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Certified Public Accountants

# VAT NEWSLETTER Q4-2019

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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 VAT GUIDANCE NOTES BY THE COMMISSIONER FOR REVENUE

On 9th October 2019, the Commissioner for Revenue published guidance notes on the so-called "Quick Fixes" regarding the changes coming into force on 01/01/2020. The notes offer a comprehensive explanation on the changes and their implementation. The new provisions set out simplification measures for:

- Call-off stock arrangements
- Chain transactions
- Legal solidification of the VAT Identification number
- Harmonised proof for intra-Community transport of goods

The full guidance notes may be viewed via the link:

*https://cfr.gov.mt/en/vat/guidelines_to_certain_VAT_Procedures/Documents/Guidance%20Notes%20-%20Quick%20Fixes.pdf*

## 1.2 CHANGE IN INTEREST RATE FOR VAT PURPOSES

By means of Legal Notice 303 of 2019 the Minister for Finance has prescribed a VAT interest rate of 0.33% per month (or part thereof) as from 1st January 2020. This substitutes the 0.54% per month prescribed rate which applied up to 31 December 2019. In terms of Article 21(4) of the VAT Act interest at the prescribed rate shall be due on any tax (excluding administrative penalties and interest) which is not paid by the date it becomes payable whereas in terms of Article 24(3) interest at the prescribed rate shall be due by the Commissioner to a person to whom a refund is due where the issue of the refund has been postponed.

## 1.3 ADMINISTRATIVE REVIEW TRIBUNAL DECISIONS

During this quarter the ART (the "Tribunal") published eight decisions in the field of VAT as follows:

1.3.1 **Case 232/12 – XXX vs Kummissarju tat-Taxxa fuq il-Valur Mizjud** – Company XXX lodged an appeal against two assessments raised by the Commissioner to revoke input VAT credits which were not supported by tax invoices following a credit control exercise by the VAT inspectors. Given the particular circumstances of the case, the Tribunal partly upheld the appeal application by allowing two particular invoices which were produced by appellant after the issuing of the assessments to be eligible for an input VAT credit and ordered the Commissioner to revise the assessments accordingly.

1.3.2 **Case 83/13 - XXX vs Direttur Generali (Taxxa fuq il-Valur Mizjud)** – Appellant challenged the assessments raised by the Commissioner for an amount of EUR 31,247 representing under-declared output VAT on grounds that they were based on an erroneous conclusion that the discrepancies noted between bank deposits and VAT return declarations in the course of a VAT investigation, did not consist entirely of business income. However, following the proceedings and given the lack of tangible evidence produced by appellant, the Tribunal was not convinced that the discrepancies were not derived from his business activity, and save for an amount of EUR 2,236 which appellant proved were derived from teaching services provided to MCAST, confirmed the assessments raised by the Commissioner.

1.3.3 **Case 140/13 - XXX vs Direttur Generali (Taxxa fuq il-Valur Mizjud)** – XXX Ltd lodged an appeal requesting the Tribunal to declare that for the purposes of Article 66 of the VAT Act it was not a representative of MLG Ltd and as such was not responsible for the payment of provisional assessments raised by the Commissioner due by MLG Ltd for failure to submit VAT returns for the period between 2008 and 2013. The Tribunal noted that whilst XXX Ltd claimed that it had resigned as corporate director of MLG Ltd in 2008 it had only officially informed the Registrar of Companies in 2013, conveniently at the time the Commissioner started the action on the defaulting VAT returns. Moreover, XXX Ltd appears to have a taken a passive role and no evidence was brought forward of any action taken to ensure that the VAT returns were submitted. As a result, the Tribunal rejected the appeal and confirmed that XXX Ltd was a representative of MLG Ltd in terms of Article 66 of the VAT Act and as such was jointly and severally liable for the tax due.

1.3.4 **Case 72/18 – XXX vs Kummissarju tat-Taxxi** – Commissioner had made a preliminary legal challenge regarding the validity of an appeal lodged by XXX Ltd pursuant to his decision to refuse the company to produce VAT records in the course of a review of provisional assessments as per Article 48(5) of the VAT Act.

According to the Commissioner, the appeal was null and void given that being made under Article 44 (a reference to the Tribunal) the matter had not been taken up in writing with the Commissioner as required by Item 5(1) of the Ninth Schedule to the VAT Act. The Tribunal whilst noting that the Commissioner must have been aware that the issue could have been referred to the Tribunal considering that a number of inconclusive meetings had taken place, the fact that a formal requirement was lacking did not preclude XXX Ltd from exercising its right to refer the question to the Tribunal. In the light of these considerations the Tribunal dismissed the Commissioner's preliminary challenge and ordered the continuation of the hearing of the case.

1.3.5 **Case 284/12 – XXX vs Kummissarju tat-Taxxa fuq il-Valur Mizjud** – XXX had lodged an appeal against the assessments issued by the Commissioner which related to the organisation of a music event. The assessments were based on a discrepancy on admission tickets counted on the days of the event by VAT Inspectors on site, which the organisers were claiming to have been issued free of charge as complimentary. The Tribunal was not convinced, on the basis of the evidence produced by XXX, that such was the case and consequently dismissed the appeal and confirmed the assessments.

1.3.6 **Case 96/14 – XXX vs Ministru tal-Finanzi u Kummissarju tat-Taxxi** – XXX was contesting the Commissioner's decision, based on Article 48(5)[1] of the VAT Act, not to allow it to produce VAT records, including tax invoices, following a credit control exercise. The Tribunal, whilst dismissing the appeal by declaring that XXX was, in terms of the said provision, precluded to present her records at this stage of the proceedings, ordered the continuation of the hearing on the its merits.

1.3.7 **Case 29/15 – XXX vs Kummissarju tat-Taxxi** - Another case concerning the application of Article 48(5) of the VAT Act pursuant to which the Tribunal upheld the Commissioner's preliminary plea that appellant company XXX is precluded to produce VAT records in connection with the VAT assessments raised by it following a credit control exercise. According to the evidence produced it transpired that a request in writing for the production of the records was shown to have been delivered to one of the directors of the company. As a result, the Tribunal ordered the continuation of the hearing of the appeal on its merits.

1.3.8 **Case 30/15 – XXX vs Kummissarju tat-Taxxi** – In this case, also concerning a preliminary plea raised by the Commissioner on the basis of Article 48(5), the Tribunal found that on the basis of the evidence produced, the Commissioner had not validly notified in writing the company or any or its representatives to produce the VAT records in question and as such there was nothing to preclude appellant company from producing the said records. Whilst dismissing the Commissioner's preliminary plea, it ordered the continuation of the hearing of the case.

[1] **Art. 48(5) of VAT Act:** Any person who, without a reasonable excuse, fails to produce records when requested by means of a notice in writing by the Commissioner shall be precluded to produce such records at a later stage after the issue of the provisional assessments or assessments or before the Tribunal or in any Court of law.

# EUROPEAN NEWS

## 2.1 European Commission – Taxation and Customs Union Directorate (TAXUD)

During this calendar quarter TAXUD uploaded the following items on its web portal:

**12th December 2019** – New VAT Committee guidelines published

This is the latest update of the VAT Committee guidelines which tackle specific VAT issues that are brought forward for discussion either by the Commission or by a Member States. Whilst undoubtedly an important reference point for consultation, it is pertinent to point out that the conclusions contained therein are merely the views of an advisory committee and as such do not constitute an official interpretation of EU law and do not necessarily have the agreement of the European Commission. Furthermore, they do not bind the European Commission or the Member States who are free to disagree. The guidelines can be accessed on the following link:

*https://ec.europa.eu/taxation_customs/sites/taxation/files/guidelines-vat-committee-meetings_en.pdf*

**20th December 2019** – Publication of "Explanatory Notes on 2020 Quick Fixes"

The Explanatory Notes on 2020 Quick Fixes, prepared by the Commission legal services, set out to explain how the new rules on call-off stock arrangements; chain transactions; the exemption for intra-Community supplies of goods; and the proof of transport for the purposes of that exemption, are to be applied in practice. Whilst not legally binding, nevertheless they should be regarded as a valuable guidance tool on how to implement the new rules which kicked in on 1st January 2020.

*https://ec.europa.eu/taxation_customs/sites/taxation/files/explanatory_notes_2020_quick_fixes_en.pdf*

## 2.2 114th Meeting of the VAT Committee – 2nd December 2019

### Working Paper 981 – VAT treatment of "Combined Lifestyle Intervention"

The Netherlands requested the opinion of the VAT Committee concerning the VAT treatment of the so-called combined lifestyle intervention ("CLI") and particularly whether it qualifies as medical care in which case it shall be exempt from VAT in terms of Art. 132(1)(b) and (c) of the VAT Directive. The CLI programme consists of a combination of interventions aimed at reducing energy intake through nutritional advice, increasing physical activity under supervision and if necessary, psychological interventions to support behavioural change in nutrition and exercises. The persons providing CLI services do not need to be medical or paramedical professionals and the CLI centres are not considered as hospitals or centres for medical treatment or diagnoses. The scope of CLI is to aim at achieving a better lifestyle, thus minimising or eliminating the likelihood of health problems attributable to stress and obesity. From the information provided, it appears to the Commission services that in principle CLI services cannot qualify as medical care falling under the VAT exemption for medical services of Article 132(1)(b) or (c) of the VAT Directive. Such services would instead be considered taxable services of a more general nature, which are neither directly aimed at nor provided in the context of a prophylactic or therapeutic treatment. Therefore, they cannot be considered eligible for a VAT exemption under the above provisions.

## 2.3 VAT Expert Group[2] Meetings

At the 24th meeting held on 27th November 2019, the VEG discussed a document titled "Upgrading the EU VAT system – A reflection of the possible ways forward". Through this document the Commission requested the input of the VEG to identify areas where the VAT system could possibly be upgraded. The VEG discussion focussed on ways to simplify the VAT system and reduce the VAT related compliance burdens for businesses; keeping the pace with new business models; exploring the opportunities offered by the new technologies as well as other of possible improvement such as the area of exemptions and the area of special schemes. For further information see the following link:

*https://circabc.europa.eu/sd/a/8732105a-999e-4bb2-8c2a-fe20d7e7383e/VEG%20086%20-%20Upgrading%20the%20EU%20VAT%20system.pdf*

[2] The VAT Expert Group, set up by Commission Decision 2012/C of 26 June 2012, is a group of experts on VAT (appointed by the Commission for a two-year term following a public call for applications) with a remit to advise the Commission on the preparation of legislative acts and other policy initiatives in the field of VAT as well as to provide insight concerning their practical implementation. VEG meetings are held in Brussels and are chaired by a representative of the Commission.

# UPDATE OF LATEST EUROPEAN COURT OF JUSTICE DECISIONS IN THE FIELD OF VAT

### 3.1 Case C-42/18 Cardpoint GmbH

On 3rd October 2019, the ECJ (the "Court") published the decision on this case concerning services related to the operation of ATM's.

Cardpoint, a German company was in the business of supplying services to banks consisting in the operation and servicing of cash dispensers (ATM's), specifically their installation, operation, maintenance, replenishing with cash including its transportation, and providing the required hardware and software. Additionally, Cardpoint was directly involved in the cash withdrawals from the ATM's by providing the necessary data to the issuing banks and then proceeding with the cash withdrawal after receiving confirmation. Taking the view that the services it supplied should be exempt from VAT, Cardpoint filed a request with the tax office to amend already submitted VAT returns (with VAT), which request was declined. The decision was challenged, with the German Federal Finance Court making a referral for a preliminary ruling to the ECJ.

The Court was asked to determine whether the ATM services supplied by Cardpoint classified as a transaction concerning payments within the meaning of Article 135(1)(d) of the VAT Directive.

In line with previous settled case law, the Court considered that a transfer is a transaction consisting in the execution of an order for the transfer of a sum of money from one bank account to another. It is characterised in particular by the fact that it involves a change in the legal and financial situation existing, on the one hand, between the person giving the order and the recipient and, on the other, between those parties and their respective banks; and, in some cases, between those banks. Moreover, the transaction which produces the change is solely the transfer of funds between accounts, irrespective of its cause. Thus, a transfer being only a means of transmitting funds, the functional aspects are decisive for the purpose of determining whether a transaction constitutes a transfer within the meaning of Article 135(1)(d) of the VAT Directive. In the case at hand, Cardpoint only provided data

to the banks to enable the execution of the underlying transfers, so much so that it did not approve the withdrawal itself, but merely provided the data to the issuing banks. The fact that Cardpoint's services are indispensable for the transfer to take place does not mean that such services also classify as a payment per se, since they lack the essential elements of a finance service.

Consequently, the Court ruled that the services rendered by Cardpoint consisting in the operation and servicing of ATM's did not classify as a transaction concerning payments within the meaning of Article 135(1)(d) of the VAT Directive and hence were to be treated as taxable supplies.

### 3.2 Case C-653/18 Unitel

On 17th October 2019 the ECJ released its decision in this case concerning exemptions on exportation and specifically the refusal of the right to apply the exemption where the person acquiring the exported goods is not identified.

Unitel sp. z.o.o. ("Unitel"), a company established in Poland, sold mobile phones to two entities established in Ukraine. Following an audit, the tax authorities whilst satisfied that the mobile phones had actually been transported to a destination outside the Community, discovered that they were not acquired by the entities stated on the invoices but by other entities which were not identified. As a result, in accordance with a Polish national provision enabled by Article 131 of the VAT Directive, it was concluded that the VAT exemption set out in Article 146(1)(a) and (b) of that Directive cannot be applied.

The ECJ was asked whether a national provision can preclude the exemption on exports set out in Article 146(1)(a) and (b) to apply where there is clear and undisputed evidence that the goods had left the territory of the Community but that the goods were acquired by an unidentified recipient. Secondly, if the exemption is not applicable, whether to consider that no supply of goods had taken place thus jeopardising the entitlement of deduction of input vat related to those goods.

The Court remarked that two conditions are key for the exemption on exports set out in Art. 146(1) to apply, namely that the transaction has to be a supply of goods within the meaning of Art. 14(1) and secondly that the goods are dispatched or transported to a destination outside the Community. It follows therefore that transactions such as those at issue in the main proceedings will constitute supplies of goods within the meaning of Art. 146(1) only if they meet the objective criteria upon which the concept is based, namely that the export of the goods is effected and the exemption becomes applicable at the point when the right to dispose of the goods as owner has been transferred to the person acquiring the goods. The characterisation of a transaction

as a supply of goods within the meaning of Art. 146(1) cannot therefore be held subject to the condition that the person acquiring the goods must be identified. On the other hand, whilst Art. 131 of the VAT Directive allows Member States to take measures to ensure the correct and straightforward application of the exemptions set out in the VAT Directive and prevent avoidance or evasion, such measures must not go beyond what is necessary to ensure the objectives set therein. As a result, the right of deduction cannot be refused merely on the basis of a failure to comply with formal obligations (the actual acquirer in the invoice) without any account being taken of whether the substantive requirements (supply of good and dispatch outside the Community) have actually been met. However, if the failure to identify the person actually acquiring the goods has the consequence of being unable to prove that the (export) transaction was not a supply of goods within the meaning of Art. 14(1) or if the taxable person exporting the goods knew or ought to have known that that transaction was fraudulent, then the exemption must be refused.

In the light of these considerations, the Court ruled that Art. 146(1)(a) and (b) of the VAT Directive must be interpreted as precluding a national practice such as that at issue in the main proceedings to refuse the exemption where whilst it is undisputed that the goods were dispatched to a destination outside the Community, it transpired that the person acquiring the goods was not the person indicated in the invoice issued by the exporter. The exemption must be refused, however, if the failure to identify the actual acquirer prevents it from being proved that a supply actually took place or that the exporter knew or ought to have known that the transaction was fraudulent. Secondly, in circumstances where there is a refusal to grant the Art. 146(1)(a) and (b) exemption, the transaction in question should be considered not to constitute a taxable transaction and, accordingly, not to confer entitlement to the deduction of input VAT.

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