THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2022

MODULE 2.07 – MALTA OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

By virtue of the fact that Super Holdings Malta Limited (SHML) was incorporated in Malta, then from a Maltese tax perspective, the entity is deemed to be resident and domiciled in Malta and hence is taxable in Malta on its worldwide income. This is in line with the provisions of Article 4 (the charging provision) of the Income Tax Act, chapter 123 of the Laws of Malta.

Bank Interest derived from Swiss bank account received in its Maltese Bank Account

This foreign interest income will be taxed in Malta as part of the chargeable income of the company. A 25% Flat Rate Foreign Tax Credit (FRFTC) can be applied on the basis that the Memorandum and Articles of Associations of SHML contains the empowering clause for the company to receive income from abroad.

This income will be allocated to the Foreign Income Account.

No scope for Participation exemption or other exemption under Maltese Income Tax Act.

Bank Interest derived from a UK bank account received in its Swiss Bank Account

This foreign interest income will be taxed in Malta even though it's not being remitted to Malta. This by virtue of the fact that SHML is both domiciled and resident in Malta and therefore being taxed on its worldwide income. A 25% Flat Rate Foreign Tax Credit can be applied on the basis that the Memorandum and Articles of Associations of SHML contains the empowering clause for the company to receive income from abroad.

This income will be allocated to the Foreign Income Account.

No scope for Participation exemption or other exemption under Maltese Income Tax Act.

Profits allocated to its Permanent Establishment in Italy

On these profits SHML is eligible to apply participation exemption from Maltese Income Tax under article 12(1)(u)(2) of the Income Tax Act (ITA), which specifically exempts any income or gains derived by a company registered in Malta which are attributable to a permanent establishment (PE) situated outside of Malta. The profits from the PE situated abroad must be calculated as if the PE is an independent enterprise operating in similar conditions and at arm's length.

These profits will be allocated to the Untaxed Account.

A capital gain derived from the transfer of Investment Property in Belgium

On the basis that SHML is domiciled and resident here in Malta, it is taxed on its worldwide income including foreign sourced capital gains. Here we are assuming that the company does not have a permanent establishment in Belgium vis-a-vis this property. The company is eligible to apply a 25% Flat Rate Foreign Tax Credit or else apply the relevant treaty relief, whichever is more advantageous to the entity.

This income will be allocated to the Foreign Income Account.

No scope for Participation exemption or other exemption under Maltese Income Tax Act.

A dividend from an EU resident company in which it holds 70% of the equity shareholding

As per the EU's Parent-Subsidiary Directive the member state of the parent, in this case Malta, can only refrain from taxing the dividend income if the dividend was not treated as a deductible expense in the hands of the company distributing the dividend. As such this dividend income

will be taxed as part of the chargeable income of the Maltese Company. The company can apply a 25% Flat Rate Foreign Tax Credit on this foreign sourced income.

This income will be allocated to the Foreign Income Account.

No scope for Participation exemption or other exemption under Maltese Income Tax Act.

A dividend from a non-EU resident company in which it holds 90% of the equity shareholding

The holding SHML has in the non-EU resident company satisfy the conditions of a participating holding by virtue of the fact that the company holds 90% of the equity shares in the non-EU resident company. On the basis that the anti-abuse conditions in relation to dividend income are met since the company is engaged in trading, the participation exemption can be applied on this dividend income. The limitation on the application of the Participation Exemption through the provisions of the EU Parent-Subsidiary directive do not apply on the basis that the dividend is being received from a non-EU resident company.

This income will be allocated to the Untaxed Account.

A tax-exempt dividend received from a letterbox company resident in a tax haven outside the EU

Although the holding SHML has in this letter box company consists of 100% of the equity shares of the company, the participation exemption's anti-abuse conditions are not satisfied by virtue of the fact that the letter box company is resident in a tax haven outside the EU, the dividend was not subject to tax and its income consists entirely of passive interest income. Consequently, this dividend income will be taxed as part of the chargeable income of the Maltese Company and a 25% Flat Rate Foreign Tax Credit can be applied.

This income will be allocated to the Foreign Income Account.

No scope for Participation exemption or other exemption under Maltese Income Tax Act.

Compensation received from its insurance in connection with negligent investment advice given to the company

On the basis that the negligent investment advice resulted in a loss of capital, such income will be deemed income of a capital nature which is out of scope of Maltese Income Tax. Capital gains are taxed by virtue of article 5 of the Maltese Income Tax Act. This article unlike article 4 does not contain a specific clause taxing all capital gains and therefore given that such gain is not specifically targeted in article 5, it will be deemed to be out of scope of Maltese Income Taxation.

This income will be allocated to the Untaxed Account.

No scope for Participation exemption or other exemption under Maltese Income Tax Act.

A capital gain derived from the sale of intellectual property registered in the State of Delaware

This foreign sourced capital gain is taxable in Malta by virtue of the fact that this entity is being taxed on a worldwide basis. As per article 14(1)(p) of the ITA, SHML may be entitled to a specific deduction if all the conditions of the Patent Box Regime (Deductions) Rules are satisfied. For such regime to apply, the DEMPE (Development, Enhancement, Maintenance, Protection and Exploitation) functions in relation to this intellectual property need to be taking place in Malta.

This income will be allocated to the Foreign Income Account.

No scope for Participation exemption or other exemption under Maltese Income Tax Act.

A capital gain derived from the sale of its 1% shareholding in an Algerian company held since 2010

The investment held in this Algerian company does not satisfy the conditions of a participating holding on the basis that the SHML only has 1% equity shareholding in the Algerian Company and the investment size is below the threshold of EUR1.2m. Here we are assuming that none of the other conditions for having a participating holding are being met. Consequently, this dividend income will be taxed as part of the chargeable income of the Maltese Company and a 25% Flat Rate Foreign Tax Credit can be applied.

This income will be allocated to the Foreign Income Account.

No scope for Participation exemption or other exemption under Maltese Income Tax Act.

A dividend derived from a Libyan company in which it has 4% equity shares since 2012

The investment held in this Libyan company does not satisfy the conditions of a participating holding on the basis that the SHML only has 4% equity shareholding in the Libyan Company and the investment size is below the threshold of EUR1.2m. Here we are assuming that none of the other conditions for having a participating holding are being met. Consequently, this dividend income will be taxed as part of the chargeable income of the Maltese Company and a 25% Flat Rate Foreign Tax Credit can be applied.

This income will be allocated to the Foreign Income Account.

No scope for Participation exemption or other exemption under Maltese Income Tax Act.

A commission received from the sale of an apartment situated in London. The commission was received in cash and is held in its safe deposit box in Switzerland.

As per Article 4(1)(g) of the ITA, any other gains or profits derived by a company should be brought to charge. The commission received from the sale of an apartment falls within this category of income in the case of SHML. The company is eligible to apply a 25% Flat Rate Foreign Tax Credit or else apply the relevant treaty relief, whichever is more advantageous to the entity.

This income will be allocated to the Foreign Income Account.

No scope for Participation exemption or other exemption under Maltese Income Tax Act.

Question 2

Part 1

If Mr N acquires EML (through Investments Ltd), Investments Ltd as the acquirer (which does not qualify for a duty exemption determination) will be liable to pay duty in terms of the Duty on Documents and Transfers Act (DDTA). As per article 43(1) of the DDTA, stamp duty will be charged at a rate of 2% on the higher of the consideration being paid and the real value. The rate increases to 5% if 75% or more of the assets of the company consists of immovable property. The 75% threshold is calculated by dividing the value of the immovable property held by the company by the total fixed assets and immovable property classified as current assets.

There will be no immediate Income tax or VAT tax implications at the level of Mr N upon such acquisition of shares.

Part 2

Yes, this will be allowable by virtue of the proviso to Article 14(1)(g) of the ITA. Such proviso states that where a merger or division referred to in the Rulings (Income Tax and Duty Treatment of Mergers and Divisions) Rules is being effected for bona fide purposes and as a result of such merger the trade or business previously carried on by a company will be subsequently carried out by another company involved in such acquisition, the Commissioner for Revenue shall be entitled to grant permission for the accumulated tax losses and capital allowances to be claimed by the company making the acquisition against its gains or profits as the case may be in determining its chargeable income. In granting such permission, the Commissioner may impose such conditions as he deems fit and reasonable. While trading losses can be set off against all sources of income, capital allowances may only be utilised against the same source of income generated by such assets (i.e. the same source of income generated by the company when the capital allowances were initially generated).

Part 3

By virtue of Subsidiary Legislation 123.187, in order for an entity to be considered a Controlled Foreign Company (CFC) it needs to meet two criteria. First, there is the controlling threshold which needs to be met. Basically the Maltese entity, which in this case is EML, needs to hold, directly or indirectly, by itself or together with its associated enterprises, 50% of the voting rights or to own, directly or indirectly, 50% or more of the capital or be entitled to 50% or more of the profits in the subsidiary.

The second criterion is that the actual corporate tax paid on its profits by the entity or permanent establishment is lower than the difference between the tax that would have been charged on the entity or permanent establishment under the Income Tax Acts and the actual corporate tax paid on its profits by the entity or permanent establishment.

Both of these conditions are met with respect to Diversions Ltd. Diversions Ltd is fully owned by EML and its not paying any tax in the tax haven where it is located. The subsidiary legislation goes further to qualify that an entity will be treated as CFC and therefore have its income included in the tax base of its Maltese parent, if it can be proved that such income is arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.

For the purpose of this legislation, an arrangement is regarded as non-genuine to the extent that the entity (Diversions Ltd) would not own the assets or would not have undertaken the risks which generate its income if it were not controlled by a company where the significant people functions, which are relevant to those assets and risks, are carried out and are instrumental in generating the controlled company's income - provided that the said company is the taxpayer (i.e. EML) and the said significant people functions are carried out in Malta. From the information provided, it seems evident that some of the significant people functions are taking place in Malta and this will further reinforce the case for a CFC.

In addition, CFC rules apply if the accounting profits of the respective subsidiary abroad exceed €750,000. In the case of non-trading income, the threshold is €75,000. Also, if the accounting profit is 10% or lower of its operating costs, CFC rules don't apply. These thresholds are surpassed by Diversions Ltd by virtue of the fact that it is generating approximately €5,000,000 in annual income and, as per the information provided, the expenses being incurred would be expected to be relatively minimal.

The structure mentioned above is also inherently risky because on the basis of the information provided, it seems that Diversions Ltd is actually being managed and controlled in Malta by virtue of having its key personnel based and tax resident in Malta. Moreover, all decisions in relation to this subsidiary are being taken in Malta. When considering these facts, the tax authorities can deem Diversions Ltd to be taxable in Malta as a resident of Malta. For Maltese Income Tax purposes, a company is deemed to be tax resident in Malta by virtue of having its place of management and control here, even if its domicile is somewhere else.

Another inherent risk in Ms S's structure is that it is treating the rental income generated from the Maltese properties as trading income and thereby deducting against it such expenses as finance costs, wages & salaries and wear and tear allowances. These expenses might also have been incurred in relation to the operations of Diversions Ltd because as indicated, the Malta based employees are also working upon functions which relate to Diversions Ltd. In order to be fully compliant with article 4 of the ITA, the only expenses which are allowed as a deduction at the level of the Maltese entity are those incurred wholly and exclusively in the production of the income, which in this case is the income generated from the Maltese properties.

Part 4

If Diversions Ltd were to distribute a dividend to its sole shareholder i.e. EML, this should be eligible for participation exemption under article 12(1)(u) on the basis that EML is the sole shareholder of Diversions Ltd and therefore holds 100% of the equity shares in the company, thereby satisfying the condition for a participating holding. In addition, the anti-abuse conditions are met by virtue of the fact that the income generated by Diversions Ltd is not passive interest or royalties. Such profits will be allocated to the Untaxed account of EML and will be subject to a withholding tax of 15% upon the distribution to the individual shareholder Ms S (who is both ordinarily resident in Malta and domiciled in Malta). Here we are assuming that the tax haven in which Diversions Ltd is incorporated in, is not a country on the EU list of non-cooperative jurisdictions. In that case, the application of participation exemption will not be allowed if certain other criteria are met.

Part 5

If EML decides to dispose its shareholding in Diversions Ltd, the capital gain would be eligible for Participation exemption on the basis that EML is the sole shareholder of Diversions Ltd and therefore holds 100% of the equity shares in the company, thereby satisfying the condition for a participating holding. Such profits will be allocated to the Untaxed account of EML and will be subject to a withholding tax of 15% upon the distribution to the individual shareholder who is both ordinarily resident and domiciled in Malta.

PART B

Question 3

A cash donation of EUR 15,000 to the Community Chest Fund

Donations are not normally allowed as a deduction in arriving at the chargeable income for income tax purposes, unless specifically provided for through legislation. In the case of the above donation, by virtue of S.L. 123.162 - Donation (Community Chest Fund) Rules, it is possible to deduct the full donation assuming that the donation is made through one of the commercial entities that Mr. Weal has in Malta. If the donation had been for an amount less than EUR 2,000, the amount would not have been deductible for tax purposes.

In order to claim the deduction, a certificate with respect to the donation as issued by the MCCF must be in hand and kept as evidence. This deduction applies with respect to donations made up to 31/12/2021, unless future legislation provides a further temporal extension to this deduction.

A cash donation of EUR 50,000 to an approved Philanthropic Institution

This donation will be disallowed for income tax purposes on the basis that it is voluntary in nature and not incurred wholly and exclusively in the production of the income.

A donation of a warehouse in Marsa (Malta) to an Approved Philanthropic Institution

Donations of immovable property situated in Malta to approved philanthropic institutions are exempt from property transfer taxes by virtue of article 5A(4)(a)(ii). The same article contains a proviso that upon any subsequent transfer of the property, the date of acquisition shall be considered to be the date of the original acquisition of the property by the person who made the original donation.

A donation of his home in France to his son

Donation of the home in France falls outside the scope of Maltese income tax on the basis that Mr. Weal is ordinarily resident in Malta but not domiciled here. Therefore, such person is ordinarily resident in Malta but not domiciled in Malta and thus foreign sourced capital gains are not taxable in Malta as per Article 4(1) of the ITA.

A donation of his home in Malta (bought in 2016) to his daughter

Donations of immovable property situated in Malta to a direct descendant are exempt from property transfer taxes by virtue of article 5A(4)(a)(ii). The same article contains a proviso that upon any subsequent transfer of the property, the date of acquisition shall be considered to be the date of the original acquisition of the property by the person who made the original donation.

A donation of his shares listed on the Malta Stock Exchange to his son

Transfers of shares listed on the Malta Stock Exchange are exempt from Maltese Income Tax by virtue of article 5(6)(b).

A donation of his shares listed on the New York Stock Exchange to his daughter

The transfer of shares listed on the New York Stock Exchange will fall outside the scope of Maltese income tax on the basis that the individual is ordinarily resident in Malta but not domiciled in Malta and therefore foreign sourced capital gains are not taxable in Malta (irrespective of whether or not such gains are received in or remitted to Malta).

A donation of 50% of his equity shares in his Maltese resident company to his son

In terms of article 5 of the Income Tax Act, Cap. 123 of the Laws of Malta ('ITA'), the transfer by Mr. Weal of his respective shares in the Maltese resident company to his son by means of a donation would fall within the purview of income tax. That being said, the ITA contemplates an exemption via the interaction of sub-articles 5(2)(e) and 5(3)(f) thereof.

Essentially, the relevant provisions state that notwithstanding that a donation "shall be considered as a deemed sale made at the market value… at the time of transfer", "no tax shall be payable where the donation is made by a person to… his spouse, descendants and ascendants in the direct line and their relative spouses, or in the absence of descendants to his brothers or sisters and their descendants".

A donation of 50% of his equity shares in his Italian resident company to his daughter

The transfer of shares in the Italian resident company will fall outside the scope of Maltese income tax on the basis that the individual is ordinarily resident in Malta but not domiciled in Malta and therefore foreign sourced capital gains are not taxable in Malta.

Cessation of his tenancy rights on a shop in Valletta (Malta) in favour of girlfriend.

Cessation of tenancy rights to his girlfriend on a shop situated in Valletta (Malta) falls within the scope of the Article 5 which brings to charge gains or profits from transfer of ownership or usufruct of any immovable property assignment/cession of any rights over such property. No exemption applies given that here we don't have a formal spouse.

PART C

Question 4

Fixed assets fall into the category of plant and machinery if they meet all the following three conditions:

- The asset is retained for the permanent utilisation of the business. It is typically considered that if an asset has a useful economic life of two years or more, this should be sufficient for the asset to be considered as permanently employed in the business.

- The relevant asset is not held as inventory. For instance, in a catering establishment, a stock of flour or heating oil cannot be considered as plant and machinery.

- The asset must be part of the system employed in the furtherance of the economic activity of the business.

In the case of a catering company, examples of plant and machinery that fall within the parameters laid out above may include ovens, fryers, sinks, blenders, mixers, working tables, fridges, freezers and so on.

By virtue of article 14(1)(f) of the ITA, a person is allowed a deduction in respect of wear and tear of any Plant and Machinery arising out of the use or employment of such property in the production of the income. The deduction is calculated on a straight-line basis over a minimum number of years as prescribed in the schedule to the "Deduction for Wear and Tear of Plant and Machinery Rules".

Assignation of exclusive agency to a third party for a consideration

Income Tax

The transfer of the exclusive agency to a third party for a consideration will most likely be deemed to be a transfer of a going concern and therefore such transfer is taxable under article 5(1)(a)(ii) of the ITA, which brings to charge gains or profits arising from the transfer of a business.

VAT

If the company can prove that this is a transfer of a going concern capable of separate operation, in terms of item 16 of the Second Schedule to the VAT Act such assignment of rights would fall outside the scope of VAT. If the transfer of a going concern provisions do not find application, the transfer of the exclusive agency will be subject to VAT in Malta at the standard rate of 18% since this should typically be considered to be a business-to-business supply of services taking place in Malta (that is to say, where the recipient business is established.)

Duty on Documents

A transfer of a going concern will not be subject to duty on documents assuming that the transfer will not include transfer of marketable securities, interests in partnerships or immovable property.

Assignation of fixed assets to a related Group company at a nil consideration

Income Tax

If the fixed assets of Food Limited are transferred to related Group company at nil consideration, a balancing statement would need to be prepared by Food Limited in line with Article 24 of the ITA. This is computed by deducting the tax written down value of the asset from the proceeds received on the disposal. Given that no proceeds are being received upon the disposal of the fixed assets (i.e. nil consideration), one would need to refer to sub-article 7(d) which states that

the disposal value shall be the amount that such assets would have fetched if sold or otherwise transferred under onerous title in the open market at the time. If the tax written down value is higher than the disposal value, a balancing allowance will be created.

A balancing allowance is equivalent to wear and tear allowances i.e. it can be deducted from the same source of income and if not absorbed it can be carried forward to future years as long as that source of income is still in existence and belongs to the same person. If the disposal value is higher than the tax written down value, a balancing charge will result which would need to be charged to tax similar to the other income generated by the company.

VAT

Assuming that input VAT in relation to these fixed assets had been reclaimed by Food Ltd and given that these assets will be transferred at a nil consideration, in virtue of item 14 of the Second Schedule to the VAT Act, this will be deemed to be a supply of goods and therefore VAT shall be self-charged at the standard rate of 18%. The taxable value that shall be used in the calculation of the VAT due will be in line with item 6 of the Seventh Schedule, which states that the consideration shall be the purchase price of those or similar goods or, in the absence of a purchase price, the cost price, determined at the time of the supply.

Duty on Documents

Out of Scope of Duty on Documents.

Question 5

Double Tax Treaty between Malta and the Netherlands

When it comes to deciding whether Services BV will have a Permanent Establishment (PE) here in Malta, the mere fact that it does not have a branch is not enough to justify that it does not have a PE. Article 5 of the Double Tax Treaty between Malta and the Netherlands states that a PE is a fixed place of business in which the business of the enterprise is wholly or partly carried on. In the case at hand, Services B.V. will be having a semi-submersible oil rig for more than 730 days in Maltese territorial waters. The question is whether this asset can constitute a fixed place of business given that such equipment normally does not stay in the same place for a long period of time. By the term "Fixed" the commentary to Article 5 of the OECD Convention states that we should understand that the place of business – "must be established at a distinct place with a certain degree of permanence".

The commentary also states that equipment does not necessarily need to be actually fixed to the soil. Given that a semi-submersible drilling rig is continuously engaged in exploration in different spots but within the same area allowed by the license, this is can generally be viewed to be a fixed place of business in terms of the definition of PE in the double tax treaty. Therefore Services B.V. will likely be deemed to have a PE here in Malta.

In terms of Article 7 of the Double Tax Treaty between Malta and the Netherlands, the profits that shall be generated by both Drilling B.V. and Services B.V. will only be taxable in the state where they are resident or where they have the permanent establishment which is generating such profits. Therefore, in accordance with this article, both Drilling B.V.'s Maltese Branch and Services B.V. Permanent Establishment in Malta will be liable to tax in Malta.

Income Tax Act

The determination of petroleum profits chargeable to tax is regulated by Article 23 of the ITA. This article also mentions the existence of production sharing contracts granted by the Government of Malta in terms of the Petroleum Production Act and the Continental Shelf Act. In terms of these laws, a person engaged in the business of exploration for, and production of petroleum is referred to as the "contractor".

The chargeable income of Drilling BV which in this case shall be deemed to be the contractor will amount to the value of the cost recovery petroleum (CRP) plus the share of profit petroleum (SPP) minus the recoverable costs not yet fully recovered plus any other ancillary income. A 35% tax rate applies on the resultant chargeable income.

Trading losses can only be offset against income from the exploration for or production of petroleum. No deduction of trading loss or expense incurred in relation to this activity can be allowed against any other source of income. Group loss relief provisions do not apply to companies operating under a licence for the exploration for or production of petroleum. Each production sharing contract is deemed to constitute a separate and distinct source of income. The contractor deriving gains or profits from one production sharing contract is subject to tax as if that person was a separate and unconnected person with respect to each such contract.

Services B.V. which, as per the analysis above, will most likely be deemed to have a PE in Malta will be subject to tax in Malta in accordance of the general rules of the ITA. A special regime would have applied had it resulted that such entity did not have a PE here in Malta and would have therefore be deemed to be a non-resident sub-contractor rendering services to a contractor in Malta.

The special regime would have consisted of the contractor withholding 10% of the payment made to the sub-contractor for services rendered in Malta and such amounts should be paid by

the contractor to the Commissioner for Revenue within 30 days. The subcontractor can choose to consider that 10% payment as final tax and therefore there would be no further tax liability here in Malta. Alternatively, the sub-contractor can notify the Commissioner for Revenue that the tax withheld should be considered as provisional tax payment to be credited against its tax liability for the relevant year of assessment.

Duty on Documents and Transfers Act

Out of Scope of Duty on Documents.

VAT Act

Assuming that the services will be rendered by Services BV to Drilling BV's establishment in Malta, these shall be deemed to be a supply of services taking place in Malta and therefore in principle subject to 18% VAT. Any eventual sale of petroleum products will be deemed as a supply of goods which, if taking place in Malta, will also be subject to 18% VAT unless a relevant VAT exemption applies e.g. in the case of a qualifying intra-EU supply or export sale of the said products.

Question 6

One of the main advantages in applying tax consolidation is the cash flow benefit obtained. Prior to the introduction of tax consolidation, eligible companies were invariably required to pay the tax due to the Maltese Tax Authorities at the full standard corporatae rate of income tax, with the possibility to subsequently claim a tax refund under the Maltese Refundable Tax Credit System.

With tax consolidation, this process no longer applies and the combined (post-refund) effective tax rate is applied immediately. This results in better cash flow management because the company no longer needs to budget for the cash required to settle the tax in full and then wait to receive the tax refund, but only budget to pay the effective tax which is a fraction of the tax normally paid prior to receiving the refund.

In addition to the above, another advantage of tax consolidation is the fact that less tax returns would need to be filed, especially when the number of entities within the Maltese Group is high. Moreover, the past practice of submitting a claim for refund form together with additional documentation, will no longer apply because the taxpayer is being charged at the effective tax rate immediately at the consolidated tax return stage.

Another advantage of tax consolidation is the better usage of tax trading losses b/fwd and capital losses b/fwd, as essentially the formation of a fiscal unit would give rise to the transfer of these tax attributes to the principal taxpayer and the usage of such against any income attributed to him. In the absence of such fiscal unity rules, you cannot transfer any of the above between companies as the only tax attributes which may be transferred are tax trading losses for the year.

Question 7

The case of Busuttil v. Malta (Application no. 48431/18) is important because it is the only Maltese tax case to be declared admissible by the ECtHR.

The case is an important judgment relating to personal liability of directors for unpaid tax due by the company they served in.

Prior to his resignation, the individual was, from 2001 to 2006, a co-director (owning 25% of the shares) of a company that had failed to submit to the authorities the relevant tax forms and payments (provisional tax and national insurance contributions on behalf of their employees).

After the resignation of the directorship (in 2006), under the management of the two other directors, the company went bankrupt. In 2011, the tax authorities ordered the applicant to pay, on behalf of the company , approximately euro 323,500 in outstanding tax. The applicant having failed to pay, in March 2011 criminal proceedings were instituted against him for failing to submit the relevant tax forms.

The applicant claimed that he was unaware of such a situation as he had only dealt with sales (which was his job since 1996 when he had been employed by the company). Indeed, since in practice he knew nothing about administration, he had insisted with the other directors that they should employ a financial controller as in fact they had eventually done.

By a judgment of 23 March 2012, the Court of Magistrates found the applicant guilty of the charges against him and fined him EUR 400. It did not impose any additional fine given that the applicant no longer represented the company. It examined his defence that he had been unaware that the offence had been committed and that he had exercised all due diligence to prevent such offence from taking place and dismissed it. In particular, it found that, from his own testimony, it was clear that he had failed to take any interest, no matter how minimal, in the fiscal obligations of the company of which he had been director, leaving the matters completely in the hands of third parties. The judgment was confirmed in appeal.

Busuttil filed a complaint to the ECtHR complaining that a presumption of guilt was applied against him on the basis that he was the director of the company, despite the fact that the situation had been hidden from him, which was contrary to Article 6 § 2 of the Convention.

The ECtHR noted that there was no indication that the domestic courts applied the domestic rules on the burden of proof in a manner incompatible with the presumption of innocence. In particular, the applicant has not explained in what way the burden of proof imposed on him was unattainable to the extent that his defence could have no prospect of success. As noted by the domestic courts, the defence of impossibility could be upheld in various circumstances.

The Court added that there is nothing indicating that the criminal courts in fulfilling their functions started from the assumption that the applicant was guilty. Further, in reply to the applicant's argument concerning the lack of criminal intent, the Court reiterated that the Contracting States may, in principle and under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.

The Court concluded that the presumption under Maltese law that a director is responsible for any act which by law must be performed by the company, was not unreasonable in the circumstances of the present case.