



**MALTA**

**Fit-Tribunal ta' Revizjoni Amministrattiva  
Magistrat  
Dr. Gabriella Vella B.A., LL.D.**

**Rikors Nru. 147/12VG**

**San Lawrenz Leisure Resort Limited**

**Vs**

**Il-Kummissarju tat-Taxxa fuq il-Valur Mizjud**

**Illum 3 ta' Lulju 2020**

**It-Tribunal,**

Ra r-Rikors ipprezentat mis-soċjetà San Lawrenz Leisure Resort Limited fl-4 ta' Frar 2011 quddiem il-Bord ta' l-Appelli dwar it-Taxxa fuq il-Valur Mizjud, in segwitu trasferit quddiem it-Tribunal, permezz ta' liema titlob li l-istimi mahruġa fil-konfront tagħha mill-Kummissarju tat-Taxxa fuq il-Valur Mizjud għall-perijodi ta' taxxa 01.12.04-28.02.05, 01.03.05-31.05.05, 01.06.05-31.08.05, 01.09.05-30.11.05, 01.12.05-28.02.06, 01.03.06-31.05.06, 01.06.06-31.08.06, 01.09.06-30.11.06, 01.12.06-28.02.07, 01.03.07-31.05.07, 01.06.07-31.08.07, 01.09.07-30.11.07, 01.12.07-31.12.07, 01.01.08-29.02.08, 01.03.08-31.05.08, 01.06.08-31.08.08, 01.09.08-30.11.08, 01.12.08-28.02.09, 01.03.09-31.05.09 u 01.09.09-30.11.09, jiġu kkanċellati u revokati *in toto*, inluż għalhekk il-penali amministrattivi u imghaxijiet, bl-ispejjeż kontra l-Kummissarju tat-Taxxa Fuq il-Valur Mizjud;

Ra r-Risposta tal-Kummissarju tat-Taxxa fuq il-Valur Mizjud permezz ta' liema jopponi għall-appell tas-soċjetà Rikorrenti mill-istimi mahruġa fil-konfront tagħha għall-perijodi ta' taxxa 01.12.04-28.02.05, 01.03.05-31.05.05, 01.06.05-31.08.05, 01.09.05-30.11.05, 01.12.05-28.02.06, 01.03.06-31.05.06, 01.06.06-31.08.06, 01.09.06-30.11.06, 01.12.06-28.02.07, 01.03.07-31.05.07, 01.06.07-31.08.07, 01.09.07-30.11.07, 01.12.07-31.12.07, 01.01.08-29.02.08, 01.03.08-31.05.08, 01.06.08-31.08.08, 01.09.08-30.11.08, 01.12.08-28.02.09, 01.03.09-31.05.09 u 01.09.09-30.11.09 u jitlob li l-istess jiġi miċhud, bl-ispejjeż kontriha, u minflok l-imsemmija stimi jiġu kkonfermati stante li l-likwidazzjonijiet għaż-zminijiet ta' taxxa in kwistjoni huma ġusti u jisthoqqilhom konferma;

Ra t-Tax Audit Report tat-Tax Compliance Unit anness mar-Risposta Tal-Kummissarju tat-Taxxa fuq il-Valur Miżjud;

Sema' x-xhieda ta' Charles Vella, fiż-żmien Direttur Ġenerali (Taxxa fuq il-Valur Miżjud), mogħtija waqt is-seduta tad-9 ta' Mejju 2013<sup>1</sup>, sema' x-xhieda ta' Marilyn Grima mogħtija waqt is-seduti tas-16 ta' Lulju 2013<sup>2</sup> u tas-16 ta' Novembru 2015<sup>3</sup> u ra d-dokumenti esebiti minnha markati Dok. "MG1" a fol. 42 sa' 83 tal-proċess, ra l-affidavit ta' Janice Baldacchino u d-dokumenti annessi miegħu esebiti mis-soċjetà Rikorrenti permezz ta' Nota ppreżentata fit-12 ta' Mejju 2014 a fol. 102 sa' 346 tal-proċess, sema' x-xhieda ta' Oliver Magro, rappreżentant tal-MEPA, mogħtija waqt is-seduti tat-23 ta' Mejju 2014<sup>4</sup> u ta' l-1 ta' Diċembru 2014<sup>5</sup> u ra d-dokumenti esebiti minnu markati Dok. "OM1" a fol. 351 sa' 357 tal-proċess u Dok. "OM1" u Dok. "OM2" a fol. 379 u 380 tal-proċess, sema' x-xhieda ta' Alex Buttigieg, rappreżentant tal-Kummissarju tat-Taxxa fuq il-Valur Miżjud, mogħtija waqt is-seduta tat-23 ta' Mejju 2014<sup>6</sup> u ra d-dokumenti esebiti minnu markati Dok. "AB1" a fol. 348 sa' 350 tal-proċess, sema' x-xhieda ta' Grace Vella, rappreżentant tal-Bank of Valletta p.l.c., mogħtija waqt is-seduta ta' l-1 ta' Diċembru 2014<sup>7</sup> u ta' Ray Borg, rappreżentant ta' l-HSBC Bank Malta p.l.c., mogħtija waqt is-seduti ta' l-1 ta' Diċembru 2014<sup>8</sup> u tat-2 ta' Mejju 2016<sup>9</sup>, ra l-affidavits ta' Robert Aquilina, Noel Attard u ta' l-Avukat Mark Simiana u d-dokumenti annessi magħhom esebiti mis-soċjetà Rikorrenti permezz ta' Nota ippreżentata fl-1 ta' Diċembru 2014 a fol. 381 sa' 435 tal-proċess, ra l-affidavit ta' Dorothy Baldacchino esebiti mis-soċjetà Rikorrenti permezz ta' Nota ppreżentata fit-8 ta' Novembru 2016 a fol. 437 sa' 442 tal-proċess<sup>10</sup>, sema' x-xhieda ta' Raphael Aloisio mogħtija waqt is-seduta tal-11 ta' Ġunju 2015<sup>11</sup> u sema' x-xhieda ta' Gordon Xerxen, rappreżentant ta' l-HSBC Bank Malta p.l.c., mogħtija waqt is-seduta tat-18 ta' Lulju 2016<sup>12</sup> u ra d-dokumenti esebiti minnu markati Dok. "A" u "Dok. "B"<sup>13</sup>;

Ra n-Nota ta' Sottomissjonijiet tas-soċjetà Rikorrenti a fol. 478 sa' 502 tal-proċess u ra in-Nota Responsiva tal-Kummissarju tat-Taxxi a fol. 506 sa' 518 tal-proċess;

Ra l-atti kollha tal-kawza;

## **Ikkonsidra:**

Bil-proċeduri odjerni s-soċjetà Rikorrenti tikkontesta serie ta' stimi maħruġa fil-konfront tagħha mill-Kummissarju tat-Taxxa fuq il-Valur Miżjud għall-

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<sup>1</sup> Fol. 33 sa' 37 tal-proċess.

<sup>2</sup> Fol. 84 sa' 92 tal-proċess.

<sup>3</sup> Fol. 455 u 456 tal-proċess.

<sup>4</sup> Fol. 358 u 359 tal-proċess.

<sup>5</sup> Fol. 380a u 380b tal-proċess.

<sup>6</sup> Fol. 360 sa' 365 tal-proċess.

<sup>7</sup> Fol. 380c sa' 380e tal-proċess.

<sup>8</sup> Fol. 380f sa' 380h tal-proċess.

<sup>9</sup> Fol. 465 sa' 468 tal-proċess.

<sup>10</sup> Dan l-affidavit qed jinżamm fis-sigrieta.

<sup>11</sup> Fol. 449 sa' 453 tal-proċess.

<sup>12</sup> Fol. 473 sa' 475 tal-proċess.

<sup>13</sup> Dawn id-dokumenti qed jinżammu fis-sigrieta.

perijodi ta' taxxa 01.12.04-28.02.05, 01.03.05-31.05.05, 01.06.05-31.08.05, 01.09.05-30.11.05, 01.12.05-28.02.06, 01.03.06-31.05.06, 01.06.06-31.08.06, 01.09.06-30.11.06, 01.12.06-28.02.07, 01.03.07-31.05.07, 01.06.07-31.08.07, 01.09.07-30.11.07, 01.12.07-31.12.07, 01.01.08-29.02.08, 01.03.08-31.05.08, 01.06.08-31.08.08, 01.09.08-30.11.08, 01.12.08-28.02.09, 01.03.09-31.05.09 u 01.09.09-30.11.09, permezz ta' liema qed tigi mitluba thallas is-somma ta' €543,388 rappreżentanti taxxa, flimkien mas-somma ulterjuri ta' €108,683 rappreżentanti penali amministrattivi u s-somma ta' €215,535 rappreżentanti imghaxijiet, komplessivament ammontanti għal **€867,606**<sup>14</sup>.

Is-soċjetà Rikorrenti titlob li l-imsemmija stimi jiġu kkancellati u revokati *in toto*, inkluż il-penali amministrattivi w imghaxijiet, in bażi għas-segwenti aggravji: (i) *between November 2004 and June 2005 the company undertook a project consisting of the demolition of 30 existing rooms and the construction of 55 new rooms, the casino building, an extension of the spa, an additional pool and 60 residences*; (ii) *the project was intended to enable the company to expand and improve its offering in the tourism related sector*; (iii) *the concept of the residences was an alternative to the normal hotel room accommodation whereby such residences could be rented out to guests on a self catering basis*; (iv) *it was the company's intention for all its services to continue to fall within the taxable category for VAT purposes, thus entitling it to reclaim any input VAT suffered by virtue of Article 22 of the Value Added Tax Act (Chapter 406 of the Laws of Malta)*; (v) *a challenging economic climate coupled with the company's severe cash flow problems, resulted in its bankers imposing a restructuring of the loan facilities and demanding the repayment of the rescheduled loan through the sale of at least some of the residences*; (vi) *as a matter of fact, seven residences were sold over the years, the proceeds from which were used to repay the company's bankers*; (vii) *as required in terms of the Value Added Tax (Adjustments Relating to Input Tax on Capital Goods) Regulations (Subsidiary Legislation 406.12), the company repaid back to the VAT Department the input tax reclaimed on the construction of the residences, on a proportionate basis, calculated on the surface area of the residences sold as a proportion of the surface area of the whole project*; (viii) *we understand that the assessments issued by the VAT Department which are being appealed against seek to reclaim from the company all the input VAT previously claimed on the building of the residences i.e. that input tax that has not already been refunded by the company as per paragraph 7 above. This notwithstanding that an inspection carried out by the Department in 2007 had found everything to be in order and the pending refunds due to the company had been released*; (ix) *we understand that the VAT Department's argument for reclaiming the VAT previously refunded to the company is based on their contention that it was never the intention of the company to use the residences for the purposes of providing accommodation that is subject to VAT but it was the company's intention that such residences be sold and thus not entitling the company to recover the VAT incurred on their construction*; (x) *the company rebuts this contention and re-affirms that it was always the intention for the company to retain these residences for use as accommodation for guests and*

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<sup>14</sup> Dok. "A" anness mar-Rikors promotur.

*the selling of these residences was forced upon it for the reasons explained above; (xi) the company also re-affirms that, now that circumstances have changed such that cash flow concerns have substantially diminished, it no longer intends to sell the residences and they will continue to form part of the stock of properties/rooms available for the provision of accommodation; (xii) should it result that, in exceptional circumstances, one or more residences are actually sold, the company will refund to the VAT Department, the VAT claimed as it has already done with respect to 7 of the residences sold up to now<sup>15</sup>.*

Il-Kummissarju tat-Taxxa fuq il-Valur Miżjud, illum Kummissarju tat-Taxxi, jopponi għall-appell tas-soċjetà Rikorrenti mill-istimi maħruġa fil-konfront tagħha għall-perijodi ta' taxxa 01.12.04-28.02.05, 01.03.05-31.05.05, 01.06.05-31.08.05, 01.09.05-30.11.05, 01.12.05-28.02.06, 01.03.06-31.05.06, 01.06.06-31.08.06, 01.09.06-30.11.06, 01.12.06-28.02.07, 01.03.07-31.05.07, 01.06.07-31.08.07, 01.09.07-30.11.07, 01.12.07-31.12.07, 01.01.08-29.02.08, 01.03.08-31.05.08, 01.06.08-31.08.08, 01.09.08-30.11.08, 01.12.08-28.02.09, 01.03.09-31.05.09 u 01.09.09-30.11.09 u jitlob li l-istess jiġi miċhud u minflok l-imsemmija stimi jiġu kkonfermati stante li l-likwidazzjonijiet għaż-żminijiet ta' taxxa in kwistjoni huma ġusti u jisthoqqilhom konferma.

Qabel ma jibda jittratta l-appell tas-soċjetà Rikorrenti, it-Tribunal josserva li fl-20 ta' Ottubru 2010 il-Kummissarju tat-Taxxa fuq il-Valur Miżjud kien ħareġ stimi proviżorji fil-konfront tas-soċjetà Rikorrenti għall-perijodi ta' taxxa 01.12.04-31.08.05, 01.03.05-31.05.05, 01.06.05-31.08.05, 01.09.05-30.11.05, 01.12.05-28.02.06, 01.03.06-31.05.06, 01.06.06-31.08.06, 01.09.06-30.11.06, 01.12.06-28.02.07, 01.03.07-31.05.07, 01.06.07-31.08.07, 01.09.07-30.11.07, 01.12.07-31.12.07, 01.01.08-29.02.08, 01.03.08-31.05.08, 01.06.08-31.08.08, 01.09.08-30.11.08, 01.12.08-28.02.09, 01.03.09-31.05.09, 01.06.09-31.08.09, 01.09.09-30.11.09<sup>16</sup>. Mir-Rikors promotur però jirriżulta li s-soċjetà Rikorrenti ma appellatx mill-istima maħruġa fil-konfront tagħha għall-perijodu ta' taxxa 01.06.09-31.08.09. Sfortunatament l-istimi finali li nħarġu fil-konfront tas-soċjetà Rikorrenti ma ġewx esebiti u b'hekk it-Tribunal ma jistax jgħid jekk l-istima proviżorja għall-perijodu ta' taxxa 01.06.09-31.08.09 ġietx effettivament segwita minn stima finali jew le. Detto ciò però, kemm-il darba nħarġet stima finali fil-konfront tas-soċjetà Rikorrenti għall-perijodu ta' taxxa 01.06.09-31.08.09, din għandha titqies bħala definitiva in kwantu l-istess ma ġietx appellata mill-imsemmija soċjetà.

Trattata din il-parentesi qasira, it-Tribunal ser jgħaddi biex jittratta l-appell tas-soċjetà Rikorrenti fil-mertu.

Il-baži fuq liema nħarġu l-istimi appellati fil-konfront tas-soċjetà Rikorrenti tirriżulta mit-Tax Audit Report<sup>17</sup> tat-Tax Compliance Unit, fejn ġie kkonstatat u konkluz is-segwenti:

<sup>15</sup> Doc. "B" anness mar-Rikors promotur.

<sup>16</sup> Fol. 399 sa' 420 tal-proċess.

<sup>17</sup> Fol. 42 sa' 49 tal-proċess.

- *Audit Scope: From an analysis of the taxpayer's business activity, it occurred that in early 2005, refurbishing works commenced at San Lawrenz Leisure Resort Limited. Such works included the extension of hotel rooms, the building of a spa and swimming pool together with the construction of a conference room. The project was also to include 60 private residences which were to be sold to third parties on a 250 year lease. Despite the fact that the transfer of immovable property is exempt without credit, all input tax incurred in the project, including that on the residences, was claimed. Thereafter, upon the sale of any of the units, the taxpayer made use of the twenty year adjustment period in line with LN318 of 2004, taking advantage of a significant cash flow gain. Considering the fact that from the start of the project the intention of the taxpayer was to put up the 60 residences for sale as transpired from the audit evidence obtained, and based on the fact that this was an exempt without credit supply and therefore, any input tax incurred in the process could not be claimed in the first place, this case merited a tax audit.*
- *Audit Findings and Conclusions: ... As per Table 1 - illi turi total ta' amount assessed for vat għas-snin 2005, 2006, 2007, 2008 u 2009 ta' Lm1,379,271 - all input VAT claimed on the sixty residences is being assessed since the taxpayer had no right to fully deduct the VAT incurred on that capital expenditure. Various meetings were held with the taxpayer and his representative and our conclusions were presented. The taxpayer was not willing to accept the reversal of the input VAT claimed. Though he did not contend the original intention of selling part of the new development as private residences, he claims that there was a change of intention throughout the years and the number of residences that he is willing to put up for sale today is much less. Yet, the unpredictable and constantly changing property market environment is not an excuse for unrightly claiming input tax. It is also not excluded that the taxpayer artificially created minimal business activity such as the rental of the residences to obtain "taxable supply" status during the period reviewed. No evidence of such rentals was in fact provided by the taxpayer. Above all, at the time of the construction of the apartments, there never existed an intention of making any rental use of them and, as a result, the full amount of input claimed has to be reversed. Detailed Tax*
- *Detailed Tax Audit Findings: The taxpayer provided us with a full summary of the costs involved in the project and various other workings upon which the capital goods scheme calculations were arrived at. These were fully scrutinised so as to determine the exact amount of costs attributable to the construction of the residences. It was made clear to the taxpayer that in the course of the investigation, the intention of the registered person has to be proved by documentary evidence. In this regard, copies of internal communication between San Lawrenz Leisure Resort Limited and Kempinski at the original planning and financial stages of the project were requested but none was provided. The company's agreement with Kempinski was brought forward but this simply included the terms and conditions between the two parties when way back in 2001 the company entered into an operations agreement to increase the hotel rooms by 86 in line with*

*Kempinski requirements. The project's source of financing was also identified when examining the sanction letters of the loans concerned with the development of such residences. As per sanction letters dated 2004, such portion of loans was to be repaid from the sale proceeds of San Lawrenz apartments, thereby proving that the taxpayer's original underlying intention was nothing more than property development for resale. The fact that the taxpayer failed to prove that it intended to rent the residences at the point in time when the input VAT was claimed also shows that there simply was no intention of making any rental use of them and thus, the taxpayer was never entitled to deduct the input VAT incurred. It is the capacity in which the person is acting at the time the tax became chargeable that determines the deductibility of the tax. As a result, all input VAT claimed should be refunded back to the VAT Department. An audit trail performed with an advertising agency confirms that adverts were produced on a monthly basis commencing from September 2008 (when the works were completed) to date whereby 'owning' one of the Kempinski residences is being promoted as being the first luxury serviced residences on the Maltese Islands. A recent advert promoting such residences for sale was also published in a local real estate magazine dated July 2010. Furthermore, the global Kempinski website also provides a portfolio of exclusive residences for purchase or for short and long term rental. Malta is solely featured in the former section, hence, at no point were these residences advertised for rental and the fact that the units are still up for sale continues to confirm the original intention of sale. The taxpayer also applied for a Special Designated Area status in respect of the sixty residences and this was granted in 2008. It is important to note that properties falling within such areas allow foreigners to enjoy tax advantages only when acquiring them. To date, seven residences have been sold and upon each sale, the taxpayer made use of the twenty year adjustment period in line with LN 318 of 2004. Such capital goods scheme was applied on the input tax claimed by paying back to the Department a proportion of the tax relating to the remaining 20 year period. This approach is unacceptable since the right to deduct input tax never arose in the first place since these units were never used until sold. As already stated earlier on in the report, no evidence was forthcoming from the taxpayer re rental of the apartments even though requested. In view of the facts stated above, we can conclude that the taxpayer's intention was clear at the time the residences were constructed i.e. putting the residences for sale. This is concretely confirmed by the sanction letters provided dated 2004 (as stated in the previous paragraphs) and also from the taxpayer correspondence with the VAT Department in 2007 after a credit control investigation was carried out. Consequently, the taxpayer was never in a position to deduct the input VAT incurred and as a result all input tax claimed on the sixty residences must be paid back to the VAT Department after deduction the input VAT adjustments in favour of the VAT Department already made by the taxpayer in this regard.*

- *Vat Assessment: In view of the declared capital expenditure pertaining to the sixty residences amounting to Lm1,379,271<sup>18</sup> as per Table 1, it is recommended that the following VAT assessment be raised. Despite the fact that the input tax amounts to Lm248,269<sup>19</sup>, a deduction of Lm14,735<sup>20</sup> was made for the input VAT adjustments made by the taxpayer upon the sale of the apartments and which were eventually passed on to the VAT Department. After such a deduction is made, a deduction of input VAT of Lm233,514 (illum ekwivalenti għal €543,941.30) results and this was allocated in proportion to the capital goods declared in the below periods - 01.12.04 sa' 30.11.09.*

Li dawn il-konstatazzjonijiet u konsegwenti konklużjonijiet jikkostitwixxu l-bażi ta' l-istimi maħruġa fil-konfront tas-soċjetà Rikorrenti mill-perijodi ta' taxxa 01.12.04 sa' 30.11.09, jirriżulta kkonfermat mix-xhieda ta' l-uffiċjal tat-Tax Compliance Unit Marilyn Grima mogħtija waqt is-seduti tas-16 ta' Lulju 2013<sup>21</sup> u tas-16 ta' Novembru 2014<sup>22</sup>.

Mit-Tax Audit Report jirriżulta għalhekk il-pern ta' l-appell odjern jirrivolvi madwar id-dritt għal kreditu ta' input tax u, b'mod partikolari, kif jiskatta tali dritt favur it-taxpayer. Fir-rigward il-Kummissarju tat-Taxxi jikkontendi illi għall-finijiet dwar jekk jiskattax o meno d-dritt tat-taxpayer għal kreditu ta' input tax kollox jiddependi fl-ewwel lok mill-**intenzjoni** tat-taxpayer ffil-mument li tiġi inkors t-taxxa u fit-tieni lok, iżda mhux inqas importanti, jekk it-transazzjoni partikolari **hijiex ai termini tal-Liġi eligibbli** għall-kreditu ta' input tax. In effetti fin-Nota ta' Sottomissjonijiet tiegħu<sup>23</sup>, il-Kummissarju tat-Taxxi jirriassumi s-sitwazzjoni kollha mill-perspettiva tiegħu b'dan il-mod: *illi fil-perijodi li fihom inħarġu l-istejjem l-intenzjoni ta' l-appellanti kienet dejjem li l-appartamenti jinbiegħu. Dan ifisser li l-appellanti ma kellha l-ebda dritt titlob il-VAT f'dak il-perijodu. Ergo jsegwi illi l-istejjem li ħareġ l-esponenti huma korretti.*

Da parte tagħha s-soċjetà Rikorrenti, fin-Nota ta' Sottomissjonijiet a fol. 478 sa' 500 tal-proċess, wara li telenka diversi disposizzjonijiet tal-Kap.406 tal-Liġijiet ta' Malta li fil-fehma tagħha huma rilevanti u pertinenti għad-determinazzjoni tal-każ in eżami, b'mod partikolari l-Artikolu 22 tal-Kap. 406 tal-Liġijiet ta' Malta, tikkontendi li: *il-posizzjoni legali m'hijiex kif qed jifhimha l-appellat. L-Artikolu 22(3) irid li l-input tax imħallas ikun jikkwalifika bħala kreditu diment li l-istess input tax ikun attribwibbli "għall-provvisti magħmula jew maħsuba li għandhom jintagħmlu minnha, li jkunu provvisti li għalihom japplika s-subartikolu (4)". Għalhekk sabiex jitwieled id-dritt li wieħed ikollu input tax credit mhux neċessarju li l-input tax in kwistjoni jkun attribwibbli għal provvista li tkun effettivament magħmula, imma huwa suffiċjenti li jkun attribwibbli għal provvista **maħsuba li se ssir**<sup>24</sup> u li għaliha jkun*

<sup>18</sup> Illum ekwivalenti għal €3,212,837.18.

<sup>19</sup> Illum ekwivalenti għal €578,311.20.

<sup>20</sup> Illum ekwivalenti għal €34,323.31.

<sup>21</sup> Fol. 84 sa' 92 tal-proċess.

<sup>22</sup> Fol. 455 u 456 tal-proċess.

<sup>23</sup> Fol. 506 sa' 518 tal-proċess.

<sup>24</sup> Enfasi tas-soċjetà Rikorrenti.

applikabbli l-Artikolu 22(4) ta' l-Att. Fi kliem ieħor, **huwa suffiċjenti illi tkun teżisti l-intenzjoni li fil-mument li tiġi inkorsa t-taxxa, il-provvista li dwarha tkun inkorsa t-taxxa tkun intenzjonata li ssir b'rabta ma' provvista oħra li għaliha japplika l-Artikolu 22(4), u dan irrispettivament mill-fatt jekk dik il-provvista ssirx jew le**<sup>25</sup>. Illi jinsab deċiż illi "... the right to deduct arises at the time when the deductible tax becomes chargeable. Consequently, only the capacity in which a person is acting at the time can determine the existence of the right to deduct". Huwa rilevanti wkoll li, "It follows ... that a person who acquires goods for the purposes of an economic activity within the meaning of Article 4 does so as a taxable person, even if the goods are not used immediately for such economic activities. Consequently, it is the acquisition of the goods by a taxable person acting as such that gives rise to the application of the VAT system and therefore of the deduction mechanism. The use to which the goods are put, or intended to be put, merely determines the extent of the initial deduction to which the taxable person is entitled under Article 17 and the extent of any adjustments in the course of the following periods." Kwindi jidher li huwa prinċipju rikonoxxut li "... the time to test the recoverability of VAT is at the time at which the relevant VAT was incurred. This is clear from Article 17.1 and 17.2 of the Sixth Directive and from Waterschap paragraph 38-41. What matters is the intention to make taxable supplies at the time, so that an absence of an intention to make taxable supplies at the time at which the relevant VAT is incurred precludes recovery". Huwa opportun ukoll li jiġi rilevat illi l-ġurisprudenza tirrikonoxxi wkoll, in omagġ tal-prinċipju tan-newtralità ta' din it-taxxa, li persuna jkollha wkoll il-jedd li tirkupra taxxa mħallsa anke jekk fil-mument li fiha ġiet inkorsa dik it-taxxa l-intenzjoni ma kenitx li ssir provvista taxxabli. Huwa aċċettabbli wkoll li dik l-intenzjoni tiġi ffurmata sussegwentement għall-ispiza. Illi jsegwi wkoll mill-premess kollu li huwa prinċipju rikonoxxut ieħor li, "The right to deduct remains acquired where, by reasons of circumstances beyond his control, the taxable person has never made use of those goods or services for the purpose of carrying out taxable transactions". Ifisser dan li jekk l-esponenti turi li l-intenzjoni oriġinali kienet li toffri r-residenzi għall-akkomodazzjoni (li hija provvista taxxabli), iżda imbagħad kellha tbiddel l-użu intenzjonat għal użu li kien kostitwenti provvista eżenti bla kreditu (kif fil-fatt ġara) u dan minħabba raġunijiet lil' hinn mill-kontroll tagħha, mela allura xorta waħda jibqa' d-dritt kweżit tagħha li titlob id-deduzzjoni sħiħa ta' l-input tax relattiv fid-denunzji tagħha. Illi ta' interess partikolari għal din il-vertenza, u b'referenza għall-paragrafu preċedenti, hija d-deċiżjoni mogħtija mill-Qorti Ewropeja tal-Gustizzja fil-kawża Inzo v. Belgian State fejn ġie ribadit il-prinċipju espress fil-paragrafu preċedenti. Il-każ kien dwar il-pretensjoni ta' Inzo li kellha kreditu għal input tax inkors minnha waqt il-preparazzjoni ta' studju konness mal-profitabilità ta' proġett partikolari. Dak il-kreditu kien fil-fatt ingħata. In segwitu, u anke abbażi ta' l-istudju intrapriż, Inzo ddeċidiet li ma teżegwix dak il-proġett, u l-Istat insista li Inzo għalhekk ma kellhiex dritt għall-kreditu ta' input tax inkors minnha b'rabta ma' l-istudju msemmi. Il-Qorti qieset "Contrary to the submissions of the Belgian and German Governments, entitlement to that

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<sup>25</sup> Enfasi tas-soċjetà Rikorrenti.

reduction is retained, even if it was subsequently decided, in view of the results of that study, not to move to the operational phase but to put the company into liquidation, with the result that the economic activity envisaged did not give rise to taxed transactions.” Hija interessanti wkoll din ir-riflessjoni ta’ dik il-Qorti: “As the Commission has observed, it is contrary to the principle of legal certainty for the rights and obligations of taxable persons to depend on facts, circumstances or events which occurred after the tax authority made a finding in respect of those rights and obligations. It follows that, as from the time when the tax authority accepted, on the basis of information provided by a business, that it should be accorded the status of a taxable person, that status cannot, in principle, subsequently be withdrawn retroactively on account of the fact that certain events have or have not occurred.” Illi similmement, l-esponenti tiċċita d-deċiżjoni *Beaverbank Properties Ltd*: “A company (B) carried on a business of property development. It became interested in a site at Ayr, and reclaimed input tax on speculative costs relating to a project to develop it. It had to abandon the project because it was unable to obtain planning permission for the proposed development, and consequently never acquired the land. The Commissioners issued an assessment to recover the tax on the basis that it could not be attributed to a taxable supply. B appealed. The tribunal reviewed the evidence in detail and allowed the appeal, holding that, “throughout the period when the speculative costs were incurred, it was (B)’s intention, had the project proceeded, to elect to make taxable supplies in respect of the land. Any ordinary and prudent businessman would, in the circumstances, have formed the same intention. The absence of making of such an election in the course of incurring such speculative costs does not necessarily negate that intention’. Accordingly B was entitled to deduct the input tax incurred in respect of these speculative costs’. Illi in oltre, u stante somiġġanza kbira mal-fatti tal-każ *odjern*, l-esponenti tiċċita wkoll id-deċiżjoni *The Golden Oak Partnership*: “A partnership was formed to develop an estate. It acquired the freehold of the land, obtained planning permission, widened roads, and installed drainage, gas and electricity. It reclaimed input tax on the professional expenses incurred. Subsequently, it sold 75% of the land on the estate to a company carrying on the business of property development. The Commissioners issued an assessment to recover the input tax which the company had previously reclaimed, considering that, in view of the sale of the land, the expenditure could not be attributed to any taxable supplies. The company appealed, contending that the input tax was correctly reclaimable since its activities had been undertaken with the intention of making taxable supplies, and that the sale of the land constituted the transfer of a part of the business as a going concern. The tribunal accepted the partnership’s evidence and allowed the appeal. The fact that, at the time of the sale, the partnership had not made any supplies in respect of the land was not conclusive. Illi wkoll, m’huwiex inopportun li jiġi ribadit ukoll dak li ntqal mill-Qorti ta’ l-Appell (Sede Inferjuri): “Kwantu għall-interpretazzjoni korretta tad-dispożizzjonijiet fiskali għandha tiġi preferuta dik loġika-sistematika fuq is-sinifikat letterali tal-kelma ... Tajjeb però li ma’ dik is-silta tiġi akkoppata wkoll dan il-bran rakkolta mis-sentenza numru 9 deċiżda fid-9 ta’ Frar 2001, li filwaqt li jirrikonoxxi li f’materja fiskali l-interpretazzjoni kellha tkun rigoruża biex jiġi aċċertat li kulhadd iħallas dak li kien minnu dovut f’taxxa, fl-istess waqt,

*tagħraf ukoll li hadd ma jkun imġieghel iħallas dak li ma kienx minnu dovut u f'każ ta' dubju raġjonevoli li jippersisti wara l-eżercizzju ta' interpretazzjoni oġġettiva, id-dubju kellu jmur favur l-individwu u mhux favur il-fisco". Illi magħmula l-premessi osservazzjonijiet ta' natura legali, hija l-kontenzjoni ta' l-esponenti illi d-dritt tagħha li titlob ir-rifużjoni tat-taxxa imħallsa bħala input tax credit jistriħ fuq id-determinazzjoni dwar l-intenzjoni ta' l-esponenti fiż-żmien li fih giet inkorsta l-istess taxxa.*

Minn dak sottomess mis-soċjetà Rikorrenti jirrizulta għalhekk li fil-prinċipju hija taqbel illi l-element ċentrali għad-determinazzjoni dwar jekk *taxpayer* għandux o meno dritt li jitlob kreditu ta' input tax hija appuntu l-intenzjoni tat-*taxpayer* fil-mument li tiġi inkorsa t-taxxa. Jidher li taqbel ukoll illi sabiex f'dak il-mument jiskatta d-dritt għal kreditu ta' input tax, l-intenzjoni tat-*taxpayer* trid tkun waħda immirata lejn il-prestazzjoni/provvista ta' *taxable supply* u tishaq u tikkontendi li una volta akkwistat id-dritt għal kreditu ta' input tax, dak l-istess dritt ma jstax jiġi negat jew b'mod ieħor reż ineffikaċi kemm-il darba jirrizulta bdil fl-intenzjoni tat-*taxpayer* li tiġi prestata/provduta *taxable supply*, partikolarment jekk tali bdil fl-intenzjoni tat-*taxpayer* jirrizulta minħabba ċirkostanzi 'l hinn mill-kontroll tiegħu. Tikkontendi mbagħad li mill-provi prodotti jirrizulta ampjament ċar illi l-intenzjoni tagħha fiż-żmien li giet inkorsa l-input tax minnha reklamata, din kienet in konnessjoni mal-bini u tlestija ta' *inter alia* r-residenzi in kwistjoni li kienu intiżi li jiġu utilizzati fil-prestazzjoni/provvista ta' *taxable supply*, ossia li jinkrew lill-klijenti/utenti tal-lukanda fuq bażi *self catering*, u b'hekk skatta d-dritt għal kreditu ta' input tax, dritt dan li ma setgħax imbagħad jittehdilha fit-totalità tiegħu semplicement għaliex kellha, minħabba ċirkostanzi u raġunijiet finanzjarji 'l hinn mill-kontroll tagħha, tbiegħ uħud minn dawk ir-residenzi.

Fir-rigward fin-Nota ta' Sottomissjonijiet<sup>26</sup> tagħha s-soċjetà Rikorrenti tikkontendi li: *illi għalhekk jirrizulta ipprovat illi: (a) l-intenzjoni originali wara il-kostruzzjoni tar-residenzi kienet li dawn jifformaw parti mill-kummerċ eżegwit mill-esponenti billi l-istess residenzi jiġu offruti għall-akkomodazzjoni u għall-allogġ ta' l-utenti tal-lukanda. Din kienet l-intenzjoni eżistenti fiż-żmien li saru l-provvisti li taw lok għall-input tax mertu ta' din il-proċedura; (b) il-piż finanzjarju inkors mill-esponenti, flimkien mal-klima ekonomiku ta' dak iż-żmien, impona fuqha l-ħtieġa li tbiegħ uħud mir-residenzi kostruwiti, biex b'hekk jiġi mħallas dejn dovut minnha lil xi soċjetajiet bankarji; (c) l-intenzjoni fir-rigward tar-residenzi rimanenti baqgħet dejjem dik li dawn jintużaw għall-kiri, u b'konsegwenza, l-intenzjoni wara r-residenzi mhux mibjugħin kienet dejjem u baqgħet li dawn jintużaw għall-għoti ta' provvisti taxxabli.*

Fid-dawl tas-sottomissjonijiet avanzati mill-partijiet kontendenti, it-Tribunal huwa tal-fehma li l-kwistjoni ċentrali ta' l-appell in eżami hija waħda prinċipalment fattwali ossia jekk mill-provi prodotti mill-partijiet kontendenti tirrizultax l-intenzjoni li tiġi prestata/provduta *taxable supply* kif pretiż mis-soċjetà Rikorrenti jew inkella le, kif invece pretiż mill-Kummissarju tat-Taxxi.

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<sup>26</sup> Fol. 478 sa' 500 tal-proċess.

Detto ciò però t-Tribunal iqis li qabel ma jgħaddi biex jeżamina u jevalwa l-provi prodotti mill-partijiet kontendenti, ikun opportun li jagħmel riepilogu tal-prinċipju ġuridiċi relattivi għall-kunċett ta' l-input tax u d-dritt għal kreditu ta' input tax, partikolarment kif esposti mill-Qorti Ewropeja tal-Ġustizzja.

Il-Qorti Ewropeja tal-Ġustizzja diversi drabi osservat u enunċjat is-segwenti prinċipji:

- *According to settled case-law of the Court of Justice, the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by the relevant European Union legislation (Joined Cases C-80/11 and C142/11 Mahagében and Dávid [2012] ECR, paragraph 37 and the case-law cited). The Court has repeatedly held that the right to deduct provided for in Article 167 et seq. of Directive 2006/112 is an integral part of the VAT scheme and in principle may not be limited. The right to deduct is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see, inter alia Joined Cases C-110/98 to C-147/98 Gabalfrisa and Others [2000] ECR I-1577, paragraph 43; Case C-63/04 Centralan Property [2005] ECR I-11087, paragraph 50; Joined Cases C-439/04 and C-440/04 Kittel and Recolta Recycling [2006] ECR I-6161, paragraph 47; and Mahagében and Dávid, paragraph 38). The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. **The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject to VAT**<sup>27</sup> (see Case 268/83 Rompelman [1985] ECR 655, paragraph 19; Case C-37/95 Ghent Coal Terminal [1998] ECR I-1, paragraph 15; Gabalfrisa and Others, paragraph 44; Case C-32/03 Fini H [2005] ECR I-1599, paragraph 25; Centralan Property, paragraph 51; and Mahagében and Dávid, paragraph 39). It is clear from the wording of Article 168 of Directive 2006/112 that, **to qualify for the right to deduct, first the person concerned must be a 'taxable person' within the meaning of that directive and, second the goods and services in question must be used for the purposes of his taxed transactions**<sup>28</sup> (see Centralan Property, paragraph 52). Under Article 9(1) of that directive a 'taxable person' is defined by reference to the term 'economic activity' (see Fini H, paragraph 19). In this regard, it should be borne in mind that an individual who acquires goods for the purposes of an economic activity within the meaning of that provision does so as a taxable person, even if the goods are not used immediately for that economic activity (see Case C-97/90 Lennartz [1991] ECR I-3795, paragraph 14). According to the settled case-law of the Court, the economic activity referred to in Article 9(1) of Directive 2006/112 may consist in several consecutive transactions and, among those, preparatory*

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<sup>27</sup> Enfasi tat-Tribunal.

<sup>28</sup> Enfasi tat-Tribunal.

acts, such as the acquisition of business assets and therefore the purchase of immovable property, must be regarded as constituting economic activity (see Rompelman, paragraph 22; Lennartz, paragraph 13; Case C-110/94 INZO [1996] ECR I-857, paragraph 15; and Fini H, paragraphs 21 and 22). Any person performing such preparatory acts is consequently regarded as a taxable person within the meaning of that provision and is entitled to deduct the VAT (Fini H, paragraph 22). Furthermore, a person who incurs investment expenditure with the intention, confirmed by objective evidence, of engaging in economic activity within the meaning of Article 9(1) of Directive 2006/112 must be regarded as a taxable person. Acting in that capacity, he has therefore, in accordance with Article 167 et seq. of the directive, the right immediately to deduct the VAT payable or paid on the investment expenditure incurred for the purposes of the transactions which he intends to carry out and which give rise to the right to deduct (see, to that effect, Rompelman, paragraphs 23 and 24; INZO, paragraphs 16 and 17; Ghent Coal Terminal, paragraph 17; Gabalfrisa and Others, paragraph 47; and Case C-400/98 Breitsohl [2000] ECR I-4321, paragraph 34). **Accordingly, it is the acquisition of goods by a taxable person acting as such that gives rise to the application of the VAT system and therefore of the deduction mechanism. The use to which the goods or services are put, or intended to be put, merely determines the extent of the initial deduction to which the taxable person is entitled under Article 168 of Directive 2006/112 and the extent of any adjustments in the course of the following periods, adjustments which must be made under the conditions laid down in Article 184 et seq. of that directive<sup>29</sup> (see Lennartz, paragraph 15; Ghent Coal Terminal, paragraph 18; Case C-396/98 Schloßstrasse [2000] ECR-I-4279, paragraph 37, Breitsohl, paragraph 35; Centralan Property, paragraph 54; Case C-118/11 Eon Aset Menidjunt [2012] ECR, paragraph 57; and Case C-334/10 X [2012] ECR, paragraph 17). In this context, the Court has held that, in the absence of fraud or abuse and subject to adjustments which may be made in accordance with the conditions laid down in Article 185 of Directive 2006/112, the right to deduct, once it has arise, is retained even if the economic activity envisages does not give rise to taxed transactions<sup>30</sup> (see INZO, paragraphs 20 and 21; Ghent Coal Terminal, paragraphs 19 to 23; Schloßstrasse, paragraph 42; Case C-98/98 Midland Bank [2000] ECR I-4177, paragraph 22; and Fini H, paragraph 22)<sup>31</sup>.**

- **The existence of a direct and immediate link between a particular input transaction and one or more output transactions giving rise to the right to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement<sup>32</sup> (see Midland Bank, paragraph 24; Case**

<sup>29</sup> Enfasi tat-Tribunal.

<sup>30</sup> Enfasi tat-Tribunal.

<sup>31</sup> SC Gran Via Moineşti SRL v. Agenția Națională de Administrare Fiscală (ANAF), Administrația Finanțelor Publice București Sector 1, Case C-257/11, deciz fis-26 ta' Mejju 2011.

<sup>32</sup> Enfasi tat-Tribunal.

C-408/98 *Abbey National* [2001] ECR I-1361, paragraph 26; and *Investrand*, paragraph 23). **The right to deduct VAT charged on acquisition of input goods or services presupposes that the expenditure incurred in acquiring them is part of the cost components of the taxable output transactions giving rise to the right to deduct<sup>33</sup>** (see *Midland Bank*, paragraph 30; and *Abbey National*, paragraph 28). **It is however also accepted that a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and one or more output transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do, in effect, have a direct and immediate link with the taxable person's economic activity as a whole<sup>34</sup>** (see, to that effect, *inter alia* *Midland Bank*, paragraph 31, and *Case C-465/03 Kretztechnik* [2005] ECR I-4357, paragraph 36). It should, next, be noted, with regard to the nature of the 'direct and immediate link' which must exist between an input and an output transaction, that the Court has held that it would not be realistic to attempt to be more specific in that regard. In view of the diversity of commercial and professional transactions, it is impossible to give a more accurate reply as to the method of determining in every case the relationship which must exist between the input and output transactions in order for input VAT to become deductible (see, to that effect, *Midland Bank*, paragraph 25). **Finally, it is apparent from the case-law that, in the context of the direct-link test, which the tax authorities and national courts are to apply, they should consider all the circumstances surrounding the transactions at issue** (see, to that effect, *Midland Bank*, paragraph 25) **and take account only of the transactions which are objectively linked to the taxable person's taxable activity<sup>35</sup>**. The obligation to take account only of the objective content of the transaction at issues is the most compatible with the aim pursued by the common system of VAT, which seeks to ensure legal certainty and to facilitate the application of VAT (see, to that effect, *BLP Group*, paragraph 24; *Case C-108/99 Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 33; and *Case C-29/08 SKF* [2009] ECR I-10413, paragraph 47). The Court has, furthermore, held that it is also in the light of their objective content that it is necessary to determine whether there is a direct and immediate link between the supply of goods or services utilised and a taxable output transaction or, exceptionally a taxable input transaction (see, to that effect, *Midland Bank*, paragraph 32, and by analogy, with regard to the evidence to be taken into account so as to establish the taxable person's declared intention to allocate specific goods to a transaction subject to VAT, *Case 268/83 Rompelman* [1985] ECR 655, p.24). The view that, in order to determine whether there is a 'direct and immediate link' between a given transaction and the taxable activity as a whole for the purposes of the above-mentioned case-law, it is necessary to

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<sup>33</sup> Enfasi tat-Tribunal.

<sup>34</sup> Enfasi tat-Tribunal.

<sup>35</sup> Enfasi tat-Tribunal.

take account of the objective characteristics of the supply of goods or services acquired is not called into question by the fact that the Court, in paragraphs 33 and 36 of *Investrand*, held, in essence, **that where the pursuit of the taxable activity is not the exclusive reason for certain fees and costs being incurred, the latter cannot be considered as having a direct and immediate link with that activity**<sup>36</sup>. As follows from paragraphs 25 to 34 of that judgment, it is in the light of all the circumstances in which the transactions at issue in the case which gave rise to that judgment took place and, in particular, the facts apparent from the case-file submitted to the Court, that the Court held, first, that *Investrand BV* had not performed and specific output transactions subject to VAT that gave rise to the fees at issue in the main proceedings. It held, secondly, that unless *Investrand BV* could prove that it would not have incurred those costs if it had not exercised taxable economic activity, those costs could not be considered as having been incurred for the purpose of the taxable activities as a whole. It is only because the Court took account, in the context of its examination, of the objective content of the transactions at issue that it was able to find, in paragraph 34 of *Investrand*, that the situation of *Investrand BV* was similar to that of a private shareholder and hold that those transactions could not be considered as falling within the scope of the sixth directive. In that regard, it should be noted that, in its judgment in *Investrand*, the Court did not preclude that, in the light of their content, the transactions at issue could, in other circumstances, have been related to a taxable economic activity. The Court merely held, as is in essence apparent from paragraph 33 of that judgment, that, even if *Investrand BV* had not exercised a taxable activity, that company would nevertheless have incurred the costs in question, and, therefore, that the latter could not be considered to have been incurred as a result of the taxable activities of that company. In those circumstances, as the German government claimed, **the fact that the existence of the direct and immediate link between a supply of services and the overall taxable economic activity must be determined in the light of the objective content of that supply of services does not preclude that the exclusive reason for the transaction at issue can also be taken into account, since that reason must be considered as a criterion for determining the objective content. Where it is clear that a transaction has not been performed for the purposes of the taxable activities of a taxable person, that transaction cannot be considered as having a direct and immediate link with those activities within the meaning of the Court's case-law, even if that transaction would in the light of its objective content be subject to VAT**<sup>37</sup>.

- It should be recalled that, according to the structure of the system introduced by Directive 2006/112, input taxes on goods or services used by a taxable person for his taxable transactions may be deducted. **The deduction of input taxes is linked to the collecting of output taxes. Where goods**

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<sup>36</sup> Enfasi tat-Tribunal.

<sup>37</sup> Enfasi tat-Tribunal. Finanzamt Köln-Nord v. Wolfram Becker, Case C-104/12 deciz fil-21 ta' Frar 2013.

**or services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted. However, where goods or services are used for the purposes of transactions that are taxable as outputs, deduction of the input tax on them is required in order to avoid double taxation<sup>38</sup>** (see, to that effect, judgment in *Uudenkaupungin kaupunki*, C-184/04 EU:C:2006:214, paragraph 24). The period laid down in Article 187 of Directive 2006/112 for adjustment of deductions enables inaccuracies to be avoided in the calculation of deductions and unjustified advantages or disadvantages for a taxable person where, in particular, the amount of deductions after the declaration has been made. The likelihood of such changes is particularly significant in the case of capital goods, which are often used over a number of years, during which the purposes to which they are put may alter (see, to that effect, judgment in *Uudenkaupungin kaupunki*, EU:C:2006:214, paragraph 25). Article 187(1) of Directive 2006/112 thus provides for an adjustment period of five years, extendable to 20 years in the case of immovable property, with varying deductions staggered over the whole period. That provision also permits Member States to base the adjustment on a total period starting from the time at which the goods are first used. Article 187(2) of the directive provides that, if the adjustment period has been extended beyond five years, adjustment shall only be made for the corresponding fraction of the VAT charges on the capital goods. The same provision also states that the adjustment shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired, manufactures or, where applicable, used for the first time. Article 187 of Directive 2006/112 is applicable in cases of adjustment of deductions, such as the case in the main proceedings, where goods the use of which is not eligible for deduction are then put to a use which is eligible (see, to that effect, judgment in *Uudenkaupungin kaupunki*, EU:C:2006:214, paragraph 30). The system of adjustment of deductions is an essential element of the system introduced by Directive 2006/112 in that its purpose is to ensure the accuracy of deductions and hence the neutrality of the tax burden. Article 187 of the same directive, concerning capital goods, which are relevant to the case in the main proceedings, is moreover drafted in terms which leave no doubt as to its binding nature (see, to that effect, judgement *Uudenkaupungin kaupunki*, EU:C:2006:214, paragraph 26)<sup>39</sup>.

Minn dan kollu osservat jirrizulta għalhekk illi s-sistema ta' deduzzjoni ta' input tax hija parti integrali w importanti ferm fir-reġim fiskali tat-taxxa fuq il-valur miżjud, partikolarment fid-dawl ta' l-element ta' *tax neutrality* li jikkarakterizza t-taxxa fuq il-valur miżjud. Minkejja li s-sistema tad-deduzzjoni ta' input tax hija hekk ċentrali għal dan ir-reġim fiskali partikolari, din ukoll hija regolata bi prinċipji ben speċifiċi, li jimpera fosthom, proprio minhabba l-fatt li t-taxxa fuq il-valur miżjud hija bbażata fuq l-element ta' *tax neutrality*, il-prinċipju li biex ikun hemm deduzzjoni ta' input tax kontriha jrid ikun hemm l-avanz ta' output

<sup>38</sup> Enfasi tat-Tribunal.

<sup>39</sup> Gmina Międzyzdroje v. Minister Finansów, C-500/13, Ordni mogħti fil-5 ta' Ġunju 2004.

tax. Dan ifisser għalhekk li biex jinsorġi d-dritt għad-deduzzjoni ta' input tax, din trid tkun giet inkorsa għall-prestazzjoni/provvista ta' *taxable supply*, li tista' tkun immedjata kif ukoll eventwali. Il-konsiderazzjoni tan-natura tat-transazzjoni prestata jew intiża li tiġi prestata/provduta, ossia jekk hijiex *taxable supply* on meno, trid tkun konsiderazzjoni oġġettiva skond il-provi riżultanti. Jirriżulta ukoll li daqskemm huwa meħtieġ dan in-ness bejn input tax u output tax korrispettiva biex jinsorġi d-dritt immedjat jew eventwali għad-deduzzjoni ta' input tax, jirriżulta ukoll li una volta li jinsorġi u jiskatta d-dritt għad-deduzzjoni ta' input tax, u daqstant ieħor, għad illi t-*taxpayer* ma jkollux id-dritt immedjat għad-deduzzjoni ta' input tax minnu inkorsa, mhux eskluz li maż-żmien, minhabba bidla fl-użu ta' l-akkwist partikolari, ossia li t-*taxable supply* tiġi prestata/ipprovduta iktar 'l quddiem, jkun jista' u fil-fatt jakkwista d-dritt għad-deduzzjoni ta' input tax hekk minnu inkorsa.

Huma dawn il-prinċipji li t-Tribunal jrid iżomm f'moħħu hu u jikkonsidra u jevalwa dak li jirriżulta mill-provi prodotti mill-partijiet kontendenti.

Mill-provi prodotti jirriżultaw is-segweni fatti:

- Is-soċjetà Rikorrenti hija rreġistrata mad-Dipartiment tat-Taxxa fuq il-Valur Miżjud u għandha n-numru ta' reġistrazzjoni MT-1471-1436;
- Is-soċjetà Rikorrenti hija proprjetarja ta' lukanda ġewwa San Lawrenz, Għawdex, u fl-2001 dahlet f' Management Agreement ma' Kempinski Hotels S.A., kumpanija inkorporata l-Isvizzera, sabiex din ta' l-aħħar topera l-lukanda issa magħrufa bħala Kempinski Hotel San Lawrenz<sup>40</sup>;
- F' Novembru 2004 is-soċjetà Rikorrenti bdiet espansjoni tal-lukanda proprjetà tagħha billi giet demolita parti già eżistenti mill-lukanda u giet rikostruwita b'żewġ sulari addizzjonali, b'casino, kmamar godda, Ġew mibnija wkoll numru ta' residenzi fuq l-art tal-lukanda<sup>41</sup>;
- Is-soċjetà Rikorrenti ottjeniet il-finanzjament għal parti minn dan il-proġett, senjatament għall-kostruzzjoni tar-residenzi, minghand l-*HSBC Bank Malta p.l.c.*, kif jirriżulta mis-Sanction Letter datata 19 ta' Lulju 2004<sup>42</sup>;
- Il-finanzjament kien għall-valur globali ta' Lm2,800,000, konsistenti fis-somma ta' Lm1,500,000 - *to pay BOV to waive 3511m<sup>2</sup> land owned by San Lawrenz Leisure Resort Ltd*; Lm1,200,000 - *as end finance to develop part of the property of the leisure resort at San Lawrenz Gozo into 39 luxurious apartments + 2 penthouses*; u Lm100,000 overdraft - *for working capital requirements mainly to meet loan debit interest applicable every March and September*;
- It-terms of repayment skond din is-Sanction Letter kienu *in accordance with normal banking practice overdraft is, at all times, repayable on demand, and notwithstanding anything aforesaid, these facilities may be withdrawn and/or is reviewable at any time at the Bank's discretion. The loan is for a fixed term. However, if an Event of Default (as outlined in the General Conditions Regulating Banking Facilities - Other Terms and Conditions) takes place, any sum outstanding to the Bank shall be immediately due and*

<sup>40</sup> Vide affidavit ta' Janice Baldacchino, fol. 103 sa' 109 tal-proċess.

<sup>41</sup> *Ibid.*

<sup>42</sup> Fol. 57 sa' 65 tal-proċess.

*payable, together with all charges and expenses, all rights appertaining to the Bank shall be exercisable and all security shall become enforceable. In such event, the Borrower shall lose the benefit of any time granted to him for payment and this without the necessity of any notice or other proceedings. Once repaid loan facilities may not be re-utilised. Loan is to be repaid from sale proceeds of San Lawrenz Apartments, exclusive of interest and is to clear within 4 years 6 months from date of initial drawdown. Debit interest is to be paid separately when due at half yearly rests in March and September of each year by the debit of your overdraft account. A monthly deposit of Lm6,000 is to be made into the overdraft account so as to meet part of the Bank's interest. No cheque book will be issued on said overdraft;*

- *Fil-kondizzjonijiet speċifiċi li jirregolaw il-faċilitajiet konċessi, il-Bank stipula u s-soċjetà Rikorrenti aċċettat li: waivers of apartments will be made at 80% of expected selling prices as follows:*

<i>Unit</i>	<i>Quantity</i>	<i>Gross Selling Price</i>	<i>Waivers</i>
<i>Apartments</i>	<i>39</i>	<i>Lm140,000 per unit</i>	<i>Lm112,000</i>
<i>Penthouses</i>	<i>2</i>	<i>Lm250,000 per unit</i>	<i>Lm200,000;</i>

- *Fl-2008 is-soċjetà Rikorrenti ottjeniet Ordni ta' Designated Special Area għar-residenzi mibnija minnha<sup>43</sup>. In effetti bl-Avviż Legali 131 ta' l-2008 inhareġ Ordni dwar Kempinski Residences, San Lawrenz, bħala Żona Imsemmija, Leġislazzjoni Sussidjarja 246.15, fejn ir-Regolamenti 2 u 3 jipprovdu li: 2. *Is-sit Kempinski Residences, San Lawrenz, Għawdex, li jikkonsisti f' proprjetà immobbli situata f'żona delineata bl-aħmar fil-Pjanta tar-Registru ta' l-Artijiet annessa ma' dan l-Ordni, hija b'dan imsemmija bħala Żona Speċjali Imsemmija għall-finijiet ta' l-Att dwar l-Akkwist ta' Proprjetà Immobbli minn Persuni Mhux Residenti;* 3. *Iż-Żona Kempinski Residences, San Lawrenz, Għawdex għandha tiżdied mal-Lista ta' Żoni Skedati fl-Ewwel Skeda li tinsab ma' l-Att dwar l-Akkwist ta' Proprjetà Immobbli minn Persuni Mhux Residenti;**
- *Fl-2008, is-soċjetà Rikorrenti bdiet tirreklama dawn ir-residenzi għall-bejgħ kemm tramite Estate Agents kif ukoll permezz ta' riklami fuq SkyLife Magazine<sup>44</sup>;*
- *Fl-2007 saret verifika da parte tad-Dipartiment tat-Taxxa fuq il-Valur Miżjud fir-rigward ta' input tax dikjarata u kreditu relattiv pretiż fil-perijodi ta' taxxa 01.03.05-30.05.05 u 01.06.05-31.08.05. Fir-rigward ta' tali verifika l-Ispetturi tad-Dipartiment kienu kkonstataw u kkonkludew illi: *an inspection was made at the premises. From our visit we confirmed that 60 apartments, 30 of which are already built, are to be used as a hotel occupancy extension. The other 30 are being finished. In due course, these last 30 apartments are going to be built as private residences. All the details are explained in the correspondence as attached at Red 63 by Mr. Noel Attard, financial controller of the company. This also states that no timeshare activity is going to be made. Capital expenditure ledger is attached. Input Vat on building materials, plastering, aluminium works, electricity, tiling and other services have been claimed. Input VAT on these works are being scrutinised and any anomalies found are to be deducted in subsequent credits due to the company**

<sup>43</sup> Fol. 53 u 54 tal-proċess.

<sup>44</sup> Fol. 67 sa' 83 tal-proċess.

after 31.08.05. In view of the above, credits pertaining to tax periods as stated below can be released. 01.03.05-31.05.05 = Lm73,776.13; 01.06.05-31.08.05 = Lm61,107.54<sup>45</sup>;

- Il-korrispondenza li ssir referenza għaliha fir-rapport ta' l-Ispetturi tad-Dipartiment hija l-ittra ta' Noel Attard datata 29 ta' Marzu 2007 a fol. 349 tal-proċess, fejn fiha jingħad illi *with reference to the new extension for the hotel and our VAT claims the following is the summary of the whole project undertaken. We have extended the hotel by an additional 30 rooms (these rooms have already been completed and used), added another pool area, completed the casino building, added spa treatment rooms, invested some funds also in renovation of corridors and rooms and also created new types of rooms. The total of new types of rooms amounts to 60 two or three bedroom units that will come to the size of 120 hotel rooms. This year we plan to complete 30 of this units, approximately 60 more rooms to be added to the hotel inventory. The other units will be slowly added to the hotel inventory, as we need finance for their finishings. I can confirm that none of the rooms will be made as timeshare. The only project, which could come for the remaining 30 units (not yet finished mentioned above) would be that these can be sold as private residences to single owners. In that case we would use the 20-year VAT claim period. Thus in such case if these private residences would be sold after 5 years we would refund back to the VAT Department the fraction of 15/20 of VAT input paid to us, in accordance with the VAT legislation. These rooms are still directly linked with the hotel and will be serviced by the hotel. However definitely our target at the moment is to add to the hotel. Also I can confirm that the project will not involve any timeshare at all;*
- Bejn Ġunju ta' l-2008 u April ta' l-2011 is-soċjetà Rikorrenti ttrasferiet tnaqqs minn dawn ir-residenzi b'titolu ta' enfitwesi temporaneja għall-perijodu ta' 250 sena dekoribbli mit-23 ta' Ġunju 2008<sup>46</sup> u ma' kull trasferiment użufurwiet mill-iskema ta' Aġġustamenti li Għandhom x'Jaqsmu ma' Oġġetti Kapitali, Legiżlazzjoni Sussidjarja 406.12, u rrifondiet parti mill-kreditu ta' input tax lilha konċess mid-Dipartiment għall-perijodi ta' taxxa in kwistjoni;
- Fl-2010 l-HSBC Bank Malta p.l.c beda jagħfas lis-soċjetà Rikorrenti għall-ħlas tas-self konċess lilha għall-kostruzzjoni tar-residenzi fuq l-art tal-lukanda Kempinski San Lawrenz, stante li d-dhul mit-trasferiment ta' dawn ir-residenzi ma kienx qed ikun biżżejjed biex jinqata' d-dejn mal-bank<sup>47</sup> u b'hekk kienu qed isiru arrangamenti għall-ħlas tad-dejn dovut, fejn il-bejgħ ta' dawn ir-residenzi in kwistjoni baqa' s-sors prinċipali tal-ħlas<sup>48</sup>;
- Id-dejn ma' l-HSBC Bank tħallas in segwitu għall-mewt ta' Joseph Baldacchino.

Fil-kuntest ta' l-kwadru fattwali s-soċjetà Rikorrenti tallega li l-intenzjoni tagħha minn dejjem kienet illi r-residenzi in kwistjoni jiġu mikrija lill-klijenti tal-lukanda fuq bażi *self catering* u li wħud minnhom spicċaw biex ġew

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<sup>45</sup> Fol. 348 tal-proċess.

<sup>46</sup> Fol. 113 sa' 346 tal-proċess.

<sup>47</sup> Xhieda mogħtija minn Ray Borg waqt is-seduta ta' l-1 ta' Diċembru 2014, a fol. 38of sa' 38og tal-proċess.

<sup>48</sup> Xhieda mogħtija minn Gordon Xerxen waqt is-seduta tat-18 ta' Lulju 2016, fol. 473 sa' 475 tal-proċess u dokumenti esebiti minnu li qed jinżammu fis-sigrieta.

mibjugha minhabba problemi finanzjarji li rriskontrat fil-kors tal-kostruzzjoni ta' l-istess.

Fir-rigward Janice Baldacchino, Direttur tas-soċjetà Rikorrenti tikkontendi li: is-soċjetà rikorrenti hija s-sid tal-lukanda magħrufa bħala San Lawrenz, f'San Lawrenz, Għawdex. Din il-lukanda hija ġestita tramite management agreement li s-soċjetà rikorrenti għandha mas-soċjetà internazzjonali Kempinski Hotels s.a., permezz ta' liema ftehim din is-soċjetà estera għandha tiegħu ħsieb li tiġġestixxi l-lukanda skond l-istandard internazzjonali li għalih hija magħrufa madwar id-dinja. Dan il-ftehim sar mis-soċjetà estera imsemmija ġie ffirmat fid-19 ta' Ottubru 2001. Fiż-żmien meta ġie ffirmat dan il-ftehim, digà kien hemm anke referenza fil-ftehim innifsu, kif jidher mill-preamboli (recitals) - pagna 4 tal-kuntratt. Mill-istess kuntratt jidher ukoll li l-pjan originali kien li din l-estensjoni tal-lukanda tkun parti integrali mill-lukanda b'mod li din ukoll tiġi ġestita mis-soċjetà estera bħala operatriċi tal-lukanda. Fil-fatt l-applikazzjoni għall-permess ta' żvilupp meħtieġ sabiex issir il-kostruzzjoni mertu ta' din il-proċedura għandha n-numru PA5466/01. Dan fil-fatt juri li din l-applikazzjoni saret fl-istess sena li fiha s-soċjetà rikorrenti daħlet fi ftehim mas-soċjetà estera digà msemmija, u għalhekk jindikaw li l-ftehim in kwistjoni sar proprju anke b'referenza għal din il-kostruzzjoni l-ġdida. Fil-fatt l-applikazzjoni ġiet preżentata lill-MEPA jum biss qabel ma ġie ffirmat il-ftehim mas-soċjetà estera msemmija. ... Il-permess ta' żvilupp relattiv għall-kostruzzjoni mertu ta' din il-proċedura ħareġ fit-28 ta' Ottubru 2004, u kellu n-numru PA05466/01. Ix-xogħol tal-kostruzzjoni fil-fatt kien inbeda minnufih, cioè f'Novembru 2004 u sa' Ġunju 2005 kien kompletat. Dan l-iżvilupp kien essenzjalment jinvolvi d-demolizzjoni ta' parti mill-lukanda già eżistenti u r-rikostruzzjoni ta' dik il-parti, b'zewġ sulari addizzjonali, kif ukoll casino, kmamar godda u r-residenzi mertu ta' din il-proċedura. Ngħid li l-finanzjament ottenut mis-soċjetà rikorrenti sabiex issir din il-kostruzzjoni kien ġej minn self bankarju. Il-kunċett wara l-kostruzzjoni ta' dawn ir-residenzi kien wieħed kemm xejn differenti mill-kunċett ordinarju ta' kmamar flukanda li fihom jallogġjaw il-klijenti ta' dik l-istess lukanda. L-iskop tar-residenzi kien li dawn jinkrew lill-klijenti tal-lukanda b'dana però li jkunu fuq bażi self-catering, mentri ovvjament fil-każ tal-kmamar ordinarji fil-lukanda l-ikel jiġi servut fuq il-baži ordinarja mill-lukanda stess, u cioè bed and breakfast, half board jew full board. Dan però bl-istess servizzi tal-lukanda bħal tindif, użu tal-facilitajiet tal-lukanda eċċ. ... Mill-informazzjoni mogħtija lis-soċjetà rikorrenti fil-laqgħa tal-5 ta' Marzu 2020, irriżulta li d-Dipartiment tal-VAT kien qed jikkontendi li t-taxxa nkorsa b'konsegwenza ta' l-ispiza kapitali minfuqa fil-kostruzzjoni tar-residenzi ma setgħetx titqies bħala input tax credit għaliex dawn ir-residenzi kienu qed jinbiegħu. Madanakollu, jiena nikkonferma li l-intenzjoni tas-soċjetà u tad-direttur tagħha Joseph Baldacchino fiż-żmien meta nbnew dawn ir-residenzi ma kienetx li dawn jinbiegħu, imma li jkunu jiffirmaw parti mill-inventarju tal-lukanda, bl-iskop li fihom jiġu alloġġjati l-klijenti tas-soċjetà rikorrenti. Dan kif maħsub fil-ftehim tad-19 ta' Ottubru 2011 li s-soċjetà rikorrenti kellha mas-soċjetà estera Kempinski Hotels s.a., kif digà spjegat. Li ġara kien li f'xi żmien wara li nbnew dawn ir-residenzi, is-soċjetà rikorrenti iltaqgħet ma' diffikultajiet finanzjarji sabiex tlesti l-finishings ta' dawn ir-residenzi. Kif digà għedt, il-finanzjament

għall-kostruzzjoni kien għej mill-Bank, u l-Bank beda jeżiġi li jiġihallas. Kien għalhekk li missieri kien ha d-deċiżjoni li jinbiegħu ftit minn dawn ir-residenzi, sabiex mir-rikavat jiġihallas il-Bank. Nixtieq inżid illi qabel ma missieri ha d-deċiżjoni li jbiegħ xi residenzi, huwa kien ipprova jgħib finanzjament meħtieġ biex jitlestew ir-residenzi billi jagħmel uzu minn proprjetà oħra tal-Baldacchino Group of Companies. Sfortunatament, l-artijiet li kienu disponibbli kienu kollha affetti minn xi problema jew oħra, fis-sens li kien hemm kawżi fuqhom u għalhekk ma stajniex nipotekaw dawn l-artijiet u lanqas ninnegozzjaw biex inġibu l-finanzi. Il-qligħ mir-residenzi ma setax jibda minħabba li ma setgħux jitlestew. Għalhekk missieri ddeċieda li jbiegħ ftit mir-residenzi. Dan tant huwa minnu li l-ħsieb sabiex jinbiegħu dawn ir-residenzi beda biss fiż-żmien 2007, meta l-kostruzzjoni kienet ilha lesta mill-2005. Xhieda ta' dan huwa l-fatt li r-riklamar għall-bejgħ ta' dawn ir-residenzi nbeda biss snin wara li tlestiet il-kostruzzjoni. L-istess jgħodd għall-fatt illi s-soċjetà rikorrenti talbet l-istat ta' "Designated Special Area" fir-rigward ta' dawn ir-residenzi - dan l-istat intalab biss fit-3 ta' Diċembrru 2007 u nħareġ fl-2008 permezz ta' Avviż Legali 131/08... Fil-fatt l-ebda waħda minn dawn ir-residenzi ma nbiegħet, imma kollha ġie konċess dritt ta' enfitewsi temporaneja. Oriġinarjament is-soċjetà rikorrenti riedet illi t-terminu ta' l-enfitewsi temporaneja jkun ta' 99 sena, però dan it-terminu rriżulta li kien qasir wisq u kien qed jimbotta akkwirenti prospettivi. Għalhekk dan żdied għal 250 sena. Però l-iskop li l-konċessjoni ssir permezz ta' enfitewsi temporaneja juri li l-intenzjoni tas-soċjetà rikorrent meta ġiet biex 'tbiegħ' dawn ir-residenzi minħabba d-diffikultajiet finanzjarji li sabet ruħha fihom kien li xi darba il-pussess battal ta' dawn ir-residenzi jerga' jiġi lura għandha. B'kollox kien hemm t-nax-il residenza li fuqhom ġie konċess dritt ta' enfitewsi temporaneja favur terzi. Hekk kif id-diffikultajiet fininanzjarji tas-soċjetà rikorrenti ġew fit-tmiem tagħhom, immedjatament waqaf kull tentattiv sabiex jiġu konċessi drittijiet enfitewsi anke fuq ir-residenzi l-oħra. ... Għalhekk l-intenzjoni oriġinali tas-soċjetà rikorrenti qatt ma kienet li dawn ir-residenzi jinbiegħu, imma li jkun jiffirmaw parti mill-inventarju tal-lukanda sabiex fihom jiġu alloġġjati l-klijenti tas-soċjetà rikorrenti fuq bażi self-catering. Kien biss minħabba diffikultajiet finanzjarji li s-soċjetà rikorrenti kellha tikkonċedi b'titolu ta' enfitewsi temporanja wħud minn dawn ir-residenzi, liema konċessjonijiet waqfu ħesrem hekk kif id-diffikultajiet finanzjarji imsemmija ġew sorvolati<sup>49</sup>.

It-Tribunal josserva li l-fatti kif esposti fl-affidavits ta' Robert Aquilina u ta' Noel Attard, esebiti mis-soċjetà Rikorrenti permezz ta' Nota pprezentata fl-1 ta' Diċembru 2014, a fol. 381 sa' 428 tal-proċess, huma fuq l-istess linja bħall-affidvair ta' Janice Baldacchino.

Dak allegat minn dawn ix-xhieda tas-soċjetà Rikorrenti però jinsab kontradett, u dana b'mod oġġettiv, minn diversi provi oħra fil-proċess, prinċipali fosthom is-Sanction Letter datata 19 ta' Lulju 2004<sup>50</sup> u x-xhieda ta' żewġ rappreżentanti ta' l-HSBC Bank Malta p.l.c. Ray Borg u Gordon Xerxen. Hemm ukoll kontradizzjoni għal dak allegat minn Janice Baldacchino, Robert Aquilina u

<sup>49</sup> Affidavit ta' Janice Baldacchino a fol. 103 sa' 109 tal-proċess.,

<sup>50</sup> Fol. 57 sa' 61 tal-proċess.

Noel Attard, fix-xhieda ta' xhud prodott mis-soċjetà Rikorrenti stess, ossia fix-xhieda ta' Raphael Aloisio.

Kif già iktar 'l fuq osservat fis-Sanction Letter datata 19 ta' Lulju 2004, in forza ta' liema s-soċjetà Rikorrenti ottjeniet il-finanzjament għall-kostruzzjoni tar-residenzi in kwistjoni, gie espressament stipulat illi: *in accordance with normal banking practice overdraft is, at all times, repayable on demand, and notwithstanding anything aforesaid, these facilities may be withdrawn and/or is reviewable at any time at the Bank's discretion. The loan is for a fixed term. However, if an Event of Default (as outlined in the General Conditions Regulating Banking Facilities - Other Terms and Conditions) takes place, any sum outstanding to the Bank shall be immediately due and payable, together with all charges and expenses, all rights appertaining to the Bank shall be exercisable and all security shall become enforceable. In such event, the Borrower shall lose the benefit of any time granted to him for payment and this without the necessity of any notice or other proceedings. Once repaid loan facilities may not be re-utilised. **Loan is to be repaid from sale proceeds of San Lawrenz Apartments, exclusive of interest and is to clear within 4 years 6 months from date of initial drawdown**<sup>51</sup>. Debit interest is to be paid separately when due at half yearly rests in March and September of each year by the debit of your overdraft account. A monthly deposit of Lm6,000 is to be made into the overdraft account so as to meet part of the Bank's interest. No cheque book will be issued on said overdraft ... **waivers of apartments will be made at 80% of expected selling prices as follows:***

Unit	Quantity	Gross Selling Price	Waivers
Apartments	39	<b>Lm140,000 per unit</b>	Lm112,000
Penthouses	2	<b>Lm250,000 per unit</b> <sup>52</sup>	Lm200,000.

Il-kontenut ta' din is-Sanction Letter ffit li xejn iħalli dubju dwar l-intenzjonijiet tas-soċjetà Rikorrenti fir-rigward tar-residenzi li kienet se tibni fuq l-art tal-lukanda Kempinski San Lawrenz u t-Tribunal iħoss li ffit li xejn jista' jagħti affidament lil dak allegat minn Janice Baldacchino, Robert Aquilina u Noel Attard. Din l-osservazzjoni ssib sostenn f'dak osservat mill-Qorti ta' l-Appell (Sede Inferjuri) fis-sentenza fl-ismijiet **John Baptist Zammit v. John Grech, Appell Nru. 911/01**, deċiża fit-28 ta' April 2004: *sa żmien sekolari jviġi fis-sistema probatorju tagħna l-prinċipju "che non è ammissibile la prova testimoniale contro o in aggiunta al contenuto di un atto scritto" (Hasan v. Ebejer, Qorti Kummerċ, 18 ta' Ottubru 1892 a Vol XIII paġna 279). Issa huwa veru wkoll illi għal dan l-istess prinċipju jeżistu ċerti eċċezzjonijiet, kif estensivament rispekkjat fis-sentenza a Vol XXXIX pIII p855. F'dan il-każ, però il-prova testimonjali ta' l-appellant għalkemm isservi biex tillustra x'kienet l-intenzjoni tiegħu .. ma tistax tissupplixxi għal dak kjarament dettaljat fl-iskrittura jew biex tirrendi palesi l-intenzjoni komuni u vera tal-kontraenti, u mhux dik biss tiegħu. Ma jeżisti l-ebda dubbju fil-kliem ta' l-iskrittura biex jista' jkun aċċettat illi l-prova testimonjali tista' sservi ta' sussidju għalih. ... biex seta' jirribatti l-iskritt, il-konvenut ħtiegħu jipprova*

<sup>51</sup> Enfasi tat-Tribunal.

<sup>52</sup> Enfasi tat-Tribunal.

*adegwatament l-eżistenza tas-simulazzjoni ... u jista' jżied ukoll, il-frodi jew raġuni oħra valida ... jew li l-kitba kienet ambigwa ... jew xi patt incidentalni u aċċessorju - ċirkostanzi dawn ta' l-aħhar li ma jirrizultawx fil-każ in ezami.*

Ray Borg, rappreżentant ta' l-HSBC Bank Malta p.l.c., ikkonferma li l-intiża minn dejjem kienet illi r-residenzi in kwistjoni jinbiegħu tant illi mir-rikavat tal-bejgħ kellu jithallas il-finanzjament li s-soċjetà Rikorrenti ottjeniet minghand il-Bank. Fix-xhieda li ta waqt is-seduta ta' l-1 ta' Diċembru 2014<sup>53</sup>, in risposta għall-mistoqsija *fl-ingunzjoni kellek miktub biex tixhed fuq self li setgħat ħadet din il-kumpannija (is-soċjetà Rikorrenti) minghand l-HSBC in konnessjoni mal-lukanda. L-ewwel ħaġa hemm self?*, Ray Borg wieġeb minn naħa tagħna *l-HSBC is-self ma kienx fuq il-lukanda imma fuq l-appartamenti li nbnew biswit mal-lukanda. Huwa kompli jixhed illi dan is-self kien mit-2005 sat-2011 u mistoqsi u kif żvolġa ruħu dan il-pagamenti kienu qed isiru sew? Daħlet ir-recoveries fiha?* huwa wieġeb *le t-threshold tar-riskju kien żdied sew tant li konna qed nitolbu kostituzzjoni ta' debitu. Mistoqsi meta ġara dan huwa wieġeb fl-2010. Mistoqsi x'ġara fir-rigward tal-kostituzzjoni ta' debitu li ried il-Bank, Ray Borg iddikjara ma sarx għax dejjem kellu oġġezzjoni, ossia Joseph Baldacchino. Ray Borg kompli jixhed illi ir-raġuni li tlabna s-COD hija għal ċertu ċirkostanzi għaliex id-debitu ta' dan il-perijodi kellna ntawlulu ż-żmien biex forsi jħallas, kien hemm xi imgħaxijiet mhux imħallsin, tant hu hekk li għamilnilu overdraft biex jipparkjaw ruħhom sakemm jinbiegħu l-proprjetajiet u jithallas minn hemm, jigiġifieri l-kont kien fih ħafna xogħol. Mistoqsi mit-Tribunal meta tgħidli jinbiegħu l-proprjetajiet, x'proprjetajiet kienu? Ray Borg wieġeb il-proprjetajiet kienu appartamenti li nbiegħu fuq l-art ta' San Lawrenz, Għawdex. Mistoqsi ulterjorment il-bank matul l-2010, kif kien qed jittratta ma' San Lawrenz Leisure Resort? Jigiġifieri kien qed jagħmlilha l-pressure hux hekk? Ray Borg wieġeb iva bla dubju kien qed jagħmel il-pressure għax kieku lanqas konna nitolbu kostituzzjoni kieku ma konniex qed naqħmlu pressures u ridna li l-appartamenti jkunu raġjonevoli biex jinbiegħu mill-aktar fis.*

Meta xehed in kontro-eżami waqt is-seduta tat-2 ta' Mejju 2016<sup>54</sup>, mistoqsi intom ħadtu loan li kienet għand il-Bank of Valletta. Issa meta l-bank ta lis-soċjetà dan is-self, il-kumpannija jew inkella rappreżentant tagħha s-Sur Baldacchino kien qalilkom x'ser jagħmel b'dawn l-appartamenti? Għax inti għeditilna li parti minn dan is-self mar għall-appartamenti, kien qalilkom x'ser jagħmel mill-appartamenti jekk hux ser ibiegħhom, jikrihom? Ray Borg wieġeb sa fejn niftakar jiena għall-bejgħ kienu. Għall-mistoqsija ulterjuri biex tikkonferma li l-intenzjoni vera irid ibiegħ, hemm xi tip ta' eżercizzju ieħor, għandkom xi team intern li forsi jara l-intenzjoni jew jitolbu xi provi u jgħidli isma' urini li veru se tbiegħ jew urini l-intenzjoni tiegħek li ser tbiegħhom? Ray Borg wieġeb normalment ġieli anki nitolbu marketing plan u f'dan il-każ kien hemm u għall-mistoqsija ulterjuri f'dan il-marketing plan tikkonfermalna li kien hemm din l-intenzjoni li kien ser ibiegħ? Ray Borg wieġeb li kien ser ibiegħ. Mistoqsi meta tagħmlu dan l-eżercizzju mill-esperjenza tiegħek li għandek fil-bank, intom taraw l-intenzjoni tas-soċjetà x'ser tagħmel, kemm hu reliable

<sup>53</sup> Fol. 308f sa' 308h tal-proċess.

<sup>54</sup> Fol. 465 sa' 468 tal-proċess.

dan l-eżerċizzju għalikom? Jigifieri x'saħħa fih x'hin tigu biex tagħtu s-self? Ray Borg wieġeb importanti ħafna għax inkella s-source of payment huwa definitely li ma jkunx joħnoq id-dejn mill-ewwel għax inkella jigi nkapacitat, ma jistax jithallas. Għall-mistoqsija l-fatt li l-bank ra li dawn il-proprjetajiet ser jinbiegħu, li qed nipprova nistaqsik huwa l-bank ikkunsidra li l-proprjetajiet jigu estensjoni jigifieri parti mill-lukanda, allura minflok jinbiegħu jinżammu mis-Sur Baldacchino? Il-bank kien jagħti dan it-tip ta' self jekk is-Sur Baldacchino ma kienx ser jbiegħ dawn il-proprjetajiet? Ray Borg wieġeb irid jagħtik proposta ġdida, jrid jagħtik cash flow ġdida u għall-mistoqsija jigifieri l-punt fejn kontu qegħdin, l-indication kienet li ser jinbiegħu allura l-bank kien sodisfatt b'dak it-tip ta' cashflow? Ray Borg wieġeb hekk hu.

Da parte tiegħu Gordon Xerxen<sup>55</sup>, ukoll rappreżentant ta' l-HSBC Bank Malta p.l.c., għall-osservazzjoni f'seduta oħra ex-impjegat ta' l-HSBC, is-Sur Ray Borg, fix-xhieda tiegħu qalilna illi l-bank kien ħareġ dan is-self peress li l-kumpannija kienet ser tiżviluppa din il-proprjetà sabiex tbiegħha u mhux tkun parti mill-lukanda li tkompli tinkera, irrimarka hekk hu u għall-mistoqsija ulterjuri jigifieri inti dan tikkonfermah li s-self ħareġ purament biex tinbiegħ u mhux biex tinkera. Taf tindikalna mid-dokumenti li għandek minn fejn joħorġu dawn il-punti jekk jogħġbok? Gordon Xerxen wieġeb għandi l-aħħar sanction letter li kellna fejn aħna konna ser niħallsu fil-fatt mill-bejgħ tal-proprjetà ta' l-appartamenti jigifieri r-restituzzjoni tal-fondi huwa direttament mill-bejgħ ta' l-appartamenti nfushom. Minn naħa tal-marketing plan, hemm sales activity plan li tindika jigifieri l-pjanijiet li kellu għalihom.

Mix-xhieda ta' Ray Borg u ta' Gordon Xerxen u d-dokumenti esebiti minn dan l-aħħar<sup>56</sup>, jirriżulta b'mod ċar u oġġettiv li meta ttiehed originarjament il-finanzjament minghand l-HSBC Bank Malta p.l.c., ossia fl-2004, l-intenzjoni ċara tas-soċjetà Rikorrenti kienet illi tbiegħ ir-residenzi żviluppatti fuq l-art tal-lukanda u li din baqgħet hekk l-intenzjoni anke meta fl-2010 il-Bank beda jagħmel pressjoni biex is-soċjetà tagħmel pagamenti li kienu iktar konsoni mad-debitu tagħha ma' l-istess Bank. B'hekk kuntrarjament għal dak allegat mis-soċjetà Rikorrenti u x-xhieda minnha prodotti, l-intenzjoni vera w unika għal dawn ir-residenzi kienet u baqgħet għall-bejgħ ta' l-istess residenzi u mhux li dawn jinkrew lill-klijenti tal-lukanda fuq bażi self catering. Għalkemm is-soċjetà Rikorrenti tikkontendi li l-ideja li r-residenzi jinbiegħu nibtet meta s-soċjetà bdiet tiġi ppressata mill-Bank vis-à-vis id-dejn tagħha miegħu, mix-xhieda tar-rappreżentanti tal-Bank jirriżulta li l-problemi mal-Bank inqalgħu, u dan beda jippressa għal ħlasijiet konsoni, fl-**2010** mentri mill-kuntratti esebiti minn Janice Baldacchino jirriżulta li l-ewwel trasferiment sar fit-**28 ta' Ġunju 2008** b'hekk żmien ferm qabel ma l-Bank beda jagħmel pressjoni fuq is-soċjetà Rikorrenti. Fl-istess żmien, ossia fl-2008 u b'hekk qabel ma nqalgħu problemi serji mal-Bank, is-soċjetà Rikorrenti ottjeniet l-Ordni ta' Special Designated Area għar-residenzi in kwistjoni, liema ordni hija marbuta sfiq ma' l-akkwist ta' proprjetajiet. In effetti l-Artikolu 5(1)(b) ta' l-Att dwar l-Akkwist ta' Proprjetà Immoġbli Minn Persuni Mhux Residenti, Kap. 246 tal-Liġijiet ta' Malta, jipprovdi li: *id-disposizzjonijiet ta' l-artikolu 4* (il-projibizzjoni li persuni

<sup>55</sup> Vide xhieda mogħtija waqt is-seduta tat-18 ta' Lulju 2016, fol. 473 sa' 475 tal-proċess.

<sup>56</sup> Id-dokumenti qed jinżammu fis-sigrieta.

mhux residenti ma jistgħux jakkwistaw proprjetà immobbli) *ma għandhomx japplikaw dwar: (b) l-akkwist ta' proprjetà immobbli minn xi persuna, tkun fejn tkun residenti, f'xi area imsemmija speċjali.* Dan il-fatt għalhekk juru biċ-ċar illi r-residenzi in kwistjoni fil-fatt kienu intiżi għall-bejgħ u mhux għall-kiri kif pretiż mis-soċjetà Rikorrenti.

Jiġi rilevat ukoll li s-soċjetà Rikorrenti ma ressqet l-ebda prova li sodisfaċentement turi li r-residenzi kienu qed jinkrew lill-klijenti tal-lukanda u mhux jiġu trasferiti lil terzi persuni. Għalkemm fl-affidavit tagħha Dorothy Baldacchino<sup>57</sup> ddikjarat li *uħud mir-residenzi mertu ta' din il-proċedura kienu bdew jintużaw għall-alloġġ tal-klijenti tal-lukanda versu l-ħlas ta' kera kif inhi il-prassi f'kull lukanda, u dan sa' mit-2 ta' Ġunju 2010, kif jidher mid-dokument li qed neżebixxi mal-preżenti affidavit, hawn anness u mmarkat Dokument DB1. Nspjega li l-alloġġ tal-klijenti tal-lukanda fir-residenzi beda hekk kif kien hemm partijiet mill-finishings tar-residenzi li Kienu lesti biex b'hekk uħud mir-residenzi setgħu jintużaw għall-kummerċ tal-lukanda. Nikkonferma li l-intenzjoni tal-mibki missieri Joseph Baldacchino, fiż-żmien kollu li hu kien direttur, kienet dejjem li jżid ir-residenzi ma' l-inventarju tal-lukanda, u li l-kostruzzjoni tar-residenzi saret in konsiderazzjoni ta' dak miftiehem bejn il-kumpannija San Lawrenz Leisure Resort Limited u l-kumpannija estera Kempinski Hotels s.a., permezz ta' liema ftehim iż-żieda ta' kmamar fl-inventarju tal-lukanda kellha tissarraġ f'benefiċċji finanzjarji għall-kumpannija San Lawrenz Resort Limited. ... Id-deċiżjoni li jinbiegħu uħud mir-residenzi ittieħdet biss wara li kienet tlestiet il-kostruzzjoni tagħhom u nbeda l-proċess ta' finishing u ttieħdet biss minħabba problemi finanzjarji li kellha l-kumpannija dak iż-żmien, minn dan l-affidavit u d-dokumenti annessi ma jirriżulta b'mod ċar li r-residenzi kienu qed jinkrew lill-klijenti tal-lukanda stante li ma hemm xejn x'jindikaw li daww il-prenotazzjonijiet u konsegwenti alloġġi kienu fil-fatt fir-residenzi u mhux f'partijiet oħra tal-lukanda.*

Xhieda oħra minn liema jirriżulta li l-intenzjoni tas-soċjetà Rikorrenti kienet illi ir-residenzi mertu ta' dawn il-proċeduri jiġu mibjugħa, hija x-xhieda ta' Raphael Aloisio<sup>58</sup>, xhud tas-soċjetà Rikorrenti stess, illi minkejja pprova jenfasizza fuq x'kienet ix-xewqa ta' Joseph Baldacchino, fl-aħħar mill-aħħar dwar l-intenzjoni vera e propria ddikjara: *meta sar il-proġett kien hemm b'zonn finanzjament. Dak iż-żmien is-settur tal-lukandi ma kienx li huwa llum u l-bank kien iżjed interessat li jkollu repayment milli pagamenti tas-self addizzjonali li kien hemm fuq l-extension jiġi minn bejgħ ta' proprjetà milli minn operazzjoni. Mela l-bank beda jipprova u jagħmel pressjoni fuq is-sur Baldacchino li r-repayments ikunu mill-units u infatti jekk niftakar sew dak iż-żmien is-sanction letter dak iż-żmien kien ħareġ li s-self li kienu taw kellu jiġi minn estensjoni li kellu jiġi mill-bejgħ tal-units jew ta' parti mill-units. Issa s-Sur Baldacchino dak iż-żmien kellu portfolio ta' proprjetajiet mhux żgħir. Mistoqsi dwar l-impatt ta' dan il-fethim mal-Bank fuq il-fethim ma' Kempinski Hotels s.a., Raphael Aloisio ddikjara: *li niftakar jiena huwa li din il-biċċa xogħol kellha tkun a second tear lill-management fees u l-expected minnhom GOP kellhom**

<sup>57</sup> Fol. 437 sa' 442 tal-proċess. L-affidavit qed jinżamm fis-sigrieta.

<sup>58</sup> Xhieda mogħtija waqt is-seduta tal-11 ta' Ġunju 2015, fol. 449 sa' 453 tal-proċess.

*jinbidlu imma. Li niftakar imbagħad kien l-agreement li dawn il-units ikunu sort of mibjugħin, mibjugħin bħala operation parti mill-inventarju u qal mela nuzawhom meta jkolli bżonn u nagħmel l-kmamar żejda biex ma jidħlux fil-commitment li jtellgħu l-minimum guaranteed operating profit jġigifieri ppreferew li ma jagħmlux hekk. Imma huma stess riedu li jekk ikun hemm additional capacity, għax peress li Għawdex is-seasonality kien kbir u fix-xitwa kien ikun batut u s-sajf kien ikun qawwi ħafna, bid-domanda fis-sajf setgħu jużaw iżjed kmamar. Dan il-mudell ma kienx sostenibbli għall-operat minn naħa ta' l-investitur għaliex kien ifisser li kien ikollok dak l-extension kollu u l-kmamar mhux utilizzati għall-perijodu sostanzjali tas-sena. Joe baqa' għaddej jipprova jbiegħ proprjetajiet oħra biex inaqqs il-pressjoni biex jbiegħ il-units u minħaba l-pressjoni li kellu beda wkoll jipprova jagħmel bejgħ ukoll tal-units. L-ewwel qal li jipprova jagħti ċens għal erbgħin sena imbagħad meta beda ma jsibx bejgħ beda dejjem itawwal u bazikament spicċa fl-aħħar mill-aħħar jbiegħ il-units. Imbagħad għamel żmien fejn beda jikkonsidra jbiegħx kollox minħabba ovvjament il-pressjoni li kien hemm imbagħad meta beda jbiegħ anke proprjetajiet oħra, kull darba meta l-pressjoni kienet tonqas ovvjament kien jagħmel minn kollox biex iżomm il-units għax ovvjament iżjed ma kien ineħħi units mill-kumpless, aktar kien ser iwaqqa' il-valur totali għax jekk minflok kumpless sħiħ għandek units mibjugħin, kont tispicċa ttellef il-valur totali. Infatti sfortunatament meta miet u l-kumpannija ma kellhiex l-istess pressjoni, l-ewwel ħaġa li l-kumpannija għamlet, kien li waqqfet kompletament il-bejgħ u kompliet fuq ix-xewqa ta' Joe li kemm jista' jkun ma jbiegħux units. Minn hemmhekk komplew jużaw flejjes minn sosri oħra biex jġibru d-dejn li Kellhom bħala grupp għall-livelli iżjed sostenibbli.*

Minn din ix-xhieda johroġ b'mod ċar li kienet l-**intenzjoni** ċara tas-soċjetà Rikorrenti li tbiegħ ir-residenzi in kwistjoni u dana anke sabiex tkun tista' thallas id-dejn lura lill-**HSBC Bank Malta p.l.c.**, hekk kif del resto miftiehem ma' l-istess Bank, iżda kienet **ix-xewqa** (ħaġa ben distinta minn intenzjoni) ta' Joseph Baldacchino li dawn ir-residenzi jkunu jiffurmaw parti attiva mill-lukanda u mill-operat tagħha u dana sabiex ikun hemm introjtu iktar vantaġġuż diehel mill-ftehim ma' Kempinski Hotels s.a. Kienet x'kienet ix-xewqa ta' Joseph Baldacchino, ma hemmx dubju li oġġettivament l-intenzjoni tas-soċjetà Rikorrenti fir-rigward tar-residenzi in kwistjoni kienet appuntu li dawn jinbiegħu/jiġu trasferiti lil terzi persuni. Kif ben osservat mill-Qorti ta' l-Appell (Sede Inferjuri) fis-sentenza fl-ismijiet **A.B. v. Kummissarju tat-Taxxi, Appell Nru. 1/04**, deċiża fis-26 ta' Jannar 2005: *l-intenzjoni ma għandhiex tiġi valutata f'sens personalizzat u soġġettiv, distakkat minn dawk iċ-ċirkostanzi li jservu biex jiddeterminaw il-ħsieb prevalenti tal-parti u s-sens li jrid jiġi attribwit lil dawn fid-dawl ta' l-iskop konkret, u li manifestament jeżisti mill-kumpless organiku. Ĥsieb dan ispirat minn koknsiderazzjonijiet determinati li jippersegwu finalità determinanti fil-mument li fih tinsorġi l-okkazzjoni.*

It-Tribunal josserva li għalkemm fl-affidavit tagħha Janice Baldacchino tikkontendi li l-ebda waħda minn dawn ir-residenzi ma nbiegħet, imma kollha ġie konċess dritt ta' enfitewsi temporaneja. Originarjament is-soċjetà rikorrenti riedet illi t-terminu ta' l-enfitewsi temporaneja jkun ta' 99 sena,

*però dan it-terminu rriżulta li kien qasir wisq u kien qed jimbotta akkwirenti prospettivi. Għalhekk dan żdied għal 250 sena. Però l-iskop li l-konċessjoni ssir permezz ta' enfitewsi temporaneja juri li l-intenzjoni tas-soċjetà rikorrent meta giet biex 'tbiegħ' dawn ir-residenzi minħabba d-diffikultajiet finanzjarji li sabet ruħha fihom kien li xi darba il-pussess battal ta' dawn ir-residenzi jerga' jiġi lura għandha, il-verità fattwali u ġuridika hija ferm differenti minn kif minnha pretiż.*

Huwa ġuridikament stabbilit illi ċ-ċenswalist għandu d-dritt jeżerċita l-azzjonijiet kollha, sija petitorji, sija possessorji, vestiti fid-direttarju. Saħansitra, huwa konċess mill-liġi, ex-artikolu 1504(2) tal-Kodiċi Ċicili illi ċ-ċenswalist jista' jirrivendika l-fond di fronte għall-istess dominus jekk dan jużurpalu l-fond jew jiddeprivah mill-pussess tiegħu. Hemm raġuni għal dan. Mir-rapport enfitewtiku jitwieled dritt reali ta' godiment, anke jekk talvolta temporanju, fuq il-fond ta' haddieħor u tali jestrinsika ruħu f'dak tad-dominju utile fuqu. Huwa proprju l-istess artikolu surreferit li kjarament jistabilixxi wkoll illi ċ-ċenswalist għandu d-dritt 'jieħu l-utili kollha tal-fond'<sup>59</sup>. Apparte mill-import u tifsira ġuridika ta' l-enfitewsi, anke jekk waħda temporaneja, fil-każ in eżami konċessjoni ta' ben 250 sena diffiċilment tista' tkun turija jew addirittura konferma li r-residenzi in kwistjoni kienu intiżi biex jizdiedu ma' l-inventarju tal-lukanda biex jinkrew lill-klijenti tagħha fuq bażi *self catering*.

Mill-analiżi akkurata tal-provi prodotti jirriżulta għalhekk b' mod oġġettiv li kuntrarjament għal dak pretiż mis-soċjetà Rikorrenti, l-intenzjoni tagħha minn dejjem kienet li r-residenzi mibnija fuq l-art tal-lukanda Kempinski San Lawrenz jiġu trasferiti/jinbiegħu lil terzi persuni u fil-fatt kienet din l-intenzjoni li giet attwata u mhux xort' oħra.

Stabbilit dan jeħtieġ issa jiġi stabbilit kif jinkawdra l-bejgħ ta' immobbli fil-kuntest tar-reġim fiskali tat-taxxa fuq il-valur miżjud.

Il-partita 3(1) tat-Tieni Skeda tal-Kap. 406 tal-Liġijiet ta' Malta tipprovdi, u hekk kienet tipprovdi fil-perijodi ta' taxxa mertu ta' dawn il-proċeduri, illi: *trasferiment ta' attiv li jkun definit mill-liġi bħala proprjetà immobbli għandu jitqies bħala provvista ta' oġġetti: iżda konċessjoni ta' ċens li ma jeċċedix il-ħamsin sena għandha titqies bħala provvista ta' servizzi*. A tenur tal-partita 1(2) tat-Tieni Taqsima tal-Ħames Skeda tal-Kap. 406 tal-Liġijiet ta' Malta kif applikabbli anke fil-perijodi ta' taxxa mertu ta' dawn il-proċeduri, it-trasferiment ta' proprjetà immobbli jikkostitwixxi provvista eżenti bla kreditu.

Minn dawn il-provvedimenti tal-Liġi jirriżulta għalhekk illi t-trasferiment ta' proprjetà immobbli jikkostitwixxi provvista ai termini tal-Kap. 406 tal-Liġijiet ta' Malta, iżda tali provvista hija eżenti mit-taxxa fuq il-valur miżjud u konsegwentement ma hemmx dritt għal kreditu ta' input tax. Isegwi għalhekk illi is-soċjetà Rikorrenti qatt ma setgħet tarroga favur tagħha d-dritt għal kreditu ta' input tax għar-raġuni li kif osservat mill-Qorti Ewropeja tal-Ġustizzja fl-Ordni fl-ismijiet **Gmina Międzyzdroje v. Minister Finansów**, C-500/13,

<sup>59</sup> Angelo Cutajar et v. Alfred Spiteri et, Ċitaz. Nru. 3485/96 deċiża mill-Prim' Awla tal-Qorti Ċivili fis-16 ta' Jannar 2009.

mogħti, iktar 'l fuq ċitat, *where goods or services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted.*

Għal kull buon fini jiġi osservat li l-fatt li s-soċjetà Rikorrenti, jew aħjar id-Direttur tagħha Joseph Baldacchino seta' kellu x-xewqa li r-residenzi in kwistjoni jiffirmaw parti mill-inventarju tal-lukanda biex jinkrew lill-klijenti tagħha fuq bażi *self catering*, tali xewqa ma hijiex suffiċjenti biex jiġi arrogat id-dritt għal kreditu ta' input tax, iktar u iktar meta oġġettivament jirrizulta li dik ix-xewqa kienet u baqgħet biss xewqa u ma saritx intenzjoni ben esplicita w attwata. Se mai l-uniku dritt li kellha s-soċjetà Rikorrenti u l-mod kif, fil-fehma tat-Tribunal, kellha taġixxi kien billi fil-mument tas-sottomissjoni tad-dinunzji tat-taxxa tagħha għall-perijodi ta' taxxa in kwistjoni ma titlobx il-kreditu ta' input tax - in kwantu f'dak il-mument ma kellhiex dritt għalih - u imbagħad meta u fl-eventwalità li r-residenzi in kwistjoni jibdew jinkrew flok jinbiegħu titlob, entro l-parametri permessi mill-Liġi, li jsir aġġustament tad-denunzji tat-taxxa tagħha għall-perijodi ta' taxxa relattivi għall-fini li tusufruwixxi mid-dritt għal kreditu ta' input tax<sup>60</sup>.

Is-soċjetà Rikorrenti kjarament aġixxiet b'mod lilha mhux konċess bil-Liġi u per konsegwenza l-Kummissarju tat-Taxxa fuq il-Valur Miżjud kien ġustifikat f'li joħroġ l-istimi mertu ta' dawn il-proċeduri fil-konfront tagħha. Għal kull buon fini jiġi osservat li l-fatt li ma' kull bejgħ is-soċjetà Rikorrenti bl-applikazzjoni ta' l-Avviż Legali 318 ta' l-2004 irrifondiet parti mill-kreditu ta' input tax lilha konċess mid-Dipartiment, bl-ebda mod ma jissana l-aġir illegali tagħha. La ma kellhiex dritt għall-kreditu ta' input tax, hija qatt ma messha talbet għal dak l-istess kreditu. In bażi għall-prinċipju tan-newtralità, hekk ċentrali għar-reġim fiskali tat-taxxa fuq il-valur miżjud, mhux aċċettabbli non che għal kollox illegali li *taxpayer*, ossia s-soċjetà Rikorrenti, jaqta' linja favur tiegħu, jitlob għall-kreditu ta' input tax b'mod immedjat u in segwitu japplika l-mekkaniżmu kontemplat fil-Legislazzjoni Sussidjarja 314/04. Dak li għamlet is-soċjetà Rikorrenti kien li ħadet vantaġġ sostanzjali ta' cashflow, u dana mhux biss a detriment tad-Dipartiment tat-Taxxa fuq il-Valur Miżjud iżda anke a detriment tal-kompetituri tagħha, bi ksur evidenti tal-prinċipju tan-newtralità tat-taxxa fuq il-valur miżjud.

Fin-Nota ta' Sottomissjonijiet tagħha<sup>61</sup> s-soċjetà Rikorrenti tikkontendi li *jrid jiġi ukoll enfasizzat li l-esponenti kienet infurmat lid-Dipartiment bil-possibilità li uħud mir-residenzi jinbiegħu (għalkemm din ma kienetx l-intenzjoni) u d-Dipartiment komunkwe għadda biex aċċetta d-deduzzjoni ta' l-input tax reklamata mill-esponenti. B'kull rispett dovut, għandu għalhekk jiġi applikat l-insenjament segwenti: "As the Commission has observed, it is contrary to the principle of legal certainty for the rights and obligations of taxable persons to depend on facts, circumstances or events which occurred after the tax authority made a finding in respect of those rights and obligations. It follows that, as from the time when the tax authority accepted,*

<sup>60</sup> Cove Limited v. Direttur Ġenerali (Taxxa fuq il-Valur Miżjud), Rik. Nru. 63/13 deċiża mit-Tribunal ta' Revizjoni Amministrattiva fit-30 ta' Marzu 2015 u kkonfermata mill-Qorti ta' l-Appell (Sede Inferjuri) fis-16 ta' Marzu 2018.

<sup>61</sup> Fol. 478 sa' 500 tal-proċess.

*on the basis of information provided by a business, that it should be accorded the status of a taxable person, that status cannot, in principle, subsequently be withdrawn retroactively on account of the fact that certain events have or have not occurred.* It-Tribunal assolutament ma jaqbilx ma' din is-sottomissjoni tas-soċjetà Rikorrenti.

Jibda biex jingħad li hawnhekk mhux kwistjoni tat-*taxable status* tas-soċjetà Rikorrenti. Li s-soċjetà Rikorrenti hija a *taxable person* għall-finijiet u effetti tal-Kap. 406 tal-Liġijiet ta' Malta huwa indiskuss u frankament lanqas jiffirma parti mill-mertu ta' dawn il-proċeduri. Li kieku s-soċjetà Rikorrenti ma kenitx u ma hijiex meqjusa bħala *taxable person* wisq probabbli lanqas kien jinsorġi l-mertu ta' dawn il-proċeduri. Il-kwistjoni hawn hi dwar jekk is-soċjetà Rikorrenti, *qua taxable person*, kellhiex, fil-perijodi ta' taxxa in kwistjoni, dritt għall-kreditu ta' input tax fir-rigward ta' provvisti partikolari, ossia t-trasferiment tar-residenzi mibnija fuq l-art tal-lukanda Kempinski San Lawrenz. Għalkemm mill-provi prodotti jirriżulta li d-Dipartiment tat-Taxxa fuq il-Valur Miżjud ikkonċeda kreditu ta' input tax a favur is-soċjetà Rikorrenti fil-kuntest tal-proġett minnha intrapriż, inkluż il-kostruzzjoni tar-residenzi in kwistjoni, mir-rapport ta' l-Ispetturi tad-Dipartiment tat-Taxxa<sup>62</sup> jirriżulta li l-kreditu ngħata biss għall-perijodi ta' taxxa 01.03.05-31.05.05 u 01.06.05-31.08.05 u għalhekk fir-rigward tal-perijodi ta' taxxa l-oħra l-Kummissarju ma kienx ħa posizzjoni u b'hekk ma huwa qed mur lura fuq l-ebda posizzjoni u/jew deċizzjoni li seta' ħa fir-rigward ta' dawk il-perijodi ta' taxxa.

In kwantu rigwarda l-perijodi ta' taxxa 01.03.05-31.05.05 u 01.06.05-31.08.05, fir-rigward ta' liema nħargu stimi u dawn jiffirmaw parti mill-mertu tal-proċeduri odjerni, it-Tribunal iqis li l-Kummissarju kien ġustifikat f'li johroġ tali stima stanti li mill-provi jirriżulta ben evidenti li bil-komunikazzjoni tad-29 ta' Marzu 2007<sup>63</sup>, Noel Attard, għan-nom tas-soċjetà Rikorrenti kjarment qarraq bil-Kummissarju. In effetti fl-imsemmija komunikazzjoni Noel Attard stqarr *the only project, which could come for the remaining 30 units (not yet finished mentioned above) would be that these can be sold as private residences to single owners. In that case we would use the 20-year VAT claim period. Thus in such case if these residences would be sold<sup>64</sup> after 5 years we would refund back to the VAT Department the fraction of 15/20 of VAT input paid to use, in accordance with the VAT legislation. These rooms are still directly linked with the hotel and will be serviced by the hotel* u b'hekk ta lill-Kummissarju x'jifhem li l-bejgħ tar-residenzi kienet xi ħaġa li forsi setgħet tigrì, mentri mill-provi rriżulta b'mod ċar u oġġettiv li l-bejgħ tar-residenzi kien **minn dejjem, ossia sa' mill-2004**, l-iskop speċifiku intiż għal dawn ir-residenzi.

In fine s-soċjetà Rikorrenti tikkontendi li: *illi finalment għandu jiġi wkoll osservat li l-proġett tal-kostruzzjoni tar-residenzi sar sabiex ikun hemm espansjoni tal-kummerċ ġestit mill-lukanda ta' l-esponenti. Dan fis-sens li għalkemm inbnew sittin residenza, għal finijiet ta' l-Artikolu 22(3)(a),*

<sup>62</sup> Fol. 348 tal-proċess.

<sup>63</sup> Fol. 349 tal-proċess.

<sup>64</sup> Enfasi tat-Tribunal.

tissussisti l-ħtieġa li l-input tax inkors mill-esponenti ikun attribwibbli għal provvisti taxxabbli anke jekk jintużaw biss ftit mir-residenzi sabiex isiru dawn il-provvisti taxxabbli. Il-bżonn huwa li l-provvistili taw lok għall-input tax ikollhom konnessjoni oġġettiva, immedjata u diretta mal-provvisti taxxabbli li għandhom isiru mill-persuna registrata taħt l-Artikolu 10. Dan ifisser li l-input tax inkors għat-twettiq tal-proġett għandu jigi meqjus b'mod unit u quid unum, b'mod allura li għaladarba l-proġett wassal jew kien maħsub li jwassal għal provvista taxxabbli, il-vot tal-liġi huwa sodisfatt, u dan irrispettivament minn jekk il-provvista taxxabbli tkunx toriġina fil-konfront ta' kull wieħed u waħda mir-residenzi kostruwiti<sup>65</sup>.

Hawn ukoll però t-Tribunal ma jaqbilx mas-sottomissjoni tas-soċjetà Rikorrenti u dana billi, kif già iktar 'l fuq osservat, jinsab fermament stabbilit mill-Qorti Ewropeja tal-Ġustizzja li: *the existence of a direct and immediate link between a particular input transaction and one or more output transactions giving rise to the right to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement... The right to deduct VAT charged on acquisition of input goods or services presupposes that the expenditure incurred in acquiring them is part of the cost components of the taxable output transactions giving rise to the right to deduct... It is however also accepted that a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and one or more output transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do, in effect, have a direct and immediate link with the taxable person's economic activity as a whole*<sup>66</sup> u li *the view that, in order to determine whether there is a 'direct and immediate link' between a given transaction and the taxable activity as a whole for the purposes of the above-mentioned case-law, it is necessary to take account of the objective characteristics of the supply of goods or services acquired is not called into question by the fact that the Court, in paragraphs 33 and 36 of Investrand, held, in essence, that where the pursuit of the taxable activity is not the exclusive reason for certain fees and costs being incurred, the latter cannot be considered as having a direct and immediate link with that activity*<sup>67</sup>.

Il-prinċipji enunċjati mill-Qorti Ewropeja tal-Ġustizzja kjarament juru li *taxpayer* ma jistax jippretendi li jaqta' għad-dritt u jqis, b'mod għal kollox sempliċistiku, l-operat kollu tiegħu, irrispettivament min-natura oġġettiva ta' l-istess, bhala operat taxxabbli ai termini tal-Kap. 406 tal-Liġijiet ta' Malta u b'hekk li għandu dritt għal kreditu ta' input tax pratikament *across the board*.

Fid-dawl ta' dan kollu osservat it-Tribunal iqis li l-appell tas-soċjetà Rikorrenti mill-istimi maħruġa fil-konfront tagħha mill-Kummissarju tat-Taxxa fuq il-

<sup>65</sup> Nota ta' Sottomissjonijiet tas-soċjetà Rikorrenti, fol. 478 sa' 500 tal-proċess.

<sup>66</sup> Enfasi tat-Tribunal.

<sup>67</sup> Enfasi tat-Tribunal.

Valur Miżjud, illum Kummissarju tat-Taxxi, għall-perijodi ta' taxxa 01.12.04-28.02.05, 01.03.05-31.05.05, 01.06.05-31.08.05, 01.09.05-30.11.05, 01.12.05-28.02.06, 01.03.06-31.05.06, 01.06.06-31.08.06, 01.09.06-30.11.06, 01.12.06-28.02.07, 01.03.07-31.05.07, 01.06.07-31.08.07, 01.09.07-30.11.07, 01.12.07-31.12.07, 01.01.08-29.02.08, 01.03.08-31.05.08, 01.06.08-31.08.08, 01.09.08-30.11.08, 01.12.08-28.02.09, 01.03.09-31.05.09 u 01.09.09-30.11.09 mhux ġustifikat u b'hekk ma jisthoqqux li jigi milqugħ.

Għal dawn ir-ragunijiet it-Tribunal jaqta' u jiddeciedi billi jiċċhad l-appell tas-soċjetà Rikorrenti mill-istimi maħruġa fil-konfront tagħha mill-Kummissarju tat-Taxxa fuq il-Valur Miżjud, illum Kummissarju tat-Taxxi, għall-perijodi ta' taxxa 01.12.04-28.02.05, 01.03.05-31.05.05, 01.06.05-31.08.05, 01.09.05-30.11.05, 01.12.05-28.02.06, 01.03.06-31.05.06, 01.06.06-31.08.06, 01.09.06-30.11.06, 01.12.06-28.02.07, 01.03.07-31.05.07, 01.06.07-31.08.07, 01.09.07-30.11.07, 01.12.07-31.12.07, 01.01.08-29.02.08, 01.03.08-31.05.08, 01.06.08-31.08.08, 01.09.08-30.11.08, 01.12.08-28.02.09, 01.03.09-31.05.09 u 01.09.09-30.11.09 u minflok jikkonferma l-istess imsemmija stimi.

L-ispejjez ta' dawn il-proċeduri għandhom jiġu sopportati interament mis-soċjetà Rikorrenti.

A tenur tal-partita 2(4) tal-Kap. 406 tal-Liġijiet ta' Malta, it-Tribunal jordna li kopja ta' din is-sentenza tiġi notifikata lis-soċjetà Rikorrenti.

**MAGISTRAT**

**DEPUTAT REĠISTRATUR**