



MALTA
INSTITUTE
OF TAXATION



MALTESE TAX LAW UPDATE

(Update 33)







EDITOR'S NOTE

Tax Law Update (Update 33)

Editor's Note

Article 22A ITA providing for tax consolidation has just been implemented and remains the most important legislative development occurring in this quarter. Our Courts have delivered around 20 judgments but, with the exception of an important case involving ranking of creditors, none of them seems to resonate. The most interesting European Court judgment noticed this quarter is that in the case of Bjarni Armannsson v. Iceland (Application no. 72098/14) involving double jeopardy.

A number of authoritative texts have been published. The Revenue's guidance note on the remittance basis of taxation is extremely important because it takes a position with respect to a number of fundamental issues. Meanwhile, the EU Council's Recommendation on the 2019 National Reform Programme of Malta and delivering a Council opinion on the 2019 Stability Programme of Malta refers the Maltese tax system singling out the royalty exemption, NID, and the remittance basis of taxation, amongst others. Lastly, the OECD/G20 put forward new proposals relating to the taxation of the digital economy.

Robert Attard

12/7/19

Act XV of 2019 – Malta Free Zones Act, 2019

A relevant tax rule is contained in Article 16 of the Act. Article 16 prescribes that notwithstanding any provisions of the Income Tax Act or of any other law, incentives, benefits and grants in terms of schemes that may be made applicable by the Authority to give effect to the Act, shall be exempt from tax in the hands of the relevant beneficiary, provided that such aid does not take the form of income substitution.

The Minister may make regulations to lay down the conditions relating to accounting, record keeping and reporting to the Authority for the enjoyment of the incentives, benefits and grants. Where any benefit provided by the Act or by regulations made thereunder is due to a partnership or other undertaking and, in accordance with the Income Tax Act or any other applicable law, the partners or members thereof and not the partnership or undertaking itself are assessable to tax on any income of such partnership or undertaking, any benefit provided in terms of this Act to a partnership or undertaking shall be due to the partners or members of any such partnership or undertaking.

L.N. 110 of 2019 INCOME TAX ACT (CAP. 123) Consolidated Group (Income Tax) Rules, 2019

L.N. 110 implements Article 22A ITA (passed by Act III of 2013) creating rules:

- (a) allowing bodies of persons under common ownership to elect to compute and bring to charge their chargeable income or losses on a collective basis; and
- (b) to comply with the provisions of the ITA as if they are a single body of persons.

Conditions Regulating Eligibility to Fiscal Unity

Rule 3 articulates the concept of a fiscal unit. Rule 3 prescribes that a parent company may make an election in order for itself and its 95% subsidiary to form a fiscal unit. Rule 3 (5) prescribes that No company shall form part of more than one fiscal unit at any one time.

Definitions of the capitilised terms 'parent company' and 'company' are contained in Rule 2.

The term "parent company" means a company that holds shares in another company ('the subsidiary company') that, in the year prior to the year of assessment in which an election is made, meets any two of the following conditions:

- (a) the parent company holds at least 95% of the voting rights in the subsidiary company;
- (b) the parent company is beneficially entitled to at least 95% of any profits available for distribution to the ordinary shareholders of the subsidiary company;
- (c) the parent company would be beneficially entitled to at least 95% of any assets of the subsidiary company available for distribution to its ordinary shareholders on a winding up.

Rule 2 defines the term 'company' by cross-referring to Article 2 (1) ITA specifying that the term is taken to INCLUDE:

- (a) a trust arrangement whose trustee has made an election in terms of article 27D(1)(a) of the Act; and
- (b) a foundation as defined in the Foundations (Income S.L. 123.114 Tax) Regulations,

and EXCLUDE:

- (i) a foundation whose administrators have made an election in terms of rule 4 of the Foundations (Income Tax) Rules;
- (ii) a securitisation vehicle in terms of the Securitisation Act; and
- (iii) a finance leasing company as defined in the Finance Leasing Rules.

A proviso in Rule 2 defines 95% subsidiary as a subsidiary company of a parent company that meets any two of the conditions set out in paragraphs (a) to (c) of the definition above.

A parent company and its 95% subsidiary may make an election to be treated as a fiscal unit if, besides falling under the relevant definitions, they have accounting periods beginning and ending on the same dates.

A special requirement is contemplated for a 95% subsidiary which is not a 100% subsidiary - an election shall also require the approval of the holders of the equity shares which are not owned, directly or indirectly, by the parent company. For a definition of '100% subsidiary', one must refer to the second proviso in the definition of 'parent company' where a 100 % subsidiary exists when both of the satisfied conditions are satisfied at a percentage of 100%.

Rule 3 (2) begins to speak of the concept of transparent subsidiary, a term that becomes relevant in Rule 3 (4) providing that where a parent company has made an election in respect of its 95% subsidiary and the 95% subsidiary is itself a parent company of one or more transparent subsidiaries, the 95% subsidiary and its transparent subsidiaries shall join the fiscal unit of the parent company of the said 95% subsidiary.

Balances to be treated as Balances of the Principal Taxpayer

Rules 4 and 5 regulate joining and exiting a fiscal unit. Rule 4 regulates balances of items allowed to be carried forward and balances in the tax accounts.

Rule 4 (1) prescribes that where a 95% subsidiary joins a fiscal unit -

- (a) the balance of any item allowed to be carried forward or any other tax credits that may be carried forward in terms of any other law, and
- (b) the balance of any profits allocated to the tax accounts, excluding the untaxed account, of the 95% subsidiary existing at the end of the basis year preceding that with regard to which the election for the 95% subsidiary to join the fiscal unit becomes effective, shall be considered to be a balance of the principal taxpayer as from the basis year with regard to which the election for the 95% subsidiary to join the fiscal unit becomes effective.

In the case of a 95% subsidiary that is not a 100% subsidiary the aggregation is subject to the approval of the equity shares that are not owned by the parent company.

Chargeable Income of the Fiscal Unit

Rule 6 regulates how the chargeable income of a fiscal unit is determined. Rule 6 prescribes that the chargeable income of a fiscal unit for a year of assessment shall be computed as if such income was derived by the principal taxpayer and shall be chargeable to tax in the name of the principal taxpayer at the rate/s applicable thereto. More detailed rules are contained in the proviso to Rule 6 (1) which provides that:

- (a) all transactions occurring between two or more companies forming part of the fiscal unit (including any receipts, payments, revenues, expenses, transfers of assets, distributions, accruals or otherwise) in the year preceding the year of assessment are classified as 'ignored transactions' and are deemed not to have occurred. Two exceptions to the ignored transaction rule apply:
- (i) transactions falling within the purport of article 5A of the Act or transactions involving the transfer of shares in a property company are not treated as ignored transactions;
 - (ii) Dividends distributed by a transparent subsidiary to its parent company out of taxed profits that it derived prior to it becoming a transparent subsidiary shall not be considered to be an ignored transaction and shall be deemed to be dividend income derived by the principal taxpayer of the fiscal unit of which the transparent subsidiary forms part.
- (b) All income derived by companies forming part of the fiscal unit in the year preceding the year of assessment and which are not ignored transactions shall be deemed to be derived by the principal taxpayer. Any such income shall retain the same character and shall be deemed to have been derived from the same source and the same country and be allocated to the same tax account as if the said income was received by the said principal taxpayer.
- (c) Subject to certain conditions, all outgoings and expenses incurred by companies forming part of the fiscal unit in the year preceding the year of assessment and which are not ignored transactions shall be deemed to be incurred by the principal taxpayer.
- (d) Any industrial building, structure or plant and machinery used or employed in acquiring income by a company forming part of the fiscal unit shall be deemed to be so used or employed by the principal taxpayer in acquiring the said income. For the purposes of compliance obligations stemming from the balancing statement rules, transfers of assets from and to members of the fiscal unit are disregarded.
- (e) Subject to substance requirements, any income or gains derived by a transparent subsidiary that is not resident in Malta shall be deemed to be attributable to a permanent establishment of the principal taxpayer situated outside Malta.
- (f) Where any income or gains are derived by a transparent subsidiary resident in Malta, or a transparent subsidiary not resident in Malta derives income or gains arising in Malta and the principal taxpayer is a person to whom the remittance basis of taxation applies all of the income and gains derived by the transparent subsidiary resident in Malta is deemed to arise in Malta. In addition, all of the income and gains arising in Malta of the transparent subsidiary which is not resident in Malta is attributable to the principal taxpayer. Nonetheless, when the transparent subsidiary resident in Malta is a person subject to remittance basis of taxation, the income and gains attributable to the principal taxpayer shall be such income and gains as arise in Malta and such income as arises outside Malta but which is received in Malta;
- (g) Any interest held by a transparent subsidiary in any body of persons not forming part of the fiscal unit shall be deemed to be held directly by the principal taxpayer;
- (h) For the purposes of the NID Rules, the risk capital of the principal taxpayer is calculated in a particular way.
- (i) Rule 6 (2) regulates members of a fiscal unit availing themselves of the refundable tax credit system. Rule 6 (2) prescribes that when the refundable tax credit system applies to a shareholder of a company that forms part of a fiscal unit upon a receipt of a dividend from such company and such shareholder is specifically empowered to consolidate its results pursuant to Maltese law, the chargeable income of the fiscal unit shall be fully subject to the standard rate applicable to the principal taxpayer determined by deducting from it that resulting from dividing the total amounts claimable by all members of the fiscal unit and, or persons entitled to receive distributions from the principal taxpayer in terms of the provisions of the relevant sub-articles, by the chargeable income of the fiscal unit. Logically, Rule 6 (3) confirms that tax paid in terms of 6 (2) is not refundable.

Double Tax Relief

Rule 7 regulates issues relating to double tax relief prescribing that any foreign tax suffered by a company forming part of the fiscal unit shall be deemed to have been incurred by the principal taxpayer, and where evidence of such foreign tax is in the name of a company forming part of the fiscal unit, it shall be deemed that such evidence is in the name of the principal taxpayer.

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Rule 8 explains how Tax Consolidation dovetails with the Tax Accounting Rules. The principal taxpayer shall be required to allocate profits attributable to it in terms of the rules to the same tax accounts and in the same manner as it otherwise would have, had it derived those profits directly. The distributable profits of the transparent subsidiaries shall be allocated to the untaxed account. Immovable property situated in Malta that is owned by a company forming part of the fiscal unit is deemed to be owned by the principal taxpayer. Rule 8 (3) prescribes that the principal taxpayer may make an election in terms of Rule 9 TAR for the rule to apply so as to include also all the other companies forming part of the fiscal unit.

Exclusion of Investment Income Provisions

Rule 9 prescribes that the investment income provisions shall not apply to payments of investment income where the recipient and the payor are companies forming part of the same fiscal unit.

Compliance Obligations

Rule 11 imposes special requirements relating to accounts that must be kept when the option is availed of. Rule 12 provides for the compliance obligations of the fiscal unit. A special tax return applicable to fiscal units is expected to be published soon. Subject to conditions, Rule 12 (2) prescribes that where a company other than the principal taxpayer forms part of a fiscal unit, such company shall be exempted from the requirement to file a self-assessment and an income tax return. Liability to tax between principal taxpayers and 100% transparent subsidiaries is joint and several but, in certain cases, may be apportioned.

The Anti-Abuse Measure

A special anti-avoidance provision is contemplated in Rule 13 which is split in 3 components:

- (a) The Rule in 13 (1) providing that when the tax payable by a principal taxpayer is lower than 95% of the aggregate of the tax that would have been payable by all the members of the fiscal unit, there is deemed to be an advance to shareholders falling under the purport of Article 46 ITA ('the deemed advance'). The item treated as an advance to a shareholder is an amount equal to the difference between the tax payable by all members of the fiscal unit and the tax payable by the principal taxpayer divided by 35%. In addition, a proviso to 13 (1) prescribes that when a shareholder is a person who is not an individual and is owned by a person who is both ordinarily resident and domiciled in Malta or a trust with beneficiaries that are both ordinarily resident and domiciled in Malta, shareholders are treated as deemed beneficiaries.
- (b) The deemed advance is treated as a deemed untaxed dividend.
- (c) Tax on the advance is to be of 35%.

A generic anti-abuse provision is contemplated in Rule 13 (4).

L.N. 113 of 2019 INCOME TAX ACT (CAP. 123) Personal Retirement Scheme (Amendment) Rules, 2019

This LN substitutes references to the Special Funds (Regulation) Act with references to the Retirement Pensions Act. The definition of qualifying scheme has been changed. Schemes covered by the L.N. are:

- (a) in the case of an occupational retirement scheme, a scheme that is registered under the Retirement Pensions Act or any other law substituting that Act and, in the case of a long term contract of insurance issued by a licence holder, it provides for programmed withdrawal of arrangements as provided for in pension rules issued under the said Act or other law; and
- (b) it provides for the commencement of payment benefits to a qualifying individual on a date that is not earlier than the date on which the individual attains the age of 61 and not later than the date when the individual attains the age of 70, except in those cases where the scheme provides that the payment is made by reason of the permanent disability or death of the beneficiary; and
- (c) it satisfies such further conditions as the Commissioner may deem appropriate to impose.

The tax credit to which a qualifying individual is entitled in terms of article 57 of the Act is now 25% of the aggregate amount of the qualifying contributions that he makes in the year immediately preceding the year of assessment. Nonetheless, the tax credit for any year of assessment may not exceed €500.

SUBSIDIARY LEGISLATION 123.188 DOUBLE TAXATION RELIEF (TAXES ON INCOME) (THE PRINCIPALITY OF MONACO) ORDER

This L.N. transposes Malta's tax treaty with Monaco and is largely based on the OECD Model (the 'traditional' PE and residence definitions included). The Monegasque taxes covered are profit tax on commercial income levied from individual persons and profit tax levied from companies. The Treaty came into force on 16 May 2019.

Interesting articles include Article 1 (defining the term 'person' as including a collective investment scheme') and Articles 10 (Dividends), 11 (Interest) and 12 (Royalties) granting, in certain cases exclusive taxing rights to one of the contracting states. Given the nature of the jurisdiction the articles relating to Exchange of Information is bound to become relevant.

L.N. 116 of 2019 VALUE ADDED TAX ACT (CAP. 406) Value Added Tax (Refund to Non-Residents) (Amendment) Regulations, 2019

The LN puts forward a new definition of the term "non-resident traveller" defining the term as a traveller whose domicile or habitual residence is not situated within the Community. The minimum limit for repayment as shown on a single receipt has been decreased to €50 (previously the minimum limit used to be of €100).

L.N. 117 of 2019 DUTY ON DOCUMENTS AND TRANSFERS ACT (CAP. 364) Amendments to Subsidiary Legislation (Duty on Documents and Transfers Act) Order, 2019

The first part of this LN amends the Duty on Documents and Transfers Rules adding a proviso to Rule 9 (laying down a term for refund of duty) specifying that in the case of claims for refund of duty relating to a document declared to be null by a court the period of four years, or any other established period, shall start to run from the date on which the court judgment becomes a res judicata. Rule 10 of the providing for notification of promises of sale has been substituted. Rule 10 as amended provides for electronic submission. The amendments come into force on the 1st January 2019.

The second part of this LN amends the Duty on the Acquisition of the Second Immovable Property to be used as Sole Residence (Exemption) Order. The amendment removes from Rule 2 (e) the reference to the condition "in the case where the replacement property is acquired before transferring the replaced property" which must have caused confusion. This amendment came into force with effect from the 10th October 2017 (the date of entry into force of the original Order).

2.0 BILLS

None that we are aware of.

3. JUDICIAL DECISIONS

Rikors Nru.235-250/2011 XXX vs KUMMISSARJU TAT-TAXXI INTERNI (connected cases)

The merits of this set of 15 appeals to income tax assessments filed by two different taxpayers (business associates) were connected and, at this stage, the judgments only involved an evaluation of facts. The ART concluded that there was no reason why the assessments raised by the Revenue had to be cancelled. The ART rejected the appeals.

Rikors Nru. 172/11VG Rachele Buttigieg Vs Kummissarju tat-Taxxi

The ART agreed to reduce the quantum of an assessment to duty on documents and transfers on the grounds that the valuation reports the assessment was based on referred to a different date to the date when the property was transferred.

Rikors Nru. 6/12VG Victoria Zahra de Domenico Vs Kummissarju tat-Taxxi

The ART dismissed an appeal from duty on documents on the grounds that the appeal had been filed late. The ART referred to jurisprudence providing that the time limit within which to file an appeal is of a peremptory nature. The ART suggested that a late appeal is null regardless of whether the CfR waives his right to object to the filing of a late appeal.

Rikors Nru. 160/11VG C H Formosa Company Limited Vs Direttur Ġenerali (Taxxi Interni)

Whilst refuting an appeal from an assessment to duty, the ART used its power to give any directives it thought fit by increasing the assessment. The Art expressed serious doubts with respect to the accuracy of the consideration declared in the deed of transfers.

Rikors Nru. 218/11VG Jean Pierre Borg Vs Kummissarju tat-Taxxi

The ART dismissed an assessment to duty on documents and transfers because it disagreed with taxpayer's rendition of the facts in issue.

Rikors Nru. 96/13VG Lonoris Limited Vs Direttur Ġenerali (Taxxi Interni)

The ART dismissed an assessment to duty on the basis that the Government Architect's valuation was correct.

Rik. Gur. 1002/2018 RGM Kummissarju tat-Taxxi vs. Paolo Carlo Tavarelli

The First Hall acceded to the CfR's request to register a claim against a Maltese resident filed in terms of Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes. The claim referred to tax due in Belgium.

Rikors Numru 142/2018 SM Kummissarju tat-Taxxi vs. Millenium Arrow Limited (C 64154)

The First Hall acceded to the CfR's request to register a claim against a Maltese resident filed in terms of Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes. The claim referred to tax due in Italy.

Rikors Numru 273/18TA Il-Kummissarju tat-Taxxi vs Geokul Limited gia Headlong Limited (C60820)

The First Hall Civil Court acceded to the CFR's request to register an executive title against the company. The CFR's application had not been contested.

Rikors Maħluf Numru 840/2018 LM HSBC Bank Malta p.l.c. (C 3177) vs. Kummissarju tat-Taxxa fuq il-Valur Miżjud

Plaintiff sought to rescind an executive title obtained by the Commissioner for Revenue on the basis of an alleged right of preference. Both parties were creditors of a particular taxpayer and the case involved the issue of ranking. The Court held that, subject to droit de suite, the CfR's right of preference exists regardless of the registration of such a preference. Registration merely consolidates a pre-existing right. An extract from the judgment follows:

"Il-Qorti tal-Appell fid-deċiżjoni appena ċċitata kkonsidrat ukoll li l-artikolu 62 tal-Kapitolu 406 jgħid li ta' preferenza favur il-Kummissarju tat-Taxxa, indipendentement mill-eżistenza o meno ta' xi privileġġ. Intqal li f'dan il-każ, il-preferenza tal-Kummissarju tat-Taxxa mhix ġejja mill-privileġġ, u rreġistrazzjoni tal-privileġġ isservi biss biex tagħti lill-Kummissarju konvenut iddritt li jsegwi l-proprjetà anki meta din tkun f'idejn terzi. Jekk il-privileġġ ma jiġix reġistrat, il-Kummissarju ma jkollux droit de suite, iżda xorta jkollu jedd ta' preferenza li ġej direttament mid-dispożizzjonijiet tal-liġi u mhux minn xi privileġġ iskritt favur tiegħu."

3. JUDICIAL DECISIONS

Rikors Nru. 202/2011/1 Schembri & Sons Limited vs Kummissarju tat-Taxxi Interni u b'digriet tat-8 ta' Marzu 2012 ghandu jigi indikat bhala l-Kummissarju tat-Taxxi

Rikors Nru. 176/2011 Schembri & Sons Limited vs Kummissarju tat-Taxxi Interni u b'digriet tad-9 ta' Frar 2012 ghandu jigi indikat bhala l-Kummissarju tat-Taxxi

Interestingly, these two joint cases involved an application for a retrial from a tax judgment delivered by the Court of Appeal. The Court dismissed the applications because taxpayer's case did not satisfy the prerequisites for a retrial (a mistake of fact did not transpire from the acts of the proceedings).

Citazzjoni numru 826/05 SM Christopher Gauci v. Kummissarju tat-Taxxa fuq il-Valur Mizjud

The Court of Appeal (Civil Superior) confirmed a long line of judgments that held that a demand note issued for tax dues by a company has the strength of an executive title against a director only if the relevant instrument is notified to a director in a personal capacity. An extract from this judgment is being reproduced hereunder:

"Il-kwistjoni mhux direttament marbuta mas-solidarjeta', li hi ammessa, izda mal-fatt li l-ligi in kwistjoni trid notifika lil dik il-persuna taxxabli biex ikun jista' jinghad li jkun hareg titolu eżekuttiv fil-konfront taghha. Biex jista' jigbor il-hlas minghand il-"persuna" responsabbli għall-hlas, il-Kummissarju konvenut irid jinnotifika lil dik il-"persuna" bit-talba għall-hlas. Dan ma sarx lill-attur personalment. Il-fatt li r-rikorrenti seta' kien jaf bil-hrug tad-demand notice mhux rilevanti għall-materja, għax il-ligi trid li hu jkun notifikat bl-istess, peress illi middata tan-notifika jiskata t-terminu għalih li jressaq id-debitu appell. Irrikorrent ma kienx f'pozizzjoni tajba biex jeżercita d-dritt ta' appell millistima tal-intimat, peress illi hu personalment ma giex avzat li kontra tieghu sejjer jintalab titolu eżekuttiv."

Appell numru:- 149/2012 Eurochange Financial Services Limited Vs Kummissarju tat-Taxxa fuq il-Valur Mizjud

This appeal consisted in an appeal from a judgment of the ART concluding that taxpayer's supplies were exempt without credit. Taxpayer provided the following supplies:

- (a) storage of about one hundred (100) million euro coins, plus or minus five (5) million euro coins, i.e. up to a maximum of one hundred and five (105) million euro coins of various denominations;
- (b) provision of facilities for the credit institutions to withdraw and deposit euro coin bags;
- (c) authentication according to specific procedures and standards of all deposited euro coins, amounting to about four hundred thousand coins (400,000) coins annually. Should the deposited coins exceed this quantity, they are to be processed nevertheless, and the annual fee due to Eurochange as mentioned should be adjusted pro rata;
- (d) counting and packaging of coins into rolls, in readiness for reissue, within twenty days from date of deposit; and
- (e) daily detailed reporting to the Bank of the activities undertaken to be submitted on same day basis as specified in Annex 1".

The case originally in front of the ART was 'a reference appeal' on a point of law and the appellant was the CfR who contended that:

- (a) The ART had interpreted the law incorrectly;
- (b) The ART was wrong in concluding that, when performed by the Central Bank, activities such as those performed by taxpayer were exempt because, unlike taxpayer, the CfR did not exercise an economic activity;
- (c) The ART was wrong in concluding that, when performed by the Central Bank, activities such as those performed by taxpayer were exempt because, unlike taxpayer, the CfR was a public authority acting as such;
- (d) The ART's decision caused a distortion in competition.

From the wording of the judgment it was clear that the ART had reached its conclusion on the basis of its analysis of the 'banking' services supplied by taxpayer. Appellant had misunderstood the ART's analogy with activities performed by the Central Bank. The ART was correct in concluding that taxpayer was exempt without credit because the ART had correctly concluded that the activities it performed were of a banking nature falling within the remit of the exemption. It was the nature of the activities themselves that created the right to the exemption. The Court proceeded to examine the Maltese text of the law comparing it to the English text. In addition, the Court compared the text of the law with the text of the directive. The Court referred to the recent judgment in *Bookit Ltd vs Commissioners for the Majesty's Revenue of Customs*. The Court of Appeal added that the activities performed by taxpayer could not be examined only in isolation but had to be examined in their totality. The exemption covered ancillary services too:

"Il-qorti taċċetta li l-proċess ta' awtentikar u għadd tal-muniti hu anċillari għas-servizz imsemmi fil-paragrafu preċedenti.

44. Għalhekk m'huwiex korrett l-appellant li fir-rikors tal-appell argumenta li s-servizz li tagħti l-appellata "ma jalterawx is-sitwazzjoni legali tal-Bank Ċentrali". Fil-fatt qiegħed ivarja, għaliex twassal għat-trasferiment tal-proprjeta tal-muniti.⁴⁵ Wiehed jista' għustament jargumenta li m'huwiex biżżejjed li wiehed jillimita ruħu għal transaction u ma jikkunsidrax iċ-ċirkostanzi kollha. F'dan il-każ l-appellata qiegħda tagħti servizzi oħra, fosthom ta' storage u pakeġġar tal-muniti."

The Court of Appeal dismissed the appeal deciding in taxpayer's favour.

Appell numru:- 343/2012 Sovereign Hotels Limited Vs Id-Direttur Ġenerali (Taxxa fuq il-Valur Mizjud)

The case involved an application for the cancellation of penalties and interest charged in terms of the VAT Act. The ART dismissed the appeal and taxpayer appealed to the Court of Appeal. It transpired that the reason why the ART had dismissed the appeal was that taxpayer was not in line with one of the essential conditions providing for eligibility to cancellation of interest and penalties because it emerged that taxpayer was not in line with his compliance obligations. The Court of Appeal decided in favour of the CfR, dismissing the appeal.

3. JUDICIAL DECISIONS

C-235/18 Vega International Car Transport and Logistic — Trading GmbH v Dyrektor Izby Skarbowej w Warszawie

The CJEU held that Article 135(1)(b) 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 case in the main proceedings, the provision of fuel cards by a parent company to its subsidiaries, enabling those subsidiaries to refuel the vehicles they transport, may be classified as a service granting credit which is exempt from value added tax as referred to in that provision.

C-127/18 A-PACK CZ s. r. o. v Odvolací finanční ředitelství

The CJEU held that Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that a taxable person cannot correct the value added tax (VAT) taxable amount, in the case of total or partial non-payment, by its debtor, of a sum due in respect of a transaction subject to that tax, if the debtor is no longer a taxable person for the purposes of VAT.

C-712/17 EN.SA. Srl v Agenzia delle Entrate — Direzione Regionale Lombardia Ufficio Contenzioso

The CJEU held that:

1. In a situation, such as that at issue in the main proceedings, in which fictitious circular sales of electricity made between the same traders and for the same amounts did not cause tax losses, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in the light of the principles of neutrality and proportionality, must be interpreted as not precluding national legislation which excludes the right to deduct value added tax (VAT) relating to fictitious transactions while requiring the persons who enter VAT on an invoice to pay that tax, including for a fictitious transaction, provided that national law allows the tax liability arising from that obligation to be adjusted when the issuer of that invoice, who was not acting in good faith, has, in sufficient time, wholly eliminated the risk of any loss of tax revenue, this being a matter for the referring court to ascertain.

2. The principles of proportionality and neutrality of value added tax (VAT) must be interpreted as precluding, in a situation such as that at issue in the main proceedings, a rule of national law under which the unlawful deduction of VAT is penalised by a fine equal to the amount of the deduction made.

C-265/18 Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos v. Akvilė Jarmuškienė

The CJEU held that Articles 282 to 292 of Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, where a supply to a same purchaser, includes two immovable properties, linked by their nature and falling under a single sales contract, and that the annual limit of turnover used as a reference for the applicability of the special small businesses scheme provided for by that directive is exceeded, the taxable person is required to pay the tax on the basis of the value of the entire delivery in question, that is to say taking into account the value of the two goods subject to this delivery, even if taking into account the value of one of those goods would not lead to the exceeding of that annual limit.

Case C-225/18 Grupa Lotos S.A. v Minister Finansów

The CJEU held that Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as:

– precluding national legislation, such as that at issue in the main proceedings, which provides for the scope of an exclusion from the right to deduct value added tax (VAT) to be extended, after the accession of the Member State concerned to the European Union, and which means that a taxable person, providing tourism services, is deprived, from the entry into force of that extension, of the right to deduct VAT paid on the purchase of overnight accommodation and catering services which that taxable person re-invoices to other taxable persons in the context of the provision of tourism services and

- not precluding national legislation, such as that at issue in the main proceedings, which provides for the exclusion from the right to deduct VAT paid on the purchase of overnight accommodation and catering services, that exclusion having been introduced before the accession of the Member State concerned to the European Union and maintained thereafter, in accordance with the second paragraph of Article 176 of Directive 2006/112, and which means that a taxable person, who does not provide tourism services, is deprived of the right to deduct VAT paid on the purchase of such overnight accommodation and catering services which that taxable person re-invoices to other taxable persons.

Case C-224/18 Budimex S.A. v Minister Finansów

The CJEU held that point (c) of the first paragraph of Article 66 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, must be interpreted as not precluding, if an invoice relating to the performance of the service supplied is not issued or is issued late, the formal acceptance of that service from being regarded as the time when that service was supplied, where, as in the case in the main proceedings, the Member State provides that VAT is to become chargeable on expiry of a time limit running from the day when the service was supplied, provided, first, that the formality of acceptance was stipulated by the parties in the contract that binds them according to contractual terms reflecting the economic and commercial realities in the field in which the service is supplied and, second, that that formality constitutes the actual completion of the service and determines the amount of consideration due, which is for the referring court to ascertain.

Case C-42/18 Finanzamt Trier v Cardpoint GmbH, successor in law to Moneybox Deutschland GmbH

The CJEU held that Article 13B(d)(3) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment must be interpreted as meaning that the exemption from value added tax which is laid down in that provision for transactions concerning payments and transfers does not apply to supplies of services, such as those at issue in the main proceedings, consisting in operating and maintaining ATMs, replenishing them, installing computer hardware and software in them, sending a withdrawal authorisation request to the bank that issued the bank card used, dispensing money and registering withdrawal transactions, by a service provider to a bank operating an automated teller machine.

Case C-695/17 Applicant: Metirato Oy v. Suomen valtio/Verohallinto, Eesti Vabariik/Maksu-ja Tolliamet

The CJEU held that Article 13(1) and Article 14(2) of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures must be interpreted as meaning that, first, they apply to proceedings seeking restitution, to the insolvency estate of a company established in the requested Member State, of claims which were recovered at the request of the applicant Member State, if those proceedings are based on disputes concerning the enforcement measures, within the meaning of Article 14(2) and, second, the requested Member State, within the meaning of those provisions, must be regarded as the defendant in those proceedings, the fact that the amount represented by those claims has been separated from the assets of that Member State or merged with them being irrelevant in that regard.

Case C-449/17 A & G Fahrschul-Akademie GmbH v. Finanzamt Wolfenbüttel

The CJEU held that the concept of ‘school or university education’, within the meaning of Article 132(1)(i) and (j) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as not covering motor vehicle driving tuition provided by a driving school, such as that at issue in the main proceedings, for the purpose of acquiring driving licences for vehicles in categories B and C1 referred to in Article 4(4) of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences.

Case C-214/18 H. W. PSM ‘K’

The CJEU held that the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2013/43/EU of 22 July 2013, and the principles of neutrality of value added tax (VAT) and proportionality must be interpreted as not precluding an administrative practice of the competent national authorities, such as that at issue in the main proceedings, under which the VAT relating to supplies of services by a court enforcement officer in an enforcement procedure is regarded as included in the fees charged by that officer.

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

The CJEU held that Article 13B(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment must be interpreted as meaning that the exemption from value added tax on the leasing or letting of immovable property provided for in that provision is applicable to a contract for transfer of the use of land comprising vineyards for agricultural purposes to a company engaged in viticulture, entered into for a period of one year, automatically renewable and under which rent is paid at the end of each year

Case C-201/18 Mydibel SA v État Belge

The CJEU ruled that:

1. Subject to verification of the relevant matters of fact and national law by the referring court, Articles 184, 185, 187 and 188 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/162/EU of 22 December 2009, must be interpreted as not imposing an obligation to adjust value added tax (VAT) on a building which was initially deducted correctly, where that property was the subject of a sale and lease back transaction not subject to VAT in circumstances such as those at issue in the main proceedings.
2. An interpretation of Articles 184, 185, 187 and 188 of Directive 2006/112, as amended by Directive 2009/162, as imposing an obligation to adjust the value added tax (VAT) initially deducted in circumstances such as those at issue in the main proceedings complies with the principles of VAT neutrality and equal treatment.

Case C-562/17 Nestrade SA v. Agencia Estatal de la Administración Tributaria (AEAT), Tribunal Económico-Administrativo Central (TEAC)

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

Case C-531/17 Vetsch Int. Transporte GmbH v. Zollamt Feldkirch Wolfurt

The CJEU held that Article 143(d) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and Article 143(1)(d) of that directive, as amended by Council Directive 2009/69/EC of 25 June 2009, must be interpreted as meaning that the exemption from import value added tax laid down in those provisions may not be refused in respect of an importer designated or recognised as liable for payment of that tax, within the meaning of Article 201 of Directive 2006/112, in a situation, such as that in the main proceedings, in which, first, the recipient of the intra-Community transfer of goods effected after that import commits tax evasion in connection with a transaction which is subsequent to that transfer and is not linked to that transfer and, secondly, there is no evidence to support the conclusion that the importer knew or ought to have known that that subsequent transaction entailed tax evasion on the part of the recipient.

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

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

Case C-449/17 A & G Fahrschul-Akademie GmbH v Finanzamt Wolfenbüttel

The CJEU held that the concept of 'school or university education', within the meaning of Article 132(1)(i) and (j) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as not covering motor vehicle driving tuition provided by a driving school, such as that at issue in the main proceedings, for the purpose of acquiring driving licences for vehicles in categories B and C1 referred to in Article 4(4) of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences.



3. JUDICIAL DECISIONS

CASE OF BJARNI ÁRMANNSSON v. ICELAND (Application no. 72098/14)

In its most recent judgment on tax penalties and non bis in idem, the ECtHR found a breach because of the lack of connection between the two distinct procedures. The ECtHR noted that having regard to the above circumstances, in particular the lack of overlap in time and the largely independent collection and assessment of evidence, the Court could not find that there was a sufficiently close connection in substance and in time between the tax proceedings and the criminal proceedings in the case for them to be compatible with the bis criterion in Article 4 of Protocol No. 7. The ECtHR held that it is incumbent on the member State to ensure that criminal proceedings fulfil the requirements of the ne bis in idem rule. Consequently, the Court concluded that applicant was tried and punished for the same or substantially the same conduct by different authorities in two different sets of proceedings which lacked the required connection.

4. OTHER

4.1 The Remittance Basis of Taxation for Individuals under the Income Tax Act

In March 2019, the CfR published the above-captioned guideline explaining the remittance basis of taxation. Interestingly, the Revenue guideline provides clarification with respect to a number of topical issues.

The Revenue Guidance Note explains that residence does not depend on nationality or any other civil status, but is a question of fact adding that a person may be resident in Malta even if he is also resident for tax purposes in another country. The Guidance Note continues to explain that presence in Malta for more than 183 days in any particular year amounts to residence in Malta for that year, regardless of the purpose and the nature of the individual's stay in Malta. An individual who comes to Malta to establish his residence here becomes resident from the date of his arrival, regardless of the duration of his stay in Malta in any particular year. A person who lives in Malta on a permanent or indefinite basis is ordinarily resident in Malta. A person who is in Malta for a temporary purpose may become ordinarily resident in certain circumstances. This would apply, for example, to individuals who are in Malta for more than 183 days in each year over a long period - say, for three consecutive years. It can also apply to individuals who do not stay in Malta for more than 183 days in any year but who come to Malta regularly over a long period - say, over a period of three years - and establish personal and economic ties with Malta.

An ordinary resident loses his residence status if he leaves Malta permanently or indefinitely. If he is temporarily absent from Malta, he continues to be considered as resident here unless his absence is or becomes inconsistent with a residence status. This depends on the circumstances of each case and, in particular, on the personal and economic ties that the individual may have retained with Malta.

The Guidance Note offers new insights with respect of the meaning of the term 'arising in Malta' explaining that income derived from employment or from a profession, business or other self-employment arises in Malta if the activities are performed in Malta. Passive income arises in the country where the source is situated. Rent and other income from immovable property arises where the property is located. Rent or other compensation for the use of tangible or intangible movable property is usually treated as arising in the country where the lessee is resident or carries on his business. Dividends are normally treated as arising in the country where the paying company is incorporated while interest is treated as arising in the country where the debtor is resident. Capital gains arise in Malta if the asset that is transferred is situated in Malta.

Insights are offered with respect to the Revenue's interpretation of the term 'Received in Malta'. Income is received in Malta if it is paid to the recipient in Malta. Income paid into an account held abroad is also treated as received in Malta if it is subsequently remitted to Malta. Proceeds of a capital nature, such as an inheritance or the proceeds from the sale of a capital asset, are not income and the receipt in Malta is not captured under the remittance basis.

The Guidance Note incorporates a loaded statement creating an important presumption - remittances to Malta for ordinary expenses, such as living expenses, are presumed to be remittances of income unless proven otherwise, regardless of the foreign account out of which the remittance is made. When remittances are made for a capital purpose, such as the purchase of property in Malta, and the individual can show that they originate from moneys held abroad as capital, such as an inheritance or the proceeds from the sale of capital assets, they will be regarded as remittances of capital.

The rest of the guidance note explains the Rules contained in Article 4 ITA explaining their interplay with Legal Notices.

4.2 Council Recommendation on the 2019 National Reform Programme of Malta and delivering a Council opinion on the 2019 Stability Programme of Malta

The above-captioned document published on 5 June 2019 incorporates a number of statements relating to the Maltese tax system. The preamble states that Malta has taken measures against aggressive tax planning, but the high level of royalty and dividend payments as a percentage of GDP suggests that Malta's tax rules are used by companies that engage in aggressive tax planning. The absence of withholding taxes on outbound (i.e. from EU residents to third country residents) dividends, interest and royalty payments made by Malta based companies may lead to those payments avoiding tax altogether, if they are also not subject to tax in the recipient country.

It continues to say that while Malta's Notional Interest Deduction regime will help to reduce the debt equity bias, the scheme's anti-abuse rules, combined with a generous rate and a stock-based regime, warrant close monitoring to prevent any misuse for aggressive tax planning. The Malta Individual Investor Programme and Malta Residence and Visa Programme are mentioned too. The Recommendation notes that although the 2 Programmes do not automatically grant residence for tax purposes, if requirements are met, income may be exempt under the 'non-dom' regime, if income is not remitted to Malta, without substantial physical presence requirements. They may facilitate aggressive tax planning practices and have been listed by the OECD as having a potentially high risk for being misused to circumvent the automatic exchange of financial accounts"

The Council concluded by recommending to Malta to take action in 2019 and 2020 to, amongst others, address features of the tax system that may facilitate aggressive tax planning by individuals and multinationals, in particular by means of outbound payments.

4.3 The Multilateral Instrument

4.3.1 UK

On 15 April 2019, the CfR published the English synthesized text of the Malta - UK Tax Treaty, displaying the modifications made to the treaty by the MLI. The synthesized text reflects the agreement reached between the relevant tax authorities of both Malta and the UK on how the treaty should be impacted by the MLI and had also previously been published by the UK tax authorities. The MLI entered into force for Malta on 1 April 2019 and on 1 October 2018 for the UK. The provisions of the MLI will have effect with respect to the Malta - UK Tax Treaty on: (i) 1 January 2020 for taxes withheld at source in both jurisdictions; (ii) 1 April 2020 for corporation tax and from 6 April 2020 for income tax and capital gains tax levied by the UK; and (iii) 1 January 2020 for all other taxes levied by Malta.

4.3.2 Slovak Republic

On 15 April 2019, the Maltese Commissioner for Revenue published the English synthesized text of the Malta - Slovak Republic Tax Treaty, displaying the modifications made to the treaty by the MLI. The synthesized text reflects the agreement reached between the relevant tax authorities of both Malta and the Slovak Republic on how the treaty should be impacted by the MLI. The provisions of the MLI entered into force for Malta on 1 April 2019 and on 1 January 2019 for the Slovak Republic. The MLI entered into force for Malta on 1 April 2019 and on 1 January 2019 for the Slovak Republic. The provisions of the MLI will have effect with respect to the Malta - Slovak Republic Tax Treaty on: (i) 1 January 2020 for taxes withheld at source in both jurisdictions; (ii) 1 October 2019 with respect to all other taxes levied by the Slovak Republic; and (iii) 1 January 2020 for all other taxes levied by Malta.

4.3.3 Serbia

On 13 May 2019, the Maltese Commissioner for Revenue published the English synthesized text of the Malta - Serbia Tax Treaty, displaying the modifications made to the treaty by the MLI. The synthesized text reflects the agreement reached between the relevant tax authorities of both Malta and Serbia on how the treaty should be impacted by the MLI. The MLI entered into force for Malta on 1 April 2019 and on 1 October 2018 for Serbia. The provisions of the MLI will have effect with respect to the Malta - Serbia Tax Treaty on: (i) 1 January 2020 for taxes withheld at source in both jurisdictions; (ii) 1 October 2019 with respect to all other taxes levied by Serbia; and (iii) 1 January 2020 for all other taxes levied by Malta.

4.3.4 Lithuania

On 15 April 2019, the Maltese Commissioner for Revenue published the English synthesized text of the Lithuania - Malta Tax Treaty, displaying the modifications made to the treaty by the MLI. The synthesized text reflects the agreement reached between the relevant tax authorities of both Malta and Lithuania on how the treaty should be impacted by the MLI. The MLI entered into force for Malta on 1 April 2019 and on 1 January 2019 for Lithuania. The provisions of the MLI will have effect with respect to the Malta - Lithuania Tax Treaty on: (i) 1 January 2020 for taxes withheld at source in both jurisdictions; (ii) 1 October 2019 with respect to all other taxes levied by the Lithuania; and (iii) 1 January 2020 for all other taxes levied by Malta.

4.3.5 Isle of Man

On 15 April 2019, the Maltese Commissioner for Revenue published the English synthesized text of the Isle of Man - Malta Tax Treaty, displaying the modifications made to the treaty by the MLI. The synthesized text reflects the agreement reached between the relevant tax authorities of both Malta and the Isle of Man on how the treaty should be impacted by the MLI and had also previously been published by the Manx tax authorities. The MLI entered into force for Malta on 1 April 2019 and on 1 July 2018 for the Isle of Man. The provisions of the MLI will have effect with respect to the Malta - Isle of Man Tax Treaty on: (i) 1 January 2020 for taxes withheld at source in both jurisdictions; (ii) 1 October 2019 with respect to all other taxes levied by the Isle of Man; and (iii) 1 January 2020 for all other taxes levied by Malta.

4.3.6 Ireland

On 13 May 2019, The Maltese Commissioner for Revenue published the English synthesized text of the Ireland - Malta Tax Treaty, displaying the modifications made to the treaty by the MLI. The synthesized text reflects the agreement reached between the relevant tax authorities of both Malta and Ireland on how the treaty should be impacted by the MLI. The MLI entered into force for Malta on 1 April 2019 and on 1 May 2019 for Ireland. The provisions of the MLI will have effect with respect to the Malta - Ireland Tax Treaty on: (i) 1 January 2020 for taxes withheld at source in both jurisdictions; (ii) 1 November 2019 with respect to all other taxes levied by Ireland; and (iii) 1 January 2020 for all other taxes levied by Malta.

4.3.7 Austria

On 15 April 2019, the Maltese Commissioner for Revenue published the English synthesized text of the Austria - Malta Tax Treaty, displaying the modifications made to the treaty by the MLI. The synthesized text reflects the agreement reached between the relevant tax authorities of both Malta and Austria on how the treaty should be impacted by the MLI and had also previously been published by the Austrian tax. The MLI entered into force for Malta on 1 April 2019 and on 1 July 2018 for Austria. The provisions of the MLI will have effect with respect to the Malta - Austria Tax Treaty on: (i) 1 January 2020 for taxes withheld at source in both jurisdictions; and (ii) 1 January 2020 with respect to all other taxes levied by Austria or Malta.

4.4 OECD/G20 Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy

On 29 May 2019, the OECD/G20 Inclusive Framework on BEPS published a document entitled Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy.

In brief, after premising that the tax challenges of the digitalisation of the economy were identified as one of the main areas of focus of the OECD/G20 Base Erosion and Profit Shifting (BEPS), the document puts forward 2 proposals:

- The Pillar One Proposal focusing on the allocation of taxing rights seeking to undertake a coherent and concurrent review of the profit allocation and nexus rules;
- The Pillar Two Proposal focusing on the remaining BEPS issues seeking to develop rules that would provide jurisdictions with a right to “tax back” where other jurisdictions have not exercised their primary taxing rights or the payment is otherwise subject to low levels of effective taxation.



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