment had been issued within the time-frame contemplated by law.

Rikors Nru. 136/13 VG

This decree was delivered in the course of an Income Tax Appeal. In the course of the proceedings, the Inland Revenue Department submitted evidence which, in the pre-trial stage, had been collected from a taxpayer who had not been conceded the right to silence. Taxpayer's lawyer requested the removal of this evidence from the tribunal's file because he argued that information had been obtained in the absence of basic procedural guarantees. The Tribunal abstained from deciding on the matter adding that it felt that the matter did not fall within its remit. It distinguished between its powers with respect to pre-trial proceedings and issues arising in the course of a trial.

Rikors Nru. 149/12VG

In this reference appeal, the Tribunal was asked to answer the following question:

“are the services of cash processing which the appellant proposes to provide, consisting of the authentication, sorting, counting and packaging of bank notes and coins as described ... to be treated as exempt without credit supplies in terms of Part Two of the Fifth Schedule to the VAT Act?”

In addition, the Tribunal was asked to decide whether the services of cash processing which the appellant proposes to provide, consisting of the authentication, sorting, counting and packaging of bank notes and coins, should be treated as exempt without credit supplies in terms of Part Two of the Fifth Schedule to the VAT Act.

The ART's judgment draws heavily from ECJ case-law. The Tribunal referred to the ECJ's judgment in Sparekassernes Datacenter (SDC) and Skatterministeriet C-2/95 when the ECJ had held that exempt transactions are defined according to the nature of the services provided and not according to the person supplying or receiving the services. The fact that the identity of the persons effecting the transactions is irrelevant in determining the transactions exempt is evident from the wording of the law itself. The Court also considered that the wording of the directive did not suggest that the scope of that provision was limited only to loans and credits granted by banking and financial institutions. The fact that the transaction covered by those provisions is effected by a third party but appears to the end customer to be a service provided by the bank does not preclude exemption for the transaction.

The ART referred to the judgments of the ECJ confirming that if a particular class of legal operations is exempted from VAT in order to achieve a specific purpose, exemption can be available only for those ancillary operations which fulfil the same purpose.

The Tribunal held that taxpayer was fully entitled to the tax exemption.

Rikors Nru. 87/13VG

This VAT case involved a VAT assessment that was meant to be served on the heirs of a deceased taxpayer. The VAT Department served the assessment to a person who was not an heir of the deceased. Nonetheless, when the heirs became aware of the assessment and appealed from it, the VAT Department argued that the appeal was null because it had not been filed within the prescribed time. The Tribunal held that the notification of the assessment was invalid consequently the appeal was to be considered as having been filed on time.

Rikors Nru. 305/12VG

The VAT Department won this case on the merits because it held that the Department had built a very strong case confirming that the manner it had computed margins and deemed sales had been correct.

3.2 Judgments of the First Hall Civil Court

Rik. Nru. Rikors Kostituzzjonali Nru.: 62/15 MH Angelo Zahra [K.I. 751849M] vs L-Onorevoli Prim Ministru, L-Avukat Generali, Kummissarju tat-Taxxi u l-Kummissarju tal-Pulizija

This Constitutional Case was based on the non bis in idem rule but it must not be confused with the first Zahra case (involving FSS) decided in 2015. This case referred to different merits and involved non-payment of VAT. The Court found that there had been a violation of the non bis in idem rule. Both parties appealed the judgment and their appeals are still pending. Judgment is expected very soon.

3.3 Judgments of the Constitutional Court

Rikors numru 8/11 JRM Anthony P. Farrugia v. L-Onorevoli Prim Ministru, L-Avukat Generali, l-Kummissarju tat-Taxxa fuq il-Valur Mizjud, l-Kummissarju tal-Pulizija

Arguably, this much awaited judgment is one of the most important tax judgments delivered to date. It involved a direct challenge to the 1998 tax penalty system. The Constitutional Court has held that Malta has exceeded its wide margin of appreciation in laying down its tax policy. The case involved around 12 judgments of the Criminal Courts, 2 judgments of the Civil Courts and, in all, almost 15 years of protracted litigation. The case was extremely complex and the summary hereunder is limited to the most important issues.

Facts of the Case

According to the Department, Farrugia and his companies had not paid VAT dues on time. Because of Farrugia's failure to pay his VAT on time, the VAT Department issued a series of tax statements incorporating administrative penalties and punitive interest. Subsequently, the VAT Department instituted criminal proceedings against Farrugia with respect to the same facts previously punished by administrative penalties and punitive interest. Farrugia was found guilty and fined. In addition, he was granted a period of time within which to settle his dues. Failure to abide by the Court's deadline exposed Farrugia to an effective prison term. Farrugia applied for a Presidential pardon but his request was declined. Meanwhile, the Registrar of Courts applied to the Court of Magistrates asking it to convert daily penalties previously imposed by the Court to an effective prison term. In January 2011, the Court of Magistrates agreed to the request filed by the Registrar of Courts but in February 2011 Farrugia filed a constitutional application that suspended everything. The outcome of Farrugia's Constitutional case would determine whether he would have to serve an effective prison term.

Farrugia's Application to the First Hall Civil Court Constitutional Jurisdiction

In brief, Farrugia attacked the whole tax penalty system on 2 grounds:

- (a) Farrugia held that he had been subjected to multiple penalties for the same offence. He held that the non bis in idem (Article 4 of Protocol 7 ECHR) rule was being infringed because he was being subjected to 2 criminal charges for the same fact. At the time, Farrugia's attempt at classifying administrative penalties as 'criminal charges' may have been perceived as being somewhat outlandish. It was only a year later, in November 2012, that the Constitutional Court (in the Geranzi case) began to accept this type of argument. Unfortunately, Farrugia's case remained stuck at first instance for almost 5 years. Meanwhile, arguments similar to those raised by Farrugia gained momentum in cases such as Zahra and Mifsud influencing the eventual outcome of the Farrugia case.
- (b) More importantly, Farrugia challenged the tax penalty on the basis that it was disproportionate. He held that the tax penalty system created an excessive burden that was incompatible with the right to property (Article 1 of Protocol 1 ECHR).

The Judgment of the Court of First Instance

In brief, the Court of First Instance decided for Farrugia:

- (a) It held that, on some counts, there had been a violation of the non bis in idem rule but it disagreed with applicant's classification of administrative penalties as criminal charges. Thus only some of the judgments of the Criminal Courts were annulled;
- (b) With respect to the claims relating to right to property the Court held that the right to property had not been infringed because the harshness of the tax penalty system had been mitigated via a series of tax amnesties.

The Appeals to the Constitutional Court

Both parties appealed. Putting aside procedural issues, the AG appealed because:

- (a) There had not been any violation of the non bis in idem rule;
- (b) The remedy granted by the Court was excessive (a cancellation of the judgments was beyond what was necessary).

Farrugia appealed on the following grounds:

- (a) The Court head incorrectly interpreted the concept of 'criminal charge' for the purposes of the ECHR;
- (b) Contrary to what was held by the First Court, administrative penalties were disproportionate and in violation of the right to property;
- (c) In reality, part of the debt vaunted against him was a civil debt and the Department was using criminal means to enforce a civil debt in a way that was contrary to the ECHR;
- (d) The First Court had ignored judgments of the ECHR on the right to property;
- (e) The First Court had not granted an effective remedy.

With respect to the issues above, the Constitutional Court dismissed the AG's appeal and upheld taxpayer's appeal as explained hereunder.

Non Bis In Idem

The Constitutional Court confirmed its earlier judgments on this point. Clearly, for the purposes of the ECHR, tax penalties are to be treated as criminal charges. The Court referred and incorporated conclusions reached in judgments delivered in 2016 (including the David Mifsud judgment covered in a previous tax update). The Court pointed out that the fact that a penalty could be cancelled in the course of an amnesty did not alter the nature of such penalty. After all, amnesties occur even in the context of 'pure' criminal charges imposed by the Criminal Courts.

Effective Remedy

Once the Court concluded that there had been a violation of the non bis in idem rule it followed that the only effective remedy that could be granted was the cancellation of all the judgments of the criminal courts.

Classification of Additional Tax as a Criminal Charge

The judgment of the Court of First Instance had suggested that some forms of additional tax are not criminal charges because they are not *both* deterrent and punitive. Taxpayer strongly contested this point and the Constitutional endorsed taxpayer's interpretation in full. Hopefully, the matter is settled now. An extract from the Court's judgment follows:

"42. Din il-Qorti, fir-rigward, taghmel referenza għall-konsiderazzjonijiet magħmula minnha fl-eżami tat-tielet aggravju tal-konvenuti b'referenza għad-dritt fundamentali tan-ne bis in idem protett bl-Artikolu 4 tas-Seba' Protokoll tal-Konvenzjoni u, abbazi tal-istess konsiderazzjonijiet, tikkonsidra dan l-ewwel aggravju tal-attur bħala fondat in kwantu l-akkuza tal-fatt jew tal-ghemil li hu soġġett għal multi amministrattivi ingenti u l-imghaxxijiet relattivi tikkwalifika bħala criminal charge, bir-risultat li l-proceduri kriminali gudizzarji għall-istess nuqqasijiet u għall-istess perijodi huma vjolattivi tal-artikolu fuq citat."

The last line is immensely important because it appears that the Constitutional Court is endorsing the view that even punitive interest must be considered a 'criminal charge' within the meaning of the ECHR.

On the Issue of Proportionality

This is the most important part of the judgment. The ramifications of this part of the judgment are very far reaching. In brief, the Constitutional Court concluded that the penalty system exceeded what was reasonable and proportionate. The Court found that the Maltese legislator had exceeded its wide margin of appreciation; an excessive burden had been placed on the Maltese taxpayer. The Court referred extensively to a judgment of the ECHR cited by the taxpayer (the one in *Mamidakis v. Greece*) as well as to the CJEU decision in *Gasus Dosier*; tax measures must conform to value of proportionality. The Constitutional disagreed with the Court of First Instance's analysis of the penalty regime. Referring to the exorbitant amount of the tax penalties (tax penalties in excess of EUR260,000 with respect to endangered tax of EUR180,000), it concluded that administrative penalties (late payment penalties, especially) were clearly disproportionate. An extract from the judgment follows:

"58. Fid-dawl tal-premess din il-Qorti hi tal-fehma li l-multi amministrattivi, partikolarment il-late payment penalties, apparti milli huma sproporzjonati għall-ghan tagħhom li jassikuraw il-gbir tax-taxxa, affettwaw lill-attur b'mod li ma jistax jadempixxi obbligi finanzjarji assunti minnu fil-konfront ta' terzi, inkluz id-Direttur, peress li jirrizultaw ta' xkiel serju sabiex jimmexxiel u jbiegħ ir-restaurant u jissalda l-pozizzjoni tiegħu mal-istess Direttur. Għalhekk jirrizulta car li, fic-cirkostanzi, l-impozizzjoni tal-multi u l-imghax fuqhom, imposti fuq il-kumpanija Allegro Andante Limited, għall-perjodu li jestendi bejn Settembru 2000 u Jannar 2009 qed jittgħu fuq l-attur personalment u fuq l-imsemmija kumpanija gestita minnu piz ecessiv u sproporzjonat."

59. Inoltre, il-fatt li l-attur ma bbenefikax mill-iskemi intizi sabiex jirriducu l-multi sostanzjalment ma jimmilitax kontra l-konkluzjoni premessa, stante li l-problema tal-likwidita' tiegħu setgħet tittaffa sostanzjalment biss bil-bejgħ tar-restaurant. Mill-provi jirrizulta li l-attur kien applika għal xi whud mill-iskemi applikabbli għalih, izda minhabba l-problema tal-likwidita' ma setax juzufuwxix minnhom."

60. Għalhekk, tenut kont tal-fatt li dawn il-multi kif komputati huma vjolattivi tal-principju tal-proporzjonalita' fl-ambitu tal-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni peress li jaffettwaw kwazi l-propjeta' kollha tal-attur, partikolarment dawk relattivi għall-imsemmija kumpanija din il-Qorti tikkonsidra li f'dan il-kaz ir-rimedju għandu jkun dak li għall-perjodu li jestendi mill-1 ta' Jannar 1999 sal-1 ta' Jannar 2009 il-multi amministrattivi kemm fir-rigward tad-dhul tiegħu mill-professjoni kif ukoll fir-rigward tal-kumpaniji tiegħu għandhom jigu ridotti għar-rati viginti mill-1 ta' Jannar 2009 'il quddiem."

It must be emphasized that the Constitutional Court was not only critical of late payment penalties but was critical of the rules relating to interest too. In fact, paragraphs 58 and 67 refer to a mitigation of both penalties and interest.

Court's Order

The Appellate Court decided as follows:

- (a) The PM was non-suited (upholding a small section of the AG's appeal);
- (b) The Court upheld Taxpayer's appeal finding that:
 - There had been a violation of the non bis in idem rule and, contrary to the First Court's conclusions, ALL judgments of the Criminal Courts had to be annulled. For the purposes of the ECHR, administrative penalties fell within the definition of 'criminal charge';
 - There had been a violation of the right to property. It over-turned the judgment of the Court of First Instance where it had found that the penalty system did not infringe the right to property;
 - Tax penalties imposed had to be mitigated. It ordered that tax penalties calculated in terms of the rules contemplated between 1999-2009 had to be re-computed in terms of the favourable rules introduced in 2009 (providing for 'controlled' rates incorporating capping);
 - The Court ordered a communication of its judgment to Parliament.

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

Joined Cases C-217/15 and C-350/15,

Massimo Orsi (C-217/15),

Luciano Baldetti (C-350/15),

The CJEU held that Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation which permits criminal proceedings to be brought for non-payment of value added tax, after the imposition of a definitive tax penalty with respect to the same act or omission, where that penalty was imposed on a company with legal personality, while those criminal proceedings were brought against a natural person.

Case C-317/15 X v Staatssecretaris van Financiën

The CJEU held that Article 64(1) TFEU must be interpreted as applying to national legislation which imposes a restriction on the movements of capital, even where that restriction can also be applied to situations which have nothing to do with direct investment, establishment, the provision of financial services or the admission of securities to capital markets.

The opening of a securities account by a resident of a Member State with a banking institution outside the European Union comes within the concept of a movement of capital involving the provision of financial services, within the meaning of Article 64(1) TFEU.

The possibility, provided for in Article 64(1) TFEU, for Member States to apply restrictions on capital movements involving the provision of financial services also applies to restrictions which, like the extended recovery period at issue in the case, are not related to either the provider of the services or the conditions and mechanisms of the provision of services.

Case C-21/16 Euro Tyre BV — Sucursal em Portugal v Autoridade Tributária e Aduaneira

The CJEU held that Article 131 and Article 138(1) of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as precluding the tax authority of a Member State from refusing to exempt an intra-Community supply from value added tax on the sole ground that, at the time of that supply, the purchaser domiciled in the territory of the Member State of destination and who was in possession of a valid identification number for the purposes of value added tax in that Member State is neither registered in the Value Added Tax Information Exchange System nor comes under a system of taxation on intra-Community acquisitions of goods, where there is no sound evidence pointing to the existence of fraud and it is established that the basic conditions of the exemption are fulfilled. In that case, Article 138(1) of that directive, interpreted in the light of the principle of proportionality, also precludes such refusal where the vendor was aware of the circumstances of the situation of the purchaser with regard to the application of value added tax and was convinced that subsequently the purchaser would be registered as an intra-Community operator with retroactive effect.

Case C-390/15 Rzecznik Praw Obywatelskich (RPO) Marszałek Sejmu Rzeczypospolitej Polskiej, Prokurator Generalny

The CJEU held that Article 98(2) of Directive 2006/112 as amended, read in conjunction with point 6 of Annex III thereto, which has the effect of ruling out the possibility for the Member States of applying a reduced rate of VAT to the supply of digital books electronically, while permitting them to apply a reduced rate of VAT to the supply of digital books on all physical means of support, does not infringe the principle of equal treatment as set out in Article 20 of the Charter.

Case C-448/15 Belgische Staat v Wereldhave Belgium Comm. VA, Wereldhave International NV, Wereldhave NV

The CJEU held that Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States is not applicable to a dispute concerning withholding tax levied in Belgium on the profits distributed by a subsidiary to its parent company where the latter is a Netherlands collective investment undertaking that makes use of the zero rate of corporation tax.

An extract from the judgment is being reproduced hereunder:

“37. Directive 90/435 is intended to avoid double taxation on the distribution of dividends between subsidiaries and parent companies with residence in different Member States, which is deemed to hinder the creation of undertakings or the grouping together of companies on a Community scale. According to the first and third recitals of the directive, (16) read together, in order to facilitate this grouping together of companies, it is necessary to remove ‘restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States’ which discriminate against or ‘disadvantage’ relationships between parent companies and subsidiaries which are not resident in the same Member State.

38. To that end, two particular types of action are to be taken under Directive 90/435. First, the State of the parent company must either refrain from taxing profits received from its subsidiary, or tax such profits ‘while authorising the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits’. (17) Secondly, the directive exempts profits or dividends distributed by a subsidiary to its parent company from withholding tax, provided certain conditions are met. (18) The second of these provisions is at the heart of the dispute in the main proceedings.

39. This ‘common system’ (19) does not apply in every case or to all parent/subsidiary relationships. The scope of Directive 90/435 is limited by the definition (in Article 2) of which ‘compan[ies] of a Member State’ it affects. Specifically, it lays down a series of mandatory conditions which must be met in order to qualify for that designation, which include the company being ‘subject to one of the following taxes, without the possibility of an option or of being exempt: ... vennootschapsbelasting in the Netherlands ...’ (Article 2(c)).

40. The dispute arises because the parent companies in the main proceedings pay corporation tax (vennootschapsbelasting) at a zero rate in the Netherlands. Does this mean that they are ‘exempt’ from payment of the tax in their State of residence? If so, the application of Article 2(c) of Directive 90/435 would automatically mean that the system established in that directive does not affect this case, since that provision requires not only that the company be subject to corporation tax but also that it not be exempt. (20)

41. The argument put by the appellants in the main proceedings is that the mere fact that they are taxable persons is enough to satisfy the requirement in question. Taxability does not necessarily require actual levying of the tax and it still exists even if there is also an exemption or taxation at a reduced rate.

42. The appellants’ approach might have been a valid one if Article 2(c) of Directive 90/435 had mentioned only taxability. That is not the case though: the provision introduces a positive requirement (being subject to tax) and a further negative one (not being able to rely on an exemption), which must both be met at the same time. It is significant that the arguments made by the appellants focus on taxability, almost completely to the exclusion of exemption. (21) Exemption implies that, despite the fact that the taxable event has occurred (in other words, taxability), no payment of the relevant tax is required as the legislature has deemed fit to release a particular class of companies from the obligation to pay the tax.

43. As I see it, when Netherlands tax law makes certain bodies (in this case CIUs) subject to corporation tax and then immediately provides, in abstracto, that they should pay at a zero rate, it is in fact granting them an exemption from the tax burden. By doing so, it is removing them from the scope of Directive 90/435.

44. I fail to see that there are any solid grounds for disputing this assessment. By definition, a 'zero rate' of corporation tax is equivalent to a complete absence of tax, in other words, a full exemption. Where this outcome has been achieved by means of an express legal provision, which establishes permanently and in advance that it is the case for a certain class of bodies, irrespective of the profits received, I think it is incontrovertible that this is a true exemption from the tax, within the meaning of Article 2(c) of Directive 90/435.

45. A further line of reasoning confirms that the Netherlands companies involved in this case fall outside the scope of Directive 90/435. As I have already mentioned, that directive seeks to prevent two Member States both levying the same type of tax (on the profits of companies) in the context of the relationships between parent companies and subsidiaries. As the other participants in the proceedings have argued, it is precisely in order to achieve this aim that Directive 90/435 does not apply to bodies that are not subject to, or are exempt from, the tax. Both an absence of taxability and a total exemption of their income (in this case investment income) remove the risk that a company to which either of these scenarios applies will be charged corporation tax twice, so that the need to apply the common system under the directive disappears. (22)

46. The Commission's observations recount how, at the meeting of the Council on 11 June 1990, prior to the adoption of Directive 90/435, several statements, intended to be included in the minutes, were prepared at the request of different governments, which expressly excluded certain classes of entity (including Netherlands CIUs) from the scope of the directive. (23) Although these statements are not binding, they are still of interest from an interpretative point of view. Although the proposals did not form part of the final text, this was not because their content was rejected but because of the certainty that the wording of Article 2(c), in so far as it related to exemption from tax, itself covered those exclusions.

47. In conclusion, Directive 90/435 is not applicable to a situation of the kind that is at issue in the main proceedings, in view of the fact that the parent companies cannot be considered 'companies of a Member State' within the meaning of Article 2(c) of the directive. It is therefore not necessary to assess whether there is a conflict between the directive and the Belgian legislation introducing withholding at source of corporation tax (at the rate of 5%) on dividends distributed by the subsidiary to its parent companies."

Case C-14/16 Euro Park Service, having assumed the rights and obligations of SCI Cairnbulg Nanteuil, v Ministère des Finances et des Comptes publics

The CJEU held that In so far as Article 11(1)(a) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States does not carry out exhaustive harmonisation, EU law allows for the assessment of the compatibility of national legislation, such as that at issue in the main proceedings, in the light of primary law, where that legislation was adopted to transpose into national law the option provided for in that provision.

The CJEU held that Article 49 TFEU and Article 11(1)(a) of Directive 90/434 must be interpreted as precluding national legislation which, in the case of a cross-border merger, makes the granting of the tax advantages applicable to such an operation under that directive subject to a process of prior approval under which, in order to obtain that approval, the taxpayer must show that the operation concerned is justified for commercial reasons, that it does not have as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance and that its terms make it possible for the capital gains deferred for tax purposes to be taxed in the future, whereas in the case of a national merger such a deferral is granted without the taxpayer being made subject to such a process.

Case C-211/16 Bimotor SpA contro Agenzia delle Entrate – Direzione Provinciale II di Torino

This VAT case is only available in Italian and French. The CJEU held that Member states were free to create their own procedures relating to payment of excess credit but national rules must respect the values of proportionality and fiscal neutrality.

Case C-37/16 Minister Finansów v Stowarzyszenie Artystów Wykonawców Utworów Muzycznych i Słowno-Muzycznych SAWP (SAWP)

The CJEU held that the VAT Directive must be interpreted as meaning that holders of reproduction rights do not make a supply of services, within the meaning of the directive, to producers and importers of blank media and of recording and reproduction devices on whom organisations collectively managing copyright and related rights levy on behalf of those rightholders, but in their own name, fees in respect of the sale of those devices and media.

Case C-28/16 MVM Magyar Villamos Művek Zrt. V Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság

CJEU held that the VAT directive must be interpreted as meaning that, in so far as the involvement of a holding company, in the management of its subsidiaries, where it has charged those subsidiaries neither for the cost of the services procured in the interest of the group of companies as a whole or in the interest of certain of its subsidiaries, nor for the corresponding VAT, does not constitute an 'economic activity', within the meaning of that directive, such a holding company does not have the right to deduct input VAT paid in respect of those services in so far as those services relate to transactions falling outside the scope of that directive.

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