MALTA
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OF TAXATION

The Malta VAT treatment of Directors' Fees

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This Paper sets out a technical analysis of the Malta VAT treatment of Directors' fees, in particular the fees paid in consideration for the supply of directorship services in terms of the provision of Director(s) that serve on the Board of Directors of a company, in light of the CJEU decision in Case C-94/19. It is intended to provide guidance on the interpretation of the relevant provisions of the legislation, based on the MIT's understanding of the interpretation adopted in practice. However, it should not be construed as an official guideline, nor as advice on the Malta VAT treatment of any given transaction. Anyone reviewing this document is encouraged to seek advice from competent tax advisors prior to taking any action on the basis thereof.

Any comments or queries concerning the contents of this paper should be addressed to the Chief Technical Officer on CTO@maintax.org or MIT@maintax.org

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1. The VAT treatment of Directors' services – the Legislation

It is a fundamental principle of VAT that VAT is chargeable on supplies of goods or services when certain conditions are satisfied, *inter alia*, when the supply is made by a "Taxable Person" acting as such. It follows that activities carried out by a person who is not acting in the capacity of a Taxable Person fall outside the scope of VAT. In terms of Article 5 of the Value Added Tax Act (CAP 406 of the Laws of Malta), a Taxable Person is any person carrying on an economic activity, which by definition excludes the activities of 'employees', as defined to include the holder of an office. As a result, the activities of the holder of an office, which includes an individual appointed to the post of Director or Company Secretary of a Limited Liability Company, in principle fall outside the scope of VAT.

2. The VAT treatment of Directors' services – implications

On the basis of the above, where an individual is appointed to the role of Director of a Company, the fees paid by the Company to the Director by way of remuneration for their activities or 'services' *qua* Director would typically fall outside the scope of VAT. In other words, since these activities are not regarded as economic activities for VAT purposes, the fees do not in principle constitute consideration for a service falling within the scope of VAT, and therefore no VAT is chargeable thereon. In practice, this would refer to the emoluments/fees paid directly to the Director in their own name, whether the said Director is registered as an employee of the Company for the purposes of the Final Settlement System (FSS), or whether they retain self-employed status for income tax purposes.

3. The VAT treatment of a supply of Directors

In practice, there may be scenarios in which the individual holding office (i.e. the Director) is not remunerated directly, and in his/her own name, for the said activities – for example:

- Where a Corporate Services Provider or other service provider makes available, to its Client Company, an individual to sit on the Board of Directors of the Client Company; or
- Where a Director's remuneration is paid to another company of which the Director is a shareholder.

It is understood that past local practice has been to consider the fees paid in both the above-mentioned scenarios to fall outside the scope of Malta VAT, on the basis that the said fees constitute remuneration for an activity which is not to be considered to be an economic activity for VAT purposes i.e. that of the 'holder of an office'.

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However, in particular pursuant to the decision of the CJEU in case C-94/19 (*San Domenico Vetraria SpA* vs *Agenzia delle Entrate*) of **11 March 2020**, it is our understanding that the aforementioned interpretation **shall no longer apply.**

Accordingly, in the above-described scenarios, the activity in question, for which a Company is being remunerated for making available to another Company the services of a Director, would in fact constitute an economic activity, which falls within the scope of VAT.

In other words, where Malta Company A makes available to Malta Company B an individual to sit on the board of Directors of Malta Company B, for a fee, Malta Company A should be regarded as supplying a service to Malta Company B, which service is in principle subject to VAT at 18%. Where the individual in question is an employee of Malta Company A, the service would constitute a (taxable) supply of staff.

The CJEU, in its **judgement** in case C-94/19, reaffirmed that the lending or secondment of staff by one company to another constitutes a (taxable) supply of services for consideration falling within the scope of VAT.

This case was brought before the CJEU in view of a provision of Italy's VAT legislation (Article 8(35) of Law No 67/88) in terms of which, the secondment of staff by one company to another for a fee corresponding to the costs incurred for the seconded staff, fell outside the scope of VAT. The case concerned the secondment of an employee (a Director) by one company, Avir, to a subsidiary, San Domenico Vetraria, for which Avir invoiced San Domenico Vetraria for amounts corresponding to the costs incurred for the seconded employee. San Domenico Vetraria applied VAT to the amount reimbursed and then exercised its right to deduct that VAT. The tax authorities took the view that those reimbursements fell outside the scope of VAT since they did not concern supplies of services between the parent and its subsidiary, and denied San Domenico Vetraria's input tax claim. The Italian Court acknowledged the specific provision of Italian legislation which excluded such reimbursements from VAT; however, it expressed doubt as to whether the secondment of staff should fall outside the scope of VAT and referred the matter to the CJEU. The CJEU found that the secondment was carried out on the basis of a legal relationship of a contractual nature between Avir and San Domenico Vetraria, in the context of which there was reciprocal performance, namely the secondment of a director from Avir to San Domenico Vetraria, on the one hand, and the payment by San Domenico Vetraria to Avir of the amounts invoiced to it, on the other. It furthermore maintained that if it were to be established (which it held was for the referring court to ascertain) that the payment by San Domenico Vetraria of the amounts invoiced to it by its parent company was a condition for the latter to second the director, and that the subsidiary paid those amounts only in return for the secondment, it would have to be held that there is a direct link between the two. On this basis, the court held that the transaction should be regarded as having been carried out for consideration and subject to VAT, maintaining that the amount of the consideration - in particular

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the fact that it is equal to, greater or less than, the costs which the taxable person incurred in providing his service - is irrelevant.

On the basis of the above, the Malta Institute of Taxation understands that, pursuant to the decision of the CJEU of 11 March 2020, article 5 of the VAT Act is interpreted as follows:

	Scenario	Malta VAT Implications
1	Individual A is appointed to the Board of Directors of MaltaCo. X and is remunerated directly (payment through FSS*)	Outside scope of VAT
2	Individual A is appointed to the Board of Directors of MaltaCo. X and is remunerated directly (A issues an invoice for services)	Outside scope of VAT
3	Individual A is appointed to the Board of Directors of MaltaCo. X and the remuneration is invoiced by and paid to A's company (MaltaCo. A)	Supply of services by MaltaCo. A to MaltaCo. X
4	Individual A is referred by Service Provider to MaltaCo. X and is appointed to the Board of Directors of MaltaCo. X. Service Provider invoices (in its own name and for its own account) MaltaCo. X for the fees for Director services	Supply of services by Service Provider to MaltaCo. X

*this scenario is for illustrative purposes only and may not necessarily be in line with the FSS requirements.

4. Services of Corporate Directors

Where a Director of a company is a body corporate, it is our understanding that the activities carried out by the said corporate Director are regarded as activities falling within the scope of VAT. A corporate Director, in the exercise of its functions, would in our view, be regarded as carrying out an economic activity and would therefore classify as a taxable person for VAT purposes. The exclusion of the activities of the holder of an office in Article 5 of the VAT Act specifically refers to an 'individual', and therefore a corporate director cannot be regarded as an 'employee' for the purposes of the said Article 5.

This reflects the unanimous view of the VAT Committee that "services supplied by a legal person as a member of a company's board of directors should be regarded as economic activities carried out independently within the meaning of Article 4(1) and (2) [now Article 9 of Directive 2006/112] and that they should therefore be subject to VAT" (Guidelines from the 53rd Meeting of 4-5 November 1997).

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