



MALTA TAX LAW UPDATE

Update 25

EDITOR'S NOTE

A number of important local judgments have been delivered this quarter. From a practical perspective, the Constitutional Court's July judgment in the Angelo Zahra case (the second Zahra case; the VAT case) is very important because it confirms that the 'tax non bis in idem argument' applies to prosecutions for misappropriation of tax instituted under the Criminal Code. Whilst all issues relating to the non bis in idem argument should have been settled, the resolution of some other topical issues has been merely postponed.

In *Oliver Agius v. L-Onorevoli Prim' Ministru* the Constitutional Court refused to express itself with respect to the legality of provisions in the Income Tax Management Act providing for the indefinite suspension of prescription. Similarly, in the *Network Enterprises Ltd* case the Court refrained from confirming the illegality of articles restricting taxpayers' right to bring fresh evidence on appeal.

Meanwhile, the Court of Appeal continued to apply provisions dealing with vicarious responsibility for VAT rather strictly. The tax authorities won a couple of important cases on the merits. Nonetheless, taxpayers appealing judgments over assessments to Duty on Documents continue to register a good success rate.

On 21 June 2017 the EU Commission published a Proposal for a Directive amending Directive 2011/16/EU. The proposed amendments provide for mandatory disclosure of aggressive tax planning arrangements. The proposed measures are intended to provide tax authorities with information relating to existing potentially aggressive tax schemes acting as an early warning system. Arrangements must be reported if they possess certain 'hallmarks'.

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1. LEGISLATIVE CHANGES

1 Legislative Changes

1.1 Acts of Parliament

None.

1.2 Legal Notices

L.N. 175 of 2017 INCOME TAX ACT (CAP. 123) Deductions and Tax Credits (Relevant Qualifications for Industry) Rules, 2017

Legal Notice 175 provides for a special tax credit equivalent to 70% of study costs. It is available by way of deduction of chargeable income (subject to being carried forward from year to year). The tax credit applies to persons falling under the definition of 'student' (a term linked to 'relevant course', a term which is, in turn linked to the capitalised term 'relevant qualification' (defined as a qualification approved by the Minister). Compliance obligations apply. LN. 75 incorporates a 2020 sunset clause.

L.N.187 of 2017 Duty on Documents and Transfers Act (Cap. 364) Duty on Transfers (Exemption) (Amendment No. 2) Order, 2017

The date of application of the reduced rate of duty of 2.5% as been extended to 1st October 2017.

L.N. 188 of 2017 INCOME TAX ACT (CAP. 123) Deduction (Income from Employment) (Amendment No. 2) Rules, 2017

The deduction available under the main rules has been increased from €9,450 to €9,500.

2 Bills

None that we are aware of.

3 Judicial Decisions

3.1 Judgments of the ART

Rikors Nru. 78/12VG Peter u Simone konjugi Calamatta Vs Direttur Generali (Taxxi Interni)

The case above was an appeal from an assessment to duty. The ART upheld the appeal because it transpired that the Revenue's architect had based his valuation on a number of wrong assumptions (that the size and specifications of the apartment that had been sold were the same as those of an apartment that sold at a higher value).

Rikors Nru. 203/12VG Benjamin Curmi Vs Direttur Generali (Taxxi Interni) qabel Kummissarju tat-Taxxi Interni

The ART upheld this assessment to duty because it held that the Revenue's architect had over-stated the property's potential.

Rikors Nru. 56/12VG XXX Vs Kummissarju tat-Taxxa fuq il-Valur Mizjud

Taxpayer, a director of an insolvent limited liability company filed an appeal to the ART requesting the ART to impugn an executive title obtained by the VAT Department against taxpayer in his personal capacity. The ART held that:

- (a) Legally, the ART did not have the authority to determine whether the underlying tax debt had been established on the basis of a judgment that was in breach of the right to a fair hearing;
- (b) Contestations over joint and severally liability relating to demand notes could be submitted to the ART via the reference appeal procedure.

Rikors Nru. 202/11VG Schembri & Sons Limited Vs Kummissarju tat-Taxxi

The ART rejected an appeal over an assessment to duty because it held that the Architect's valuation underlying the assessment was correct.

Rikors Nru. 61/12VG Spinola Development Company Limited Vs Direttur Generali (Taxxi Interni)

The ART cancelled an assessment to duty because it concluded that the Revenue's architect had based his valuation on a number of wrong assumptions.

3.2 Judgments of the First Hall Civil Court

Rikors numru 1028/2016LM Kummissarju tat-Taxxi vs. Marten Erik Jansson (K.I. 67397A)

The First Civil Court granted the Commissioner's request to enforce a tax debt due by Mr. Jansson to the Swedish tax authorities.

3.3 Judgments of the Constitutional Court

Rikors Kostituzzjonali numru 6/2016 JRM Oliver Agius v. L-Onorevoli Prim'Ministru, l-Avukat Ġenerali, il-Kummissarju tat-Taxxi

Agius contested the legality of Article 31(7) ITMA; an article that provides that, in certain cases, time-barring does not apply. Agius was served with an assessment that had been raised beyond the peremptory term and Agius raised the plea of time-barring. The Revenue contested Agius's plea on the basis that the assessment that had been raised referred to a case of material misreporting. According to the Revenue, Agius's case was a case that fell under 31 (7) ITMA.

Faced with this argument, Agius contended that 31 (7) ITMA was unconstitutional because it did not reconcile with the right to a fair hearing. According to Agius, statute-barring is a tenet of the right to a fair hearing and the exception contained in Article 31 (7) ITMA is incompatible with the Constitution. Agius raised this argument in the course of proceedings relating to a tax appeal which is still pending in front of the ART.

In brief, the Constitutional Court declared that Agius's Constitutional case was inadmissible, rejecting it. The Constitutional Court held that Agius had to wait for the outcome of his tax appeal. The Constitutional Court would express itself only after Agius exhausted all remedies available to him in terms of ordinary law.

Rikors numru 62/15 MH Angelo Zahra v. L-Onorevoli Prim Ministru, l-Avukat Generali, Kummissarju tat-Taxxi u l-Kummissarju tal-Pulizija

This case is not to be confused with the first Zahra case (the 2015 case, the leading case on non bis in idem), a case involving FSS. In the first Zahra case, the Constitutional Court had annulled a number of judgments of the Criminal Courts (which had not yet been served) on the basis that the facts punished by the judgments of the criminal courts had already been punished by a series of administrative penalties. The first Zahra case had spared Zahra an effective prison term.

The second judgment (the 2017 case) referred to Mr. Zahra's problems with the VAT Department. Because of his failures to abide by a number of obligations under the VAT Act, Zahra was punished with hefty administrative penalties. Subsequently, for the same facts previously punished by the administrative penalties he was prosecuted criminally under the Criminal Code. The Court of Magistrates acting as a Court of Criminal Inquiry (Kumpilazzjoni) had held that there was enough evidence to prosecute Zahra for misappropriation. Zahra was charged for misappropriation and found guilty. Zahra was given a term within which to settle the tax due but he missed the deadline and was sentenced to an effective prison term of 13 months which he served. In the course of the proceedings in front of the criminal courts he did not raise the issue of non bis in idem. In the VAT case, Zahra raised the non bis in idem argument several years after he had served his effective prison term. Zahra based his Constitutional case on Article 4 of the 7th Protocol ECHR (non bis in idem) and Article 5 ECHR (right to liberty).

By the time Zahra filed his second Constitutional Case, the Constitutional Court had delivered a number of judgments holding that the legal system on which Mr. Zahra's conviction had been based was unconstitutional. The issue with the second Zahra case was that, unlike other successful cases, this case had been instituted ex post facto (after and not before, the effective prison term was served). Zahra's second case was different from previous cases because of another reason; unlike previous cases which involved prosecutions undertaken in terms of special provisions in tax laws (Vat Act and Income Tax Management Act), the second Zahra case involved a prosecution undertaken in terms of the Criminal Code, a prosecution which comprised a Kumpilazzjoni and charges for misappropriation.

Zahra won his second case both at first and second instance. In brief, the Courts found that the non bis in idem rule had been infringed. This judgment was an important win for the taxpayer because the Attorney General was maintaining that the Constitutional Court's previous tax judgments on non bis in idem did not apply to prosecutions filed for tax misappropriation under the Criminal Code. Had the Constitutional Court agreed with the Attorney General, the Commissioner would have begun filing his prosecutions under the Criminal Code eroding the practical significance of major wins at the Constitutional Court. An extract from the judgment follows:

"18. Fl-ewwel lok u in vena legali, din il-Qorti tirribadixxi li t-terminu "offence" fl-Artikolu 4 tas-Seba' Protocol ghandu jigi interpretat b'mod wiesa' fis-sens li jiggarrantixxi li persuna ma tigix processata darbtejn fuq "identical facts or facts which are substantially the same". B'din l-interpretazzjoni l-Qorti Ewropea riedet tassigura li d-dritt protett bl-artikolu in dizamina jkun interpretat u applikat b'mod li jkun "practical and effective, not theoretical and illusory." Dik il-Qorti tkompli tispjega hekk ir-ragunament li fuqha ibbazat l-osservazzjoni maghmula minnha... Fil-kaz odjern, din il-Qorti tosserva li n-nuqqas ta' hlas tat-taxxa minnu migbura u biex ex lege tigi mghoddija lill-Kummissarju tat-Taxxi, huwa l-bazi kemm tal-impozizzjoni tal-penali amministrattivi kif ukoll tar-reat meritu tal-proceduri kriminali, stante li apparti mill-vjolazzjonijiet tal- ligi fiskali, dan in-nuqqas tieghu wassal ghall-ezistenza tal-elementi materjali u intenzjonali sabiex jikkonfigura r-reat ta' approprijazzjoni indebita li tieghu huwa kien instab hati fil-proceduri kriminali. Ghalhekk dan huwa kaz car ta' pieni imposti fuqu a bazi ta' fatti identici.

22. Ghaldaqstant dan l-aggravju mhuwiex gustifikat u qed jigi respint."

Interestingly, even Zahra's claim relating to an imprisonment in flagrant denial of justice was upheld. The Constitutional Court held that, because the judgments of the criminal courts were based on double jeopardy, there had been a violation of Article 5 ECHR too. The second Zahra case is the only known tax case when a Court has found a violation of the right to liberty. Successful judgments under Article 5 ECHR are exceedingly rare. An extract from the judgment follows:

"27. Permezz ta' dan l-aggravju l-intimati jikkontestaw il-fatt illi l-ewwel Qorti sabet vjolazzjoni tal-Artikolu 5 tal-Konvenzjoni li jipprotegi l-jedd fundamentali tal-liberta' tal-individwu mill-interferenza ingusta u arbitrarja tal-istat. Jissenjalaw li fost l-eccezzjonijiet hemm elenkati l-paragrafu [c] tas-subinciz [1] li jaghti permess lill-istat li jcahhaad il-jedd tal-liberta' ta' persuna meta d-detenzjoni tkun saret fl-ezekuzzjoni ta' sentenza jew ordni ta' qorti kompetenti dwar reati kriminali li taghha dik il-persuna tkun instabet hatja.

28. L-intimati jissottomettu li ma hemmx dubju illi d-detenzjoni ta' Angelo Zahra kienet giet awtorizzata bil-ligi minn qorti kompetenti, madankollu detenzjoni wara sentenza kriminali xorta titqies li tkun bi ksur tal-Artikolu 5 jekk jintwera li fil-process kriminali jkun twettaq "a flagrant denial of justice". L-ewwel Qorti sabet illi l-prigunerija kienet wahda llegali ghaliex sabet ksur tal-Artikolu 5 tal-Konvenzjoni, izda huma jikkontendu illi in kwantu r-rikorrent ma sofra ebda ksur tal-Artikolu 4 tas-Seba' Protokol, ir-raguni moghtija mill-ewwel Qorti ghall-ksur tal- Artikolu 5 tal-Konvenzjoni taqa' wkoll.

29. Ir-rikorrent jilqa' ghal dan il-gravam billi jsostni illi sentenzi tal-qorti kriminali kienu bbazati fuq qafas legali leziv tad-drittijiet fundamentali u dan, jammonta ghal 'flagrant denial of justice ... manifestly contrary ... to the provisions of Article 6.'

30. Din il-Qorti taghmel referenza ghall-kunsiderazzjonijiet taghha taht l-ewwel aggravju tal-intimati, fejn ikkonfermat id-decizjoni tal-ewwel Qorti illi r-rikorrent kien fil-fatt sofra lezjoni tad-dritt fundamentali tieghu bazat fuq il-principju tan-ne bis in idem in kwantu hu kien gie sottopost ghal proceduri kriminali meta fil-fatt kienu gja gew imposti fuq multi amministrattivi severi u li kienu ghadhom pendenti. Ladarba l-Qorti sabet li l-proceduri kriminali mehuda kontra r-rikorrent kienu lezivi tad-drittijiet fundamentali tieghu, il-konsegwenzi kollha naxxenti mill-istess proceduri, jigifieri l-piena ta' habs moghtija fil-konfront tieghu u l-inkarcerazzjoni effettiva tieghu bejn it-18 ta' Dicembru 2009 u s-7 ta' Settembru 2010 sehhekk ukoll bi ksur tad-drittijiet fundamentali tieghu.

31. Kienet ghalhekk korretta l-ewwel Qorti meta sabet lezjoni tad-dritt tar-rikorrent taht l-Artikolu 5 tal-Konvenzjoni, in kwantu id-detenzjoni tieghu sehhet b'konsegwenza ta' proceduri kriminali li rrizultaw li kienu jivvjolaw l-Artikolu 4 tas-Seba' Protokoll tal-Konvenzjoni.

32. Ghaldaqstant dan l-aggravju mhuwiex gustifikat u qed jigi respint."

Regrettably, the remedies ordered by the Court were not as weighty as its legal conclusions. The Constitutional Court limited itself to erasing the judgments of the Criminal Courts (which had already been served) and financial compensation of only EUR2,000.

3.4 Judgments of the Court of Appeal

Rikors Numru 256/10 JZM Marie Therese, Richard Fenech u Mario Lino Fenech fil-kwalita` taghhom ta' eredi preżunti tal-mejjet Frank X. Fenech v. Kummissarju tat-Taxxa fuq il-Valur Miżjud

This case involved an attempt to rescind an executive title obtained in terms of VAT law. The heirs of a non-executive director of an insolvent company filed a case to impugn an executive title obtained against their late father. The heirs based their case on the argument that their late father was not vested with the management and control of the company. The First Court upheld the application holding that there was no joint and several liability with the insolvent company for non-payment of VAT. The First Court referred to 66 (5) VAT Act and the defences contemplated therein.

The Commissioner appealed this judgment. The Court of Appeal upheld the appeal revoking the decision of the first Court. The Court of Appeal held that taxpayers' case did not satisfy all the conditions contemplated in Article 66 (5) of the VAT Act. It transpired that the Court of Magistrates had previously found the late non-executive director guilty for VAT offences concerning the insolvent company. Furthermore, the Court of Appeal held that it had not seen evidence of good faith; to the contrary, the late non-executive director had signed a declaration of solvency when the company was clearly insolvent. The Court of Appeal confirmed the validity of the executive title.

Appell numru: 181/2011 Maurice Gruppetta (appellant) Vs Kummissarju tat-Taxxi Interni

This case was an appeal from a judgment of the ART. Taxpayer had claimed a capital gains tax exemption with respect to the transfer of a home to his estranged wife. The Commissioner held that taxpayer was not entitled to the tax exemption and the case went to the ART which agreed with the Commissioner. The ART had asked the Commissioner of Police to investigate the case.

Taxpayer appealed the ART's judgment repeating that the transfer of property fell plainly and squarely within the remit of 2 tax exemptions (i.e. 'own residence exemption' and the separation exemption). The Commissioner rebutted by arguing that taxpayer had availed himself of the tax exemption when he knew that he was not entitled to do so. The Commissioner held that taxpayer has misled the Notary publishing the deed of transfer. According to the Revenue, taxpayer had declared that he had transferred his own residence when, as a matter of fact, he had vacated the house over 18 years before the transfer. Furthermore, the separation exemption did not apply because taxpayer was not transferring property to his wife but was transferring the property to a third party applying the proceeds to settle a debt with his estranged spouse. The Court of Appeal endorsed the Commissioner's reasoning in full rejecting the Appeal.

Appell numru: 141/2013/1 Network Enterprises Ltd Vs Direttur Generali (Taxxa Fuq il-Valur Mizjud)

The company appealed a VAT assessment and the Commissioner raised a preliminary plea. Citing 48 (5) of the VAT Act, the Commissioner argued that the company should not be allowed to bring evidence on appeal. The Commissioner argued that because the company had failed to bring crucial evidence at investigation stage it should not be allowed to bring evidence at appeal stage. The ART held that Article 48 (5) of the VAT Act was incompatible with the right to a fair hearing and chose not to apply it. The Commissioner appealed on the basis that the ART was acting beyond the remit of its authority. The Commissioner argued that the ART could not decide not to apply a law which was in force. Taxpayer argued that the ART's decision was correct because the ART was faced with contradictory laws. Taxpayer justified the ART's decision on the basis that Article 48 (5) contradicted the Administrative Justice Act and the Constitution of Malta. The issue was one of implied repeal (Kutner vs Philips (1891), "[i]f ... the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later").

The Court of Appeal disagreed with taxpayer upholding the Commissioner's appeal. The Court of Appeal held that the ART did not have the legal authority to refuse to apply a legislative provision which was still part of the laws of Malta. Nonetheless, it only ordered a renvoi. Taxpayer is to provide the ART with a reasonable excuse justifying why crucial documentation had not been provided at investigation stage.

3.5 Judgments of the CJEU

Case C 386/16 'Toridas' UAB v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos

The CJEU held that:

1. Article 138(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, in circumstances such as those of the main proceedings, a supply of goods by a taxable person established in a first Member State is not exempt from value added tax under that provision where, prior to entering into that supply transaction, the person acquiring the goods, who is identified for value added tax purposes in a second Member State, informs the supplier that the goods will be resold immediately to a taxable person established in a third Member State, before he takes them out of the first Member State and transports them to that third taxable person, provided that that second supply has in fact been carried out and the goods have then been transported from the first Member State to the Member State of the third taxable person. The fact that the first person acquiring the goods is identified for value added tax purposes in a Member State other than that of the place of the first supply or that of the place of the final acquisition is not a criterion for classification of an intra-Community transaction or, in itself, evidence sufficient to show that a transaction is an intra-Community one.

2. For the purposes of interpreting Article 138(1) of Directive 2006/112, processing of the goods, in the course of a chain of two successive supplies, such as that at issue in the main proceedings, carried out on the instructions of the middleman acquiring the goods and before the goods are transported to the Member State of the person finally acquiring them, has no effect on the conditions for any exemption of the first supply where that processing takes place after the first supply.

C-591-15 The Gibraltar Betting and Gaming Association Limited v Commissioners for Her Majesty's Revenue and Customs

The CJEU held that Article 355(3) TFEU, in conjunction with Article 56 TFEU, is to be interpreted as meaning that the provision of services by operators established in Gibraltar to persons established in the United Kingdom constitutes, as a matter of EU law, a situation confined in all respects within a single Member State.

The interpretation of Article 355(3) TFEU, in conjunction with Article 56 TFEU, has no effect on the status of the territory of Gibraltar under international law, as it merely concludes that, since EU law is applicable to that territory as European territory for whose external relations a Member State, namely the United Kingdom, is responsible, the provision of services by operators established in Gibraltar to persons established in the United Kingdom constitutes, as a matter of EU law, a situation confined in all respects within a single Member State. That interpretation cannot be understood as undermining the separate and distinct status of Gibraltar.

C-20/16 Wolfram Bechtel, Marie-Laure Bechtel v Finanzamt Offenburg

The CJEU held that that Article 45 TFEU must be interpreted to the effect that it precludes legislation of a Member State in terms of which a taxpayer residing in that Member State and working for the public administration of another Member State may not deduct from the income tax basis of assessment in her Member State of residence the pension and health insurance contributions deducted from her wages in the Member State of employment, in contrast to comparable contributions paid to the social security fund of her Member State of residence, where, under the Convention for the avoidance of double taxation between the two Member States, the wages must not be taxed in the worker's Member State of residence and merely increase the tax rate to be applied to other income.

C 288/16 ‘L.Č.’ IK v Valsts ienemumu dienests

The CJEU held that Article 146(1)(e) of the VAT Directive must be interpreted as meaning that the exemption laid down in that provision does not apply to a supply of services relating to a transaction consisting in the transport of goods to a third country, where those services are not provided directly to the consignor or the consignee of those goods.

C 126/15 European Commission v Portuguese Republic

The CJEU held that, by providing that cigarettes released for consumption in a given year may no longer be marketed or sold to the public after the expiry of the time limit laid down in Article 27(a) of the Portaria No 1295/2007 do Ministério das Finanças e da Administração Pública (Decree No 1295/2007 of the Ministry for Finance and Public Administration), where there is no increase in the excise duty on those products taking effect the following year, the Portuguese Republic has failed to fulfil its obligations under Article 9, first paragraph of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC and the principle of proportionality.

C 74/16 Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe

The CJEU held that a tax exemption to which a congregation belonging to the Catholic Church is entitled in respect of works on a building intended to be used for activities that do not have a strictly religious purpose, may fall under the prohibition in Article 107(1) TFEU if, and to the extent to which, those activities are economic, a matter which is for the referring court to determine.

C 254/16 Glencore Agriculture Hungary Kft., formerly Glencore Grain Hungary Kft., v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság

The CJEU held that EU law must be interpreted as precluding national legislation under which, where a tax investigation procedure is initiated by a tax authority and where a taxable person is fined for failure to cooperate, the date of the refund of overpaid value added tax may be delayed until the formal report on that investigation is delivered to the taxable person and the payment of default interest may be refused, even where the duration of the tax investigation procedure is excessive and cannot be attributed entirely to the conduct of the taxable person.

C 633/15 London Borough of Ealing v Commissioners for Her Majesty’s Revenue and Customs

The CJEU held that:

1. The second paragraph of Article 133 of the VAT Directive must be interpreted as not precluding the legislation of a Member State from providing that compliance with the condition laid down in point (d) of the first paragraph of Article 133 of that directive is a prerequisite for the grant of a VAT exemption to bodies governed by public law that supply services closely linked to sport or physical education, within the meaning of Article 132(1)(m) of that directive, even though, on the one hand, on 1 January 1989 that Member State did not apply VAT to all those supplies of services and, on the other, the supplies of services at issue were not exempted from VAT before the requirement of compliance with that condition was imposed.
2. The second paragraph of Article 133 of the VAT Directive must be interpreted as precluding national legislation where that legislation provides that compliance with the condition laid down in point (d) of the first paragraph of Article 133 of that directive is a prerequisite for the grant of a VAT exemption to non-profit making organisations governed by public law making supplies of services closely linked to sport or physical education, within the meaning of Article 132(1)(m) of that directive, but fails also to apply that condition to non-profit making organisations other than those governed by public law that make such supplies of services.

Case C 151/16 ‘Vakarų Baltijos laivų statykla’ UAB v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos

The CJEU held that Article 14(1)(c) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, must be interpreted as meaning that the exemption laid down by that provision applies to fuel used to sail a ship, without cargo, from a port of a Member State, in the present case that where that ship was built, to a port of another Member State in order to take on cargo to be transported to a port of a third Member State.

Article 14(1)(c) of Directive 2003/96 must be interpreted as precluding legislation of a Member State which excludes the application of the exemption laid down by that provision on the ground that the supply of energy products for a ship was carried out without complying with the formal requirements laid down by that legislation, even though that supply is in accordance with all the conditions for application laid down by that provision.

4. Other

4.1 Proposal for a Council Directive Amending Directive 2011/16/EU

The Proposal contemplates new transparency rules for intermediaries, contemplating mandatory reporting obligations. The Proposal is intended to provide tax authorities with information relating to potentially aggressive tax schemes creating an early warning system. Should the proposal pass, Member States will have to take the necessary measures to require intermediaries to file information with the competent tax authorities on reportable cross-border arrangements within five working days. Arrangements would have to be reported if they possess certain ‘hallmarks’. The proposal draws from the laws of countries that have already implemented similar measures (UK, Ireland and Portugal). If the proposal becomes law it will apply from 1 January 2019.

4.2 Guidance Note – Article 31D (Taxation of Rental Income)

The Inland Revenue Department has just published some clarifications relating to the application of Article 31D providing for a reduced rate of tax on rental income. The Guidance Note is being reproduced hereunder:

- ‘a) The final tax rate of 15% can be applied on receipts of rent, including ground rents derived from the granting of an emphyteutical concession in respect of a residential tenement and a commercial tenement
- b) The final tax rate of 15% can be applied both on receipts of rental income that are chargeable to tax either under Article 4(1)(a) of the Income Tax Act or Article 4(1)(e) of the Income Tax Act
- c) A “tenement” within the meaning of Article 31D is considered to include all types of immovable property (e.g. undeveloped land, roof tops, etc.)
- d) Receipts derived from the charging or recharging of common costs in respect of a residential or commercial tenement, are not considered rental income derived from the letting of property for the purpose of Article 31D.
- e) Where a person who opts to be taxed under Article 31D of the Income Tax Act would have otherwise claimed a deduction for wear and tear against the income in respect of which the 15% final tax rate is being availed of, it shall be deemed that such person has claimed the said deduction for wear and tear even in the year in which the 15% final tax rate is availed of.

Accordingly, when such person is required to calculate a balancing charge or balancing allowance in terms of Article 24 of the Income Tax Act in respect of the plant and machinery or the industrial building, as the case may be, such person must add to the total depreciation referred to in item (ii) of Article 24(1) of the Income Tax Act, the deduction for wear and tear which he is deemed to have claimed in terms of the previous paragraph.’

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