ZD | Zampa Debattista
Certified Public Accountants

VAT NEWSLETTER
Q 1 - 2018

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ABOUT US

Zampa Debattista is a boutique accounting and assurance firm primarily focused on international business. Its main areas of specialization are VAT, Audit and Assurance, and Financial Reporting. Zampa Debattista is in a position to offer its clients quality professional services whilst at the same time retaining a high level of partner involvement.

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LOCAL NEWS

1.1 LEGAL NOTICE 9 OF 2018 PUBLISHED ON 9TH JANUARY 2018

Under this regulation, which amends Item 1 of Part Two of the Fifth Schedule (Immovable property), as from the 1st of January 2018, the *"the letting to players of rooms or other spaces lawfully designated for the playing of poker"* for not more than thirty days by a taxable person in the course of an economic activity is exempt without credit.

ZD Comment: This exemption complements the exemption in para. iv. of the "Guidelines on Gambling and Betting activities" regarding the provision of devices and equipment for the playing of casino-type games of chance.

1.2 SMALL BUSINESS TRESHOLD

By means of Council Implementing Decision (EU) 2018/279 of 20 February 2018, the Council of the European Union has authorised Malta to apply a special measure derogating from Article 287 of the VAT Directive consisting in raising the threshold for supplies of services by small businesses from the current €14,000 to €20,000. As a result, the Commissioner for Revenue can now, at any time, proceed to amend Item 8 of Part One of the Sixth Schedule to the VAT Act to implement this measure, announced by the Minister for Finance in the Budget speech for 2018. To avoid any misunderstandings, the new €20,000 threshold will only apply from a date to be prescribed in the Legal Notice to be published.

1.3 VAT APPEALS DECIDED BY THE ADMINISTRATIVE REVIEW TRIBUNAL (ART)

By a decision in case No. 57/15 *XXX vs Kummissarju tat-Taxxi* published on 08/02/2018 the ART dismissed appellant's claim that he should not be held liable in the same manner and to the same extent of the company of which he acted as secretary for anything done or omitted to be done by that company as provided in Article 66 of the VATA. On the basis of the evidence produced, submissions by the contending parties as well as by reference to settled case law, the ART found that appellant did not do his utmost to perform his duties as secretary of the defaulting company but rather elected to disregard or even abdicate from these duties.

On 6th March 2018 the ART published the following three decisions:

- In case **16/11** *XXX vs Kummissarju tat-Taxxa fuq il-Valur Mizjud*, and specifically with regard to a preliminary plea raised by the Commissioner, the ART ruled that on the basis of the evidence produced, the appellant company had not reasonably justified the failure to produce the documents in the manner and within the timeframe when notified to produce them by the Commissioner. As a result, the ART held that the provisions of Art. 48(5) are to apply and ordered the resumption of the hearing of the appeal with the appellant company barred from producing any documentation related to the assessments raised by the Commissioner which are the subject of the appeal.

- In case **279/12** *XXX vs Kummissarju tat-Taxxi,* it ruled against appellant and confirmed the assessments raised by the Commissioner in terms of Article 32 of the VAT Act without any modification. The assessments under appeal were issued by the Commissioner pursuant to a credit control exercise carried out by VAT Inspectors according to which the taxpayer was considered to have underdeclared his output vat and overdeclared his input vat.

- In case **343/12** *XXX vs Direttur Generali (Taxxa fuq il-Valur Mizjud),* it dismissed an appeal lodged by appellant company in connection with the refusal by the defendant of an application made by it for the remittance of interest and administrative penalties in terms of Legal Notice 112 of 2012. On the basis of the evidence produced, the ART ruled that since it resulted from the facts of the case that the conditions for a valid application in terms of said regulation were not fully met by the applicant, the Commissioner was correct and justified in refusing the application.

1.4 COURT OF APPEAL (INFERIOR JURISDICTION) DECISIONS IN THE FIELD OF VAT

By a decision published on 16/03/2018 in case **63/2013** *Cove Ltd' vs Direttur Generali (Taxxa fuq il-Valur Mizjud)* the Court dismissed an application made by the Commissioner who had appealed against the decision of the Administrative Review Tribunal which had decided in favour of appellant company. In a nutshell the dispute was about the right of the defendant, Cove Ltd, to exercise a full right of deduction of input VAT incurred in the development of five villas when at the point in time the input VAT was charged to it, the intention was to put up three villas for letting and selling the other two. As a matter of fact, the company had only claimed 3/5 of the input VAT. Subsequently the company decided not to transfer the two villas but to make them available for letting. Accordingly, it requested the Commissioner to allow the input VAT credit also on these two villas, which request was refused since the Commissioner argued that at the point in time when the input vat was deductible no right of input VAT existed with regard to these two villas since they were intended for sale. By reference to settled case law of the European Court of Justice, the Court of Appeal was of the view that the "principle of neutrality" was a fundamental right in the common system of value added tax as applied within the Community and given that the appellant was claiming input vat which at the end of the day was to be attributable to a taxable supply that right should not be precluded. In its judgement the Court confirmed the decision of the Administrative Review Tribunal and ordered the Commissioner to refund the disallowed input VAT credit in full including the interest accrued thereon.

1.5 CIVIL FIRST HALL (CONSTITUTIONAL JURISDICTION) DECISIONS IN THE FIELD OF VAT

In a decision published on 26/02/2018 in case **553/2016** *Karl Bonaci & F. Media (Operators) Ltd vs Kummissarju tat-Taxxi,* the Court ruled that on the basis of the evidence produced it does not result that under the current legal framework, neither article 59 of the VAT Act (executive title) nor the actions undertaken by the Commissioner in connection with the collection of unpaid VAT and administrative penalties due by appellant constitute a breach of his fundamental human rights as protected under Article 1 of the First Protocol of the European Convention on Human rights and under Article 37 of the Constitution of Malta with regard to the right of deprivation of property and under Article 6 of the European Convention of Human Rights and under Article 36 of the Constitution of Malta with regard to a right of fair hearing.

2.0 EUROPEAN NEWS

2.1 NOTICE TO STAKEHOLDERS BY EU COMMISSIONER ON THE WITHDRAWAL OF THE UK AND EU RULES IN THE FIELD OF CUSTOMS AND VAT - PUBLISHED ON 30/01/2018

By the publication of this notice the Commission wished to remind stakeholders that preparing for the withdrawal of the UK is not just a matter for the EU and national authorities only but also for private parties. This because given that there are considerable uncertainties, particularly concerning the content of a possible withdrawal agreement, economic operators are reminded of the legal repercussions which need to be considered when the UK becomes a third country. Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date (set for 01/04/2019), the EU rules in the field of Customs and VAT will no longer apply in the UK. As regards the treatment of VAT this will have the following consequences:

- goods entering the EU from the UK will constitute importations (taxable) whereas goods leaving the EU for the UK will constitute exports (exempt)
- operators in the UK who make supplies of telecommunications, broadcasting and electronically supplies services to non-taxable person established in the EU will be required to register for MOSS in a Member State of the EU
- taxable persons established in the UK will have to claim refund of VAT incurred in a Member State of the EU in accordance with Council Directive 86/560/EEC and not in accordance with Council Directive 2008/9/EC
- a company established in the UK carrying out taxable transactions in a Member State of the EU may be required by that Member State to designate a tax representative as the person liable for payment of the VAT in accordance with the VAT Directive

For further information please refer to the notice by accessing the link:
https://ec.europa.eu/taxation_customs/sites/taxation/files/notice_to_stakeholders_brexit_customs_and_vat_en.pdf

2.2 EU COMMISSION PROPOSALS: MORE FLEXIBILITY ON VAT RATES, LESS RED TAPE FOR SMALL BUSINESS - PUBLISHED 18/01/2018

The scope of the new rules being proposed by the Commission is to allow Member States more flexibility to set their VAT rates and to create a better environment for SMEs to flourish. They constitute the final steps of the overhaul of the EU VAT rules with the creation of a single EU VAT area (a definitive VAT regime) to systematically reduce VAT fraud while supporting businesses and securing government revenues. In particular, the new rules seek to address the problem of smaller companies that tangibly suffer disproportionate VAT compliance costs especially when trading cross-border thus curtailing growth and proving to be a real obstacle to expand. The proposed rules will allow Member States to, in addition to a standard rate (of not less than 15%), put in place:

- two separate reduced rates of between 5% and the standard rate;
- one exemption from VAT (a zero rate);
- one reduced rate set between 0% and the reduced rates.

The current complex list of goods and services to which reduced rates can be applied (Annex III of Council Directive 2006/112/EC) will be abolished and replaced by a new list containing goods to which the standard rate must be applied. To safeguard public revenues, Member States will also have to ensure that the weighted average VAT rate within their territory is at least 12%. The new regime also means that all goods currently enjoying rates different from the standard rate can continue to do so.

Regarding small businesses Member States can, under the current rules, exempt sales by small businesses from VAT provided they do not exceed a given annual turnover, which varies from one country to the next. Growing SMEs lose their access to simplification measures once the exemption threshold has been exceeded. Also, these exemptions are available only to domestic players. This means that there is no level playing field for small companies trading within the EU. While the current exemption thresholds would remain, today's proposals would introduce:

- A €2 million revenue threshold across the EU, under which small businesses would benefit from simplification measures, whether or not they have already been exempted from VAT;
- The possibility for Member States to free all small businesses that qualify for a VAT exemption from obligations relating to identification, invoicing, accounting or returns;
- A turnover threshold of €100,000 which would allow companies operating in more than one Member State to benefit from the VAT exemption.

These legislative proposals will now be submitted to the European Parliament and the European Economic and Social Committee for consultation and to the Council for adoption. The amendments will become effective only when the switch to the definitive regime effectively takes place.

2.3 VAT ON YACHTS: COMMISSION OPENS INFRINGEMENT PROCEDURES AGAINST CYPRUS, GREECE AND MALTA – PRESS RELEASE DATED 08/03/2018

The Commission decided to send letters of formal notice to **Cyprus, Greece** and **Malta** for not levying the correct amount of value added tax on the provision of yachts. Pierre Moscovici, Commissioner for Economic and Financial Affairs, Taxation and Customs Union was quoted as saying that *"In order to achieve fair taxation we need to take action wherever necessary to combat VAT evasion. We cannot allow this type of favourable tax treatment granted to private boats, which also distorts competition in the maritime sector. Such practices violate EU law and must come to an end."* In detail the infringement procedures concern:

- a reduced VAT base for the lease of yachts – a general VAT scheme provided by **Cyprus, Greece** and **Malta**. While current EU VAT rules allow Member States not to tax the supply of a service where the effective use and enjoyment of the product is outside the EU, they do not allow for a general flat-rate reduction without proof of the place of actual use. Malta, Cyprus and Greece have established guidelines according to which the larger the boat is, the less the lease is estimated to take place in EU waters, a rule which greatly reduces the applicable VAT rate;

- the incorrect taxation in **Cyprus** and **Malta** of purchases of yachts by means of what is known as 'lease-purchase'. The Cypriot and Maltese laws currently classify the leasing of a yacht as a supply of a service rather than a good. This results in VAT only being levied at the standard rate on a minor amount of the real cost price of the craft once the yacht has finally been bought, the rest being taxed as the supply of a service and at a greatly reduced rate.

The three Member States now have two months to reply to the arguments put forward by the Commission. If they do not act within those two months, the Commission may send a reasoned opinion to their authorities. By this reasoned opinion, the Commission, whilst explaining why it is considering that the Member State is breaching EU law, would be requesting the Member State to take measures, within a specified period, to comply with EU law. If the Member State does not comply the Commission may consider referring the case to the European Court of Justice and may also ask the Court to apply penalties.

3.0 UPDATE OF THE LATEST CJEU DECISIONS IN FIELD OF VAT

3.1 CASE C-164/16 MERCEDES-BENZ FINANCIAL SERVICES UK LTD.

On 4th October 2017 the CJEU released it judgement in the above case regarding a reference for a preliminary ruling by H.M. Court of Appeal (Civil Division) regarding the interpretation of the text *"contract for hire which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment"* in Article 14(2)(b) of the VAT Directive.

The dispute between Mercedes-Benz Financial Services ("MBFS") and HMRC concerned a particular car leasing contract, called 'Agility', which is one of a number of contracts offered by MBFS to finance the hire or purchase of Mercedes vehicles, alongside the traditional leasing and hire purchase ("HP") agreements. The Agility agreement is marketed as an HP contract, but offers lower monthly payments than a typical HP agreement and does not cover the full value of the vehicle. It allows the customer to lease the vehicle for a prescribed period, after which he can opt to purchase it subject to the settlement of a final 'optional purchase payment'. HMRC took the position that since the Agility contract met the criteria provided in Article 14(2)(b) of the VAT Directive and the corresponding UK VAT legislation which provides that a contract where *"in the normal course of events, ownership is to pass at the latest upon payment of the final instalment"*, then it is to be treated as a supply of goods. On the other hand, MBFS challenged this view pointing out that only around half of its customers ultimately took advantage of the option to purchase.

As a preliminary point, the CJEU remarked that the label attached to a specific agreement for the hiring of a motor vehicle with an option to purchase, such as 'finance lease' or 'hire purchase', does not *per se* determine whether the supply is to be treated as one of goods or one of services. The CJEU specified that in testing whether a supply is in accordance with Article 14(2)(b) two conditions need to be satisfied and namely: (i) that the contract must include a clause expressly relating to the transfer of ownership of the goods; and (ii) objectively assessed, ownership of the goods will pass automatically through the normal performance, over the full term, of the contract.

In a contract where condition (i) is met but where the transfer of ownership of the goods is not automatic and is one of a number of options available to the customer (e.g., option to extend the lease or option to return the goods), condition (ii) will not be met and consequently the contract will not classify as a supply of goods, except where the contractual instalments correspond to the market value of the goods including financing, and the customer will not be required to pay a substantial additional fee in order to exercise the option to purchase.

Having considered the above, the CJEU ruled that the words *"contract for hire which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment"*, used in Article 14(2)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as applying to a leasing contract with an option to purchase if it can be inferred from the financial terms of the contract that exercising the option appears to be the only economically rational choice that the lessee will be able to make at the appropriate time if the contract is performed for its full term, which it is for the national court to ascertain.

3.2 CASE C-533/16 VOLKSWAGEN AG

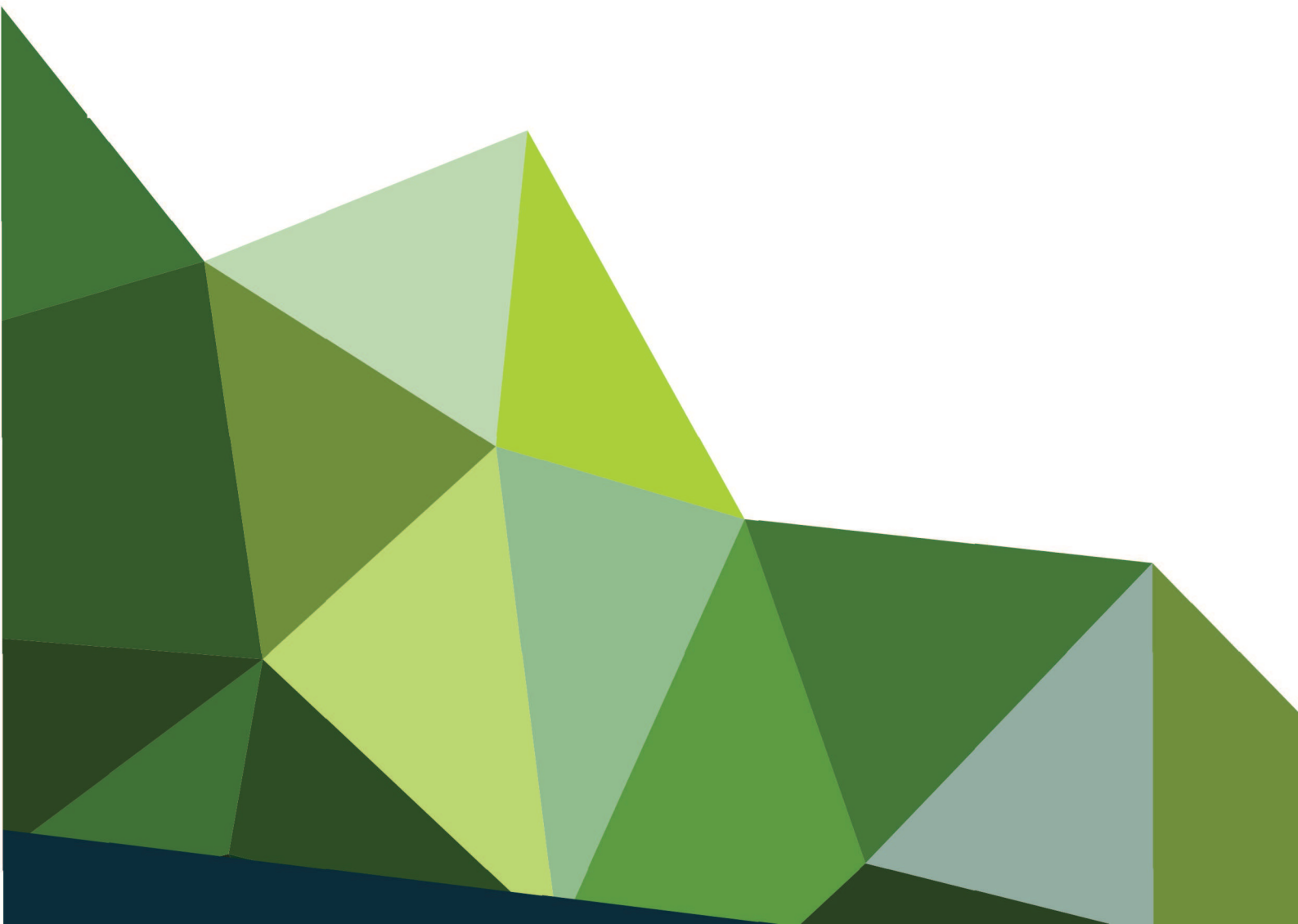
On 21st March 2018 the CJEU released its judgment in the above case regarding a reference for a preliminary ruling by the Supreme Court of the Slovak Republic as to whether EU law must be interpreted as precluding legislation of a Member State under which, in the circumstances such as those at issue in the main proceedings in which VAT was charged to the taxable person and paid by it several years after the delivery of the goods in question, the benefit of the right to a refund of VAT is denied on the grounds that the limitation period provided for by that regulation for the exercise of that right began to run from the date of supply of the goods and expired before the application for a refund was submitted.

The dispute in the main proceedings concerned a claim by Volkswagen AG ("VAG"), established in Germany, for a refund of VAT according to Council Directive 2008/9/EC for VAT incurred by it in Slovakia, which claim was only partially upheld by the Slovak Tax Authorities. Between 2004 and 2010, two companies established in Slovakia supplied VAG with moulds for the manufacture of lights for motor vehicles, but did not charge any VAT as they considered the transactions not as supplies of goods but of "financial compensation", which is exempt from VAT. However, in 2010 the two companies had a rethink on the VAT treatment of these transactions and concluded that they were effectively supplies of goods subject to VAT. As a result, going back to 2004 they charged the VAT on these transactions, filed supplementary returns and paid the resultant VAT to the Treasury, and issued invoices to VAG. In July 2011, VAG submitted an application to the Slovak Tax Authority for the recovery of the relative input VAT pursuant to which it was informed in April 2012 that only the input VAT paid on supplies of goods carried out from 2007 to 2010 was to be refunded and that no refund was being effected regarding the input VAT paid on goods supplied between 2004 and 2006. This because in terms of Slovak national rules the right to claim input VAT is limited to five years from the date when the right to deduct it arises.

The Court considered that under Directive 2008/9 a taxable person has a right to obtain a refund of VAT paid in another Member State in the same manner that a person established within that Member State can deduct Input VAT subject to the rules and conditions applicable in the relevant Member State. The right to deduct is a fundamental principle of EU common system of VAT, intended as it is to relieve the operator entirely of the burden of the VAT due or paid in the course of all his economic activity, thus ensuring neutrality. However, the right to deduct is subject to both substantive and formal requirements or conditions. According to settled case law of the ECJ, if the substantive conditions are met and no evasion or fraud is detected, the right of deduction cannot be refused on the basis that the formal requirements were not met. The Court noted that whilst under Article 273 of the VAT Directive, Member States may take measures to set out conditions which they deem necessary for the correct

collection of VAT and for the prevention of evasion, yet such measures must not go further than necessary to attain the objectives. As a result, the conditions must not have the effect of systematically undermining the right to deduct VAT, such as is the case in the main proceedings. Indeed, it was only following the adjustment by the Slovak Companies that the substantive and formal conditions giving rise to a right to deduct VAT were met and that VAG could therefore request to be relieved of the VAT burden paid, in accordance with the VAT Directive and the principle of fiscal neutrality. Accordingly, since VAG did not demonstrate a lack of diligence, and in the absence of an abuse or fraudulent collusion with the Slovak companies, a limitation period which began from the date of supply of the goods and which, for certain periods, expired before the adjustment, cannot validly deny VAG the right to a refund of VAT.

The Court ruled that EU law must be interpreted as meaning that it precludes legislation of a Member State under which, in circumstances such as those at issue in the main proceedings in which the VAT was charged to the taxable person and paid by it several years after delivery of the goods in question, the benefit of the right to claim a refund of VAT is denied on grounds that the limitation period provided for by that legislation for the exercise of that right began to run from the date of supply and expired before the application for a refund was submitted.



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