



**MALTA**

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

**Rikors Nru. 160/12VG**

**XXX**

**Vs**

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

**Illum 1 ta' Dicembru 2020**

**It-Tribunal,**

Ra r-Rikorsi pprezentati mis-soċjetà XXX. fit-18 ta' Mejju 2011 quddiem il-Bord ta' l-Appell dwar it-Taxxa Fuq il-Valur Mizjud, in segwitu trasferiti quddiem dan it-Tribunal, liema Rikorsi qed jiġu trattati bħala appell wiehed mill-istimi maħruġa fil-konfront tagħha mill-Kummissarju tat-Taxxa fuq il-Valur Mizjud għall-perijodi ta' taxxa 01.08.04-31.10.04, 01.11.04-31.01.05, 01.02.05-30.04.05, 01.05.05-31.07.05, 01.08.05-31.10.05, 01.11.05-31.01.06, 01.02.06-30.04.06, 01.05.06-31.07.06, 01.08.06-31.10.06, 01.11.06-31.01.07, 01.02.07-30.04.07, 01.05.07-31.07.07, 01.08.07-31.10.07, 01.11.07-31.12.07, 01.01.08-31.01.08, 01.02.08-30.04.08, 01.05.08-31.07.08, 01.08.08-31.10.08, 01.11.08-31.01.09, 01.02.09-30.04.09, 01.05.09-31.07.09, 01.08.09-31.10.09 u 01.11.09-31.01.10 permezz ta' liema titlob li l-imsemmija stimi jiġu revokati w kkanċellati *in toto*, inluż għalhekk il-multi amministrattivi u l-imghaxijiet, bl-ispejjeż kontra l-Kummissarju tat-Taxxa fuq il-Valur Mizjud;

Ra d-dokumenti annessi mar-Rikorsi tas-soċjetà Rikorrenti;

Ra r-Risposta tal-Kummissarju tat-Taxxa fuq il-Valur Mizjud permezz ta' liema jopponi għall-appell tas-soċjetà Rikorrenti mill-istimi maħruġa fil-konfront tagħha għall-perijodi ta' taxxa 01.08.04 sa' 31.01.10 u jitlob li l-istess jiġi miċhud, bl-ispejjeż kontra tagħha, stante li l-likwidazzjonijiet ta' taxxa għall-perijodi ta' taxxa in kwistjoni huma ġusti u jistojqilhom konferma;

Ra d-dokumenti annessi mar-Risposta tal-Kummissarju tat-Taxxa fuq il-Valur Mizjud;

Ra r-Risposta ulterjuri tad-Direttur Ġenerali (Taxxa fuq il-Valur Miżjud) ippreżentata fl-1 ta' Ġunju 2012 permezz ta' liema jeċċepixxi li: (i) it-titolu ta' Kummissarju tat-Taxxa fuq il-Valur Miżjud illum inbidel għal Direttur Ġenerali (Taxxa fuq il-Valur Miżjud) skond l-Att XXII ta' l-2011 u għaldaqstant jeħtieġ li ssir il-korrezzjoni opportuna; (ii) a tenur ta' l-Artikolu 24(4) tal-Kap.406 tal-Liġijiet ta' Malta, id-Direttur Ġenerali (Taxxa fuq il-Valur Miżjud) legalment ma setax joħroġ ir-rifuzjoni pretiża mis-soċjetà Rikorrenti peress li kienet qed issir investigazzjoni fil-konfront tagħha, liema investigazzjoni wasslet għall-ħruġ ta' stimi li issa qed jiġu appellati minnha; (iii) id-Direttur Ġenerali (Taxxa fuq il-Valur Miżjud) għamel l-investigazzjoni fil-konfront tas-soċjetà Rikorrenti bis-saħħa ta' l-Artikolu 53(b) tal-Kap.406 tal-Liġijiet ta' Malta, liema investigazzjoni, jiġi ribadit, wasslet għall-ħruġ ta' stimi fil-konfront tagħha u liema stimi qed jiġu minnha kontestati b'appell ippreżentat quddiem dan it-Tribunal bir-Rikors Nru. 91/12; (iv) b'riżultat ta' l-investigazzjoni fil-konfront tagħha, is-soċjetà Rikorrenti ma fadlilha l-ebda rifuzjoni x'tieħu; (v) b'hekk it-talba tas-soċjetà Rikorrenti għandha tiġi miċhuda bl-ispejjeż kontra tagħha;

Ra d-dokument anness mar-Risposta ulterjuri tad-Direttur Ġenerali (Taxxa fuq il-Valur Miżjud);

Sema' x-xhieda mogħtija minn XXX waqt is-seduti tat-3 ta' Diċembru 2012<sup>1</sup>, tat-8 ta' April 2013<sup>2</sup> u tal-15 ta' Novembru 2016<sup>3</sup> u ra d-dokumenti esebiti minnu markati Dok. "ML1" sa' Dok. "ML5" a fol. 22 sa' 29 tal-proċess u markati Dok. "GV" a fol. 49 sa' 62 tal-proċess, sema' x-xhieda ta' Carl Vassallo mogħtija waqt is-seduti tat-3 ta' Diċembru 2021<sup>4</sup> u tal-15 ta' Novembru 2016<sup>5</sup>, sema' x-xhieda ta' Charlot Pavia, rappreżentant tal-Kummissarju tat-Taxxi, mogħtija waqt is-seduta tat-18 ta' Frar 2016<sup>6</sup> u x-xhieda ta' Chris Spiteri, rappreżentant tal-Kummissarju tat-Taxxi, mogħtija waqt is-seduta tat-2 ta' Mejju 2016<sup>7</sup>, ra l-affidavit ta' Edward Fenech esebit mis-soċjetà Rikorrenti permezz ta' Nota ppreżentata fit-28 ta' Frar 2017 a fol. 156 sa' 163 ta' l-atti proċesswali tar-Rikors fl-ismijiet "XXXCo. Ltd. v. Il-Kummissarju tat-Taxxa fuq il-Valur Miżjud" Rik. Nru. 91/12;

Ra t-talba avvanzata mis-soċjetà Rikorrenti waqt is-seduta tat-8 ta' April 2013 sabiex id-Dipartiment tat-Taxxa fuq il-Valur Miżjud jesebixxi fl-atti ta' dawn il-proċeduri l-file tagħha kif ukoll il-faxxikoli u dokumenti kollha li wasslu għall-vertenza odjerna. Ra li d-Direttur Ġenerali (Taxxa fuq il-Valur Miżjud) oġġezzjona għal din it-talba stante li mar-Risposta tiegħu giet ippreżentata d-dokumentazzjoni kollha li s-soċjetà Rikorrenti tista' teħtieġ għall-finijiet ta' dawn il-proċeduri<sup>8</sup>;

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<sup>1</sup> Fol. 30 sa' 38 tal-proċess.

<sup>2</sup> Fol. 62A tal-proċess.

<sup>3</sup> Fol. 100 sa' 102 tal-proċess.

<sup>4</sup> Fol. 39 sa' 47 tal-proċess.

<sup>5</sup> Fol. 98 tal-proċess.

<sup>6</sup> Fol. 83 sa' 86 tal-proċess.

<sup>7</sup> Fol. 88 sa' 92 tal-proċess.

<sup>8</sup> Fol. 48 tal-proċess.

Ra li t-talba avvanzata mis-soċjetà Rikorrenti waqt is-seduta tat-8 ta' April 2013 giet milqugħa b'Digriet datat 16 ta' April 2013<sup>9</sup>, liema Digriet gie kkonfermat mill-Qorti ta' l-Appell (Sede Inferjuri) b'deċiżjoni mogħtija fil-25 ta' Frar 2015<sup>10</sup>;

Ra l-vera kopja tal-files intieri tad-Dipartiment tat-Taxxa fuq il-Valur Miżjud pertinenti għall-każ odjern<sup>11</sup>;

Ra d-diversi dikjarazzjonijiet da parte tas-soċjetà Rikorrenti li l-provi miġbura fl-atti ta' l-appell fl-ismijiet "XXXCo. Ltd. v. Il-Kummissarju tat-Taxxa fuq il-Valur Miżjud" Rik. Nru. 91/12 jgħoddu għal dawn il-proċeduri wkoll;

Sema' t-trattazzjoni orali da parte tad-difensur tas-soċjetà Rikorrenti u ra n-Nota Responsiva tal-Kummissarju tat-Taxxi a fol. 107 sa' 117 tal-proċess;

Ra l-atti kollha tal-kawża;

### **Ikkonsidra:**

Fl-20 ta' April 2011 il-Kummissarju tat-Taxxa fuq il-Valur Miżjud ħareġ stimi fil-konfront tas-soċjetà Rikorrenti għall-perijodi ta' taxxa 01.08.04-31.10.04, 01.11.04-31.01.05, 01.02.05-30.04.05, 01.05.05-31.07.05, 01.08.05-31.10.05, 01.11.05-31.01.06, 01.02.06-30.04.06, 01.05.06-31.07.06, 01.08.06-31.10.06, 01.11.06-31.01.07, 01.02.07-30.04.07, 01.05.07-31.07.07, 01.08.07-31.10.07, 01.11.07-31.12.07, 01.01.08-31.01.08, 01.02.08-30.04.08, 01.05.08-31.07.08, 01.08.08-31.10.08, 01.11.08-31.01.09, 01.02.09-30.04.09, 01.05.09-31.07.09, 01.08.09-31.10.09 u 01.11.09-31.01.10, permezz ta' liema jesigi ħlas tas-somma komplessiva ta' €72,687.03 rappreżentanti taxxa, flimkien mas-somma komplessiva ta' €14,537.41 rappreżentanti multi amministrattivi u s-somma ulterjuri komplessiva ta' €19,375.05 rappreżentanti imghax - ilkoll flimkien ammontanti għal **€106,599.49**.

Is-soċjetà Rikorrenti ħassitha aggravata b'dawn l-istimi maħruġa fil-konfront tagħha w interponiet dan l-appell minnhom. Hija titlob li dawn l-istimi jiġu revokati u kkanċellati *in toto*, inkluż għaliex il-multi amministrattivi u l-imghaxijiet, u tibbaża l-appell tagħha fuq is-segwenti aggravju: *the assessment has not been raised properly, reasonably and fairly. The Vat Dept. did not give us a fair hearing at an investigation stage. The Vat Dept. refused to consider the relevant documentation. A detailed explanation of the arbitrary way the investigation was conducted is contained in the attached declaration of Carlo Vassallo, Malcolm XXX and Edward Fenech. Our submissions to Vat Dept. reflect a true and fair view of our Sales and our Purchases. The Vat Dept. has reached a number of wrong conclusions.*

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 01.08.04 sa' 31.01.10 u jitlob li l-istess jiġi miċhud stante li l-

<sup>9</sup> Fol. 64 sa' 67 tal-proċess.

<sup>10</sup> Fol. 19 sa' 32 ta' l-atti proċesswali ta' l-Appell bin-Numru 160/12 deċiż mill-Qorti ta' l-Appell (Sede Inferjuri) annessi ma' l-atti ta' dawn il-proċeduri.

<sup>11</sup> Konsistenti f'erba' arch lever files markati File 1(A), 1(B), 2(A) u 2(B), li qed jinżammu fis-sigrieta.

likwidazzjoni ta' taxxa għaż-żminijiet tat-taxxa in kwistjoni huma ġusti u jisthoqqilhom konferma.

### **Kwistjoni ta' natura proċedurali:**

Qabel ma' t-Tribunal jgħaddi biex jittratta l-appell tas-soċjetà Rikorrenti fil-mertu, ser jagħmel xi osservazzjonijiet ta' natura proċedurali dwar ir-Risposta ppreżentata mid-Direttur Ġenerali (Taxxa fuq il-Valur Miżjud) hekk kif ġie notifikat bid-Digriet ta' l-appuntament ta' dawn il-proċeduri quddiem dan it-Tribunal.

Fiz-żmien meta l-proċeduri odjerni kienu pendenti quddiem il-Bord ta' l-Appelli dwar it-Taxxa fuq il-Valur Miżjud, il-Kummissarju tat-Taxxa fuq il-Valur Miżjud kien ippreżenta r-Risposta tiegħu għall-appell tas-soċjetà Rikorrenti fil-25 ta' Mejju 2011<sup>12</sup>. Wara li proċeduri ġew trasferiti quddiem dan it-Tribunal u minnu appuntati għal Settembru 2012, id-Direttur Ġenerali (Taxxa fuq il-Valur Miżjud) ippreżenta Risposta ulterjuri għall-appell tas-soċjetà Rikorrenti<sup>13</sup>. Din ir-Risposta ulterjuri però hija proċeduralment inaċċettabbli għar-raġuni li din ġiet ippreżentata mingħajr il-prevja awtorizzazzjoni tat-Tribunal u fi kwalunkwe każ, ben oltre t-terminu ta' ħmistax-il ġurnata mid-data tan-notifika tar-Rikorsi promoturi ai termini tar-Regolament 11 tar-Regolamenti dwar Taxxa fuq il-Valur Miżjud (Bord ta' l-Appelli), Leġislazzjoni Sussidjarja 406.03 li għalkemm illum dawn ir-Regolament ġew revokati bis-saħħa ta' l-Avviż Legali 91 ta' l-2012, huma r-regolamenti applikabbli għall-finijiet ta' preżentata kemm ta' l-appell kif ukoll tar-Risposta tal-Kummissarju tat-Taxxa fuq il-Valur Miżjud.

Fiċ-ċirkostanzi għalhekk it-Tribunal mhux se jieħu konjizzjoni tar-Risposta ulterjuri tad-Direttur Ġenerali (Taxxa fuq il-Valur Miżjud) u ser jikkonsidra biss ir-Risposta ippreżentata mill-Kummissarju tat-Taxxa fuq il-Valur Miżjud fil-25 ta' Mejju 2011.

### **Nomenklatura ta' l-intimat:**

Għal kull buon fini t-Tribunal josserva li fid-dawl ta' dak provdut fir-Regolament 2 u fl-iskeda tar-Regolamenti dwar l-Ekwivalenza ta' ċerti Referenzi għall-Karigi fid-Dipartiment tat-Taxxa, Leġislazzjoni Sussidjarja Nru. 517.01, ma hemmx il-htieġa li issir korrezzjoni fin-nomenklatura ta' l-intimat f'dawn il-proċeduri.

Trattati dawn il-punti t-Tribunal ser jgħaddi issa biex jittratta l-appell tas-soċjetà Rikorrenti fil-mertu.

### **Appell fil-mertu:**

Mill-provi prodotti jirriżulta li s-soċjetà Rikorrenti għandha żewġ attivitajiet ekonomiċi: attività ta' bejgħ ta' arloġġi u gojellerija lussużi w attività ta' music shop.

<sup>12</sup> Risposta ppreżentata fil-25 ta' Mejju 2011, fol. 4 tal-proċess tal-Bord ta' l-Appelli dwar it-Taxxa fuq il-Valur Miżjud.

<sup>13</sup> Risposta ppreżentata fl-1 ta' Ġunju 2012, fol 6 sa' 10 tal-proċess.

Jirriżulta wkoll li minhabba l-mod kif topera l-attività ekonomika ta' bejgħ ta' arloġġi u gojellerija lussużi, ossia li timporta l-arloġġi u l-gjollerija minn barra, fil-maġġor parti mill-Isvizzera, u tbiegħ parti minnhom hawn Malta u il-kumplament jiġu ri-esportati għal bejgħ fuq is-suq barrani, fid-dikjarazzjonijiet tat-taxxa tagħha hija jkollha dikjarazzjonijiet ta' kreditu għal input tax oghla mid-dikjarazzjonijiet ta' output tax bil-konsegwenza li kważi dejjem tispicċa f'posizzjoni ta' refużjoni. Matul is-snin ma jirriżultax li qatt kien hemm problemi partikolari dwar ir-refużjonijiet iżda f'ċertu punt il-Kummissarju tat-Taxxa fuq il-Valur Miżjud fetax investigazzjoni fil-konfront ta' l-imsemmija soċjetà, kif del resto kellu kull dritt jagħmel kemm ai termini ta' l-Artikolu 24 tal-Kap.406 tal-Liġijiet ta' Malta, b'mod partikolari l-*proviso* tas-subartikolu (3) ta' l-imsemmi artikolu tal-Liġi, u kif ukoll ai termini ta' l-Artikolu 53 tal-Kap.406 tal-Liġijiet ta' Malta, għall-fini li jiddetermina jekk id-dikjarazzjonijiet tat-taxxa tagħha kienux veritieri u b'hekk jekk it-talba tagħha għal refużjoni kienitx ġustifikata.

### **Investigazzjoni fil-konfront tas-soċjetà Rikorrenti:**

Mill-Minuta Nru. 81 fil-file tad-Dipartiment esebit mill-Kummissarju tat-Taxxi bħala Edwards and XXX Co. Ltd. Copy of VAT File 1228-4035 Part 1(A), diretta lill-Analysis & Control Unit, tirriżulta r-raġuni in bażi għal liema nbdiet l-investigazzjoni fil-konfront tas-soċjetà Rikorrenti. Di fatti f'din il-Minuta hemm iddikjarat li: *your attention is being drawn to red 66 and Report & Financial Statements attached to red 78. The VAT Inspectors based their calculation on EU Global returns to arrive to mark up of 3.36% which is deemed to be low for this type of market. With such a conclusion, the integrity of the credit control exercise - li kien jirreferi għall-perijodu ta' taxxa 01.08.08-31.01.09 u li wassal għal stima proviżorja għall-valur ta' €7,607.19 - is compromised and one would recommend further investigation, emails from Director Operations refer. The Inspectors were instructed to carry out a site inspection in order to assess whether a stock build up had materialised thus resulting in such low mark up. However, the inspection did not render the desired results. During the inspection, Report and Financial Statements were obtained. These in my opinion promote a different picture. Your Assistance is kindly solicited to ensure a correct and ethical approach using proper standard accepted accounting principles to tackle the above described scenario.*

Din ir-raġuni għall-investigazzjoni fil-fatt tinsab riflessa fl-*Investigations Audit Report*, esebit flimkien mar-Risposta tal-Kummissarju tat-Taxxa fuq il-Valur Miżjud, fejn taht l-intestatura **Scope of Investigation** jingħad: *from EU Global, the calculated mark up amounted to 3.6%. When asked about this low percentage mark up, the reason given by the taxpayer was that a large stock was held by the company. This triggered an investigation by the VAT Department to determine the following: The reliability of the stock sheets as on 31<sup>st</sup> December 2009; Physical inspection to attest the veracity of the quantities claimed; and Calculations of the weighted average mark up. For the calculation of the weighted average mark up the investigation focused on May 2008 and November 2009. Both Spinola and Valletta shops were subject to mark up exercise. Once the mark up exercise was established, this was then applied consistently to all tax periods covering period 01/05/2004-31/01/2010. This resulted in an assessment of €443,157 which was quite substantial. In view of this result, this exercise was spread to cover period*

2005, 2006 and 2007 to ascertain that the correct methodology was adopted and that results obtained reflected the actual operations of the business. For the purpose of this investigation accessories, jewellery and the music shop were not considered since the main point of revenue according to the registered company is from the sale of brand watches. Different months were selected for each year under review, being: July and December 2005; March and October 2006; and January and September 2007. The exercise covered only Valletta shop since Spinola shop was not yet opened. On 5<sup>th</sup> May 2010, an email was sent to the accountant to provide us with all the necessary information. The information was eventually submitted as on 9<sup>th</sup> July 2010.

Mill-Investigations Audit Report jirrizulta li l-investigazzjoni fil-konfront tas-soċjetà Rikorrenti tmexxiet bil-mod segwenti:

**Accounting records** - Sage Line 50 is used to record all accounting records of the two main economic activities. The Accountant explained that accounts are separately kept distinguishing between watches and jewellery and music shop. At the same time, he stated that the accounts are combined. All necessary purchases and sales ledgers were provided for. The stock list was also provided as on 31<sup>st</sup> December 2009. However, at the initial meeting with the tax payer dating back to 4<sup>th</sup> February 2010, the Accountant stated that only part of the stock was physically checked. Then, the accountant confirmed that the stock was checked without the presence of an auditor. Separate cash registers are maintained by the company. The cash registers are not linked to the Sage programme on a monthly basis. Financial Statements were produced for years covering period 31<sup>st</sup> December 2004 and 2009. The following documents were requested and made available by the taxpayer: Audited Financial Statements for financial years 2004 and 2009; Purchase and Sales Ledger; Invoices and other supporting documentation including proof of transport and exchange rates applicable; Stock take as on 31<sup>st</sup> December 2009.

**Investigation Audit Working Papers** - the following procedures were carried out in within the scope of the investigation. Areas of Investigation: A. Mark up exercise - Initially, the investigative team asked the tax payer to supply the sales incurred in both shops (Spinola and Valletta) for period May 2008 and November 2009. Once this was made available the sale of the good was traced back to the original purchase invoice. Since goods are imported from Switzerland, the cost price attainable from the purchase invoice was quoted in Swiss Francs. The exchange rate used was made available by the Customs Department as at date of importation release. The Profit between the cost price and selling price (excluding VAT) was then divided against the cost price and the mark up for each transaction sold was identified. The same procedure was carried out for each selected month for both steps. Refer to Appendix 1 and 2 to the report. B. Weighted Average Mark up - As already explained in section 3, originally, four mark ups were identified representing Spinola and Valletta shop covering periods May 08 and November 09. The four readings were consolidated to come up with a weighted average mark up. Appendix 1 and 2 refer. However, given the substantial amount of the provisional assessment to be raised, it was felt that different months should be selected from different years. This ensured that the months selected provide for a more reliable

and representative mark up including July and December 2005, March and October 2006 and January and September 2007. Appendix 3 refers. C.

**Inventory** - The amount of closing stock for year ending 31<sup>st</sup> December 2009, was quite high and amounted to €2,929,483. In this regard, a stock take exercise was carried out at the two shops of Edwards and XXX situated in St. Julians and Valletta to determine the following objectives: The reliability of the stock sheets as on 31<sup>st</sup> December 2009; Physical inspection to attest the veracity of the quantities claimed.

**Selection Criteria** - Only watches of high value were checked. Based on claims by the registered person it was felt that jewellery and accessories should be left out of the scope of the exercise since they are not considered to be substantial; Brand names were randomly selected which included Girard, Perregaux, Rolex, Raymond Weil, Parmigiani, Tudor, Hublot, Patek Philippe, Breitling, Chopard, GIA, Hublot and Harry Winston; Brand names not selected included Reuge Music Boxes, Pomellato, Rado, Diamonds/N, Buben & Zoerweg, Chopard Accessories, Dodo, La Nouvelle Bague, A. Rapport & Co. L and S.T. Dupont. On the whole all the items identified in the stock lists were physically found. This exercise gave the necessary assurance that the closing stock claimed by the taxpayer was reliable. Refer to Appendix 4. To this effect, as part of the mark up exercise, all stock build up was allowed in favour of the taxpayer.

**VIES reconciliations** - Since 22% of the purchases were supplies to the tax payer from other Member States in the form of Intra-Community Acquisitions, a reconciliation exercise was carried out covering the periods under review. For each quarter under review, a break down of purchased goods and from which Member States the transaction originated were made available from the VIES system covering period 2004 (QTR2) to 2010 (QRT1). Once all information was made available, we reconciled between VIES and VAT Returns. The amount of ICAs declared in the VAT returns was greater than VIES. Since the amount declared in the VAT returns was greater than VIES declarations, the investigative team accepted this result.

**Deemed Sales exercise** - All purchases declared in the VAT returns for the period 01/05/04-31/01/10 be it intra-community acquisitions and importation from third countries were made available.

**Allowance 1: Musical Instruments Activity** - With the exception of turnover, the economic activities of the tax payer are not clearly distinguished in the Management Accounts as at 31 December 2009. The activities related to musical instruments and watches/jewellery was accounted for in one set of management accounts. In the absence of distinction of purchases between musical instruments and watches/jewellery, we established the percentage of sales of musical instruments to total sales to determine the actual percentage sales related to the musical instrument. As part of the exercise, the investigative team excluded turnover pertaining to musical instruments to ensure that the mark up only applies to watches. ... it was determined that the sale of musical instruments amounted to 1.05% of the total sales incurred. In this regard, we applied and excluded by the

same percentage the purchases claimed in the VAT returns on the assumption that for each sale of musical instrument made a respective purchase was incurred.

**Allowance 2: Stock build up** - Since the closing stock declared in the financial statements for year ending 31<sup>st</sup> December 2009, was authenticated through a physical on the spot check, the next step was to come up with a stock build up exercise. The difference between the closing stock as on 31<sup>st</sup> December 2009 and the opening stock as on 1<sup>st</sup> January 2004 resulted in the stock allowance which was apportioned to the total purchases incurred during the period under review related to watches/jewellery. The stock allowance amounted to 10% of the whole purchases made by the tax payer. ... In this regard the full stock build up was given to the tax payer after excluding 1.05% from the opening and closing stock which related directly to Musical instruments. From the total declared purchases, the relevant stock allowance for each period was deducted accordingly. The resultant purchases after allowing stock build up was multiplied by 49.5% representing those purchases which were consumed locally and thus excluding from the formula purchases which were eventually exported or sold abroad. The net purchases which were sold locally were then multiplied by the weighted average mark up identified from a separate exercise explained in a) and b) above to come up with deemed sales. The local deemed sales were then compared to local declared sales as quoted in the VAT returns. Both Intra-community supplies and export sales are VAT neutral and thus not affecting the value of the provisional assessments raised. The output VAT element corresponding to 18% was extracted from the difference between declared and deemed sales to come up with total vat due to the department. The weighted average mark up resulted from this exercise amounts to 50%. Following discussions with the Accountant of the tax payer, in two separate occasions rates of exchange used were not applied correctly. In this case, according to the tax payer's workings, weighted average mark should be reduced to 46.3%. Appendix 5 refers. The Department accepted this amendment. ...

**Conclusion** - The following are the conclusions reached after examining all documents made available by tax payer. The investigation also covered VAT period 01/05/04-31/07/04. All workings were carried out, however, during the course of the investigation this period became time barred in terms of Art. 32(1) of the VAT Act. Overall VAT due amounted to €214,745.214 (set off between positive and negative assessment). Originally, it was decided that the negative assessments for a given year will be apportioned against assessments having a positive assessment. However, given that during 2004 all assessments raised were negative, it was decided that overall VAT due be apportioned in according to declared sales for the period under review.

### **Review ta' l-istimi provizorji:**

In segwitu għal dan ir-Rapport il-Kummissarju tat-Taxxa fuq il-Valur Miżjud hareġ stimi provizorji fil-konfront tas-soċjetà Rikorrenti għall-perijodi ta' taxxa 01.08.04 sa' 31.01.10, permezz ta' liema talab il-ħlas tas-somma komplissiva ta' €214,745.25 bħala taxxa, oltre l-multi amministrattivi. Is-soċjetà Rikorrenti talbet għal Review tal-istimi provizorji maħruġa fil-konfront tagħha u dana in bażi għas-segwenti oġġezzjonijiet: *the total sales include 50.5% "overseas sales" being export or intra-*



*community supplies, which carry a much lower gross profit mark up than local supplies; in June 2007, the company had imported merchandise to the value of €341,491 on a consignment basis. These goods were imported for display purposes only and were eventually returned to the supplier in Germany.*

In segwitu għall-istadju tar-Review, fejn l-oġġezzjonijiet tas-soċjetà Rikorrenti kif appena citati ġew ikkunsidrati, fir-Review Report datat 18 ta' April 2011 - esebit flimkien mar-Risposta tal-Kummissarju tat-Taxxa fuq il-Valur Miżjud u iktar 'l quddiem f'din is-sentenza indikat bhala Review Report 3, ir-Review Officer Chris Spiteri u l-Accountant mir-Review Section Jesmar Bilocca kkonstataw u kkonkludew is-segwenti: *with regards to point one above [ossia l-ewwel miż-żewġ oġġezzjonijiet in bażi għal liema intalab ir-Review ta' l-istimi proviżorji] at preliminary investigation stage 49.5% of purchases was considered as purchases related to local sales. Then a 46.3% mark-up was applied to find the difference between the deemed local sales and the declared local sales. The taxpayer stated that the workings are incorrect because the 49.5% is the percentage of sales, which are local sales. As in his letter prior to the provisional assessment (red 118 note 3), the tax payer reiterated that the workings are based on the assumption that local sales and export sales have the same profit margin. Consequently, at review stage the VAT Department requested the company to present a sample of sale and purchase invoices related to overseas sale to test the mark up on purchases related to foreign sales as well in order to work out the actual percentages of purchases related to local sales and foreign sales. This resulted in a weighted average mark up of 26.08% (vide Appendix A). This increased the purchases percentage related to local sales to 45.85% from 45% (vide Appendix B). The mark up includes 0.6909% as transport costs. This resulted in an assessment of €72,687.05 (vide Appendix C). With regard to goods on consignment [it-tieni oġġezzjoni fuq liema s-soċjetà Rikorrenti bbażata t-talba tagħha għar-Review ta' l-istimi proviżorji] considering the materiality of the values involved, the taxpayer was asked to submit proof of transport to substantiate its claim that the goods had indeed been dispatched plus the insurance cover. None of these documents were however furnished, the taxpayer opting instead to provide an affidavit declaring that the said items had been returned to the supplier. Decision - **In light of the above and in absence of customs documents for the goods on consignment, is has been recommended to issue an assessment of €72,687.05 as per Appendix C**<sup>14</sup> - ossia fuq il-perijodi ta' taxxa mill-01.08.04 - 31.01.10; rakkomandazzjoni din li sostanzjalment tnaqqas l-istimi proviżorji maħruġa fil-konfront tas-soċjetà Rikorrenti.*

Mill-provi prodotti però, senjatament mill-files tad-Dipartiment tat-Taxxa fuq il-Valur Miżjud pertinenti għal dan il-każ, jirrizulta li qabel ir-Review Report tat-18 ta' April 2011 -esebit mill-Kummissarju tat-Taxxa fuq il-Valur Miżjud flimkien mar-Risposta tiegħu għall-appell tas-soċjetà Rikorrenti, kien hemm ben żewġ Review Reports oħra: wieħed datat 11 ta' Marzu 2011<sup>15</sup>, iktar 'l quddiem f'din is-sentenza indikat bhala Review Report 1 u l-iehor datat 18 ta' April 2011<sup>16</sup>, iktar 'l quddiem f'din is-sentenza indikat bhaka Review Report 2.

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<sup>14</sup> Enfasi tat-Tribunal.

<sup>15</sup> Red 135 fil-file esebit mill-Kummissarju bhala Copy of VAT File 1228-4035 Part 1(A).

<sup>16</sup> Red 171 - Supplementary Review Report - fil-file esebit mill-Kummissarju bhala Copy of VAT File 1228-4035 Part 1(B).

Fir-Review Report 1, ir-Review Officer Chris Spiteri, wara li elenka l-oġġezzjonijiet tas-soċjetà Rikorrenti, ikkonstata u kkonkluda li: *with regards to point one above [l-ewwel oġġezzjoni fuq liema s-soċjetà Rikorrenti bbażat it-talba tagħha għar-Review] at preliminary investigation stage 49.5% of purchases was considered as purchases related to local sales. Then a 46.3% mark up was applied to find the difference between the deemed local sales and the declared local sales. The tax payer stated that the workings are incorrect because the 49.5% is the percentage of sales which are local sales. As in his letter prior to the provisional assessment (red 118 note 3) the tax payer reiterated that the workings are based on the assumption that local sales and export sales have the same profit margin. At review stage the VAT department requested the company to present a sample of sale and purchase invoices related to exports to test the mark up on purchases related to foreign sales as well in order to work out the actual percentages of purchases related to local sales and foreign sales. This consisted in a sample of more than 40 items and resulted in a weighted average mark up of 21.5% (red 134) which is close to the 20.5% mark up stated by the tax payer (red 118, note 3). When applying either the 20.5% or 21.5% mark up on purchases related to foreign sales, the percentage for purchases related to local sales resulted in 45% of purchases rather than 49.5% (red 132). With reference to goods on consignment at item 2 above [it-tieni oġġezzjoni in bażi għal liema s-soċjetà Rikorrenti talbet għal Review] taxpayer was requested to provide further proof that items were returned back to supplier. Mr. Vassallo duly presented a confirmation letter from Chopard in Germany that items were returned back with the exception of 1 item, which the Department also took into account at review stage. Conclusion: When the above arguments, together with other minor changes in the closing stock as per taxpayer's letter dated 19<sup>th</sup> November 2010, were applied to the department workings, this resulted in an assessment of **€3,473.78. Considering that the provisional assessments are spread over a long period and that some of the workings are based on assumptions, it is being recommended that the provisional assessments will be revoked**<sup>17</sup>.*

Fir-Review Report 2, ir-Review Officer Chris Spiteri u l-Accountant tar-Review Section Jemar Bilocca osservaw u kkonkludew: **First Review Report** - *the taxpayer emphasised that at the preliminary stage the 49.5% of purchases was considered as purchases related to local sales and then a 46.3% mark up was applied to find the difference between the deemed local sales and the declared local sales. He stated that the workings are incorrect because the 49.5% is the percentage of sales which are local sales. The workings showing a mark up of 20.5% on foreign sales had already been provided by the taxpayer at the preliminary investigation stage. At review we chose a sample in which we included more items (point 3 below refers) to test the said mark up. This resulted in a weighted average mark up of 21.5%. When applying either the 20.5% or 21.5% mark up on purchases related to foreign sales, the percentage of purchases related to local sales resulted in 45% (rounded) of purchases rather than 49.5%. 1. At review stage a number of sales invoices both exports and ICSs had been selected (red 154 A-C). Due to the numerous items in each invoice, the sample was reduced due to limited time. 2. Copies of invoices were kept at Review Section due to the voluminous documents involved;*

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<sup>17</sup> Enfasi tat-Tribunal.

these have now been filed. The sample was a mix of items, which were selected by the department from VAT reports of the taxpayer, and items picked up by the taxpayer at preliminary investigation. Different clients, years, tax period and items were considered for the sample. 4. The exchange rate was checked with that of the Central Bank of Malta, however since this exercise was carried out to give an indication of the mark up for foreign sales, the exchange rates have not been checked for each item separately. If this would have resulted in a material difference, we would have carried out a substantive testing. 5. The letter at red 125E is an original declaration from Chopard Deutschland confirming the items the items received back and those invoiced. This declaration is what the taxpayer provided at review stage re the on consignment items. With regards to foreign sales in general, at review stage we did not consider to require these documents. Reason being that at the preliminary investigation stage the percentage of sales, which are foreign sales, had already been agreed between the taxpayer and the department. 6. Since the on consignment items were included in the VAT return as ICAs an adjustment was made to correct the stock element. 7. After checking the exchange rates as mentioned in item 4, Mr. Chris Spiteri entered the data provided by the taxpayer on excel so we did not request a soft copy thereof. After taking into account the adjustments for the percentage of foreign sales and the on consignment items, which were returned, this resulted in an assessment of €3,473.78. In addition to the above and following discussions with the Analysis and Control Unit, the taxpayer was contacted again to obtain further documents. **Second stage of Review:** The most critical finding at this stage, which altered the above result of €3,473.38, is the export sales. When the sample was reduced as per item 1 above, we did not confirm whether both ICS and exports have been reselected. In fact those reselected were only ICS. Hence following the meeting with the Analysis and Control Unit, the taxpayer was requested to provide the export invoices (red 152). Apart from the said invoices the taxpayer provided transport documents (red 149), an affidavit to back the letter at red 125E (145 A-B), the related purchase invoices (red 148), VAT reports and audit trails (red 147 and 151 A-G) to trace the accounting transactions and the audit adjustment sheet showing the adjustment for the on consignment vale (red 146). Two main tests were carried out, this time including the export sales. First we used the daily Central Bank of Malta exchange rates to convert from Swiss franc to EURO and resulted in a mark up of 25.24% (vide Appendices A1 and C1-3) on foreign sales. This increased the purchases percentage related to local sale to 45.68% from 45%. Secondly we used his accounting records and this resulted in a mark up of 26.08% (vide Appendices A2 and B1-3) on foreign sales. This increased the purchases percentage related to local sales to 45.85% from 45%. Both mark ups include 0.6909% as transport costs. This resulted in the following four different scenarios. 1 - **Result with mark up using CBM exchange rates with adjustment for the on consignment €27,675.07 (vide A3); 2 - Result with mark up using CBM exchange rates without adjustment for the on consignment - €66,690.53 (vide A4); 3 - Result with mark up using exchange rates as per accounts with adjustment for the on consignment - €33,530.08 (vide A5); and 4 - Result with mark up using exchange rated as per accounts without adjustment for the on consignment - €72,687.05 (vide A6)<sup>18</sup>. Decision - the two main test smentioned above were**

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<sup>18</sup> Enfasi tat-Tribunal.

*carried out for comparison purposes. The audited Financial Statements submitted to the Malta Financial Services Authority (MFSA) and tax paid thereon, were based on exchange rates used by the taxpayer in the accounting records. With regards to goods on consignment, considering the materiality of the values involved, the taxpayer was asked to submit proof of transport to substantiate its claim that the goods had indeed been dispatched plus the insurance cover. None of these documents were however furnished, the taxpayer opting instead to provide an affidavit declaring that the said items had been returned to the supplier. **In light of the above and in absence of customs documents for the goods on consignment, it has been recommended to issue an assessment of €72,687.05 as per scenario 4 above**<sup>19</sup>.*

Minn dan kollu osservat jirrizulta b'mod ċar li fl-istadju ta' Review l-oġġezzjonijiet sollevati mis-soċjetà Rikorrenti ġew esplorati minn diversi angoli w aspetti u d-Dipartiment effettivament mar minn rakkomandazzjoni biex l-istimi proviżorji maħruġa fil-konfront tas-soċjetà Rikorrenti jiġu kkanċellati in kwantu l-under-declared tax irrizulta fis-somma ta' €3,473.38 mifruxa fuq il-perijodi ta' taxxa in kwistjoni, għar-rakkomandazzjoni li jinħarġu stimi għall-valur ta' €72,687.05. Huwa proprio fuq ir-rakkomandazzjoni li l-istimi proviżorji jiġu revokati u ikkanċellati li s-soċjetà Rikorrenti tibbaża s-sottomissjonijiet finali tagħha fil-każ in ezami.

Fir-rigward, waqt it-trattazzjoni orali u kif verbalizzat waqt is-seduta tat-2 ta' Mejju 2017<sup>20</sup>, ġie sottomess is-segwenti: *Dr. Attard jiddikjara li qed jirrimetti ruħu għall-provi mressqa u jirreferi għal żewġ notamenti mill-file tad-dipartiment cioè notament datat 18 ta' Marzu 2011 indirizzat lil ċertu Mrs. Schembri fejn qed jingħad "it is being recommended to revoke the provisional assessment" u jirreferi wkoll għan-nota tat-23 ta' Marzu 2011 u din id-darba ffirmat mill-istess C. Schembri "following review it transpires that the only potential under declared amount is approximately 3473. I do not deem it appropriate to reduce the provisional assessments to this figure considering it as immaterial compared to turnover declared".*

Il-minuti fil-file li rrefera għalihom id-difensur tas-soċjetà Rikorrenti fis-sottomissjonijiet orali tiegħu huma l-minuta 137 datata 18 ta' Marzu 2011<sup>21</sup>, fejn appuntu jingħad *the workings of the provisional assessments are based on the assumption that local sales and export sales have the same profit margin. A percentage of 49.5% of purchases was considered as purchases related to local sales. However 49.5% of the percentage of sales, which are local sales and not purchases. In view of the above and other adjustments related to closing stock and stock returned, it is being recommended to revoke the provisional assessments. File is being referred for your reference prior to final decision* u l-minuta 138 datata 23 ta' Marzu 2011<sup>22</sup>, fejn jingħad *provisional assessments to a total of €214,745 were raised for under declared taxable sales. Taxpayer requested review of such assessments and it resulted that incorrect percentages were applied at investigation stage. (Review report at red 135 refers). Following review, it transpires that the*

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<sup>19</sup> Enfasi tat-Tribunal.

<sup>20</sup> Verval tas-seduta a fol. 104 tal-proċess.

<sup>21</sup> Fil-file esebit mill-Kummissarju bħala Copy of VAT File 1228-4035 Part 1(A).

<sup>22</sup> *Ibid.*

*only potential under declared amount is approximately €3,473. I do not deem it appropriate to reduce the provisional assessments to this figure considering it as immaterial compared to turnover declared.*

Il-Kummissarju tat-Taxxi jirribatti għal dawn is-sottomissjonijiet tas-soċjetà Rikorrenti billi jikkontendi *inter alia* li *tenut kont tad-dokumentazzjoni pprovduta lilu, ir-Review Officer* kien qiegħed jirrakkomanda li gjaladarba l-ammont kien se jkun ikkonfermat u cioè madwar €3,000 ftaxxa mhux iddikjarata kellhom ikunu ikkanċellati l-istejjem proviżorji u dan minħabba raġunijiet ta' materjalità wara li gie meħud in konsiderazzjoni l-ammont ta' l-istejjem proviżorji. Dan kollu jirriżulta mir-Rapport tar-Review li fil-file ipprezentat mill-appellat bħala Dok. 135. Illi r-rappreżentant legali qabad ma' l-aħħar sentenza ta' dan ir-rapport u donnu li qiegħed ikanta vittorja. Kien huwa stess li għoġbu jressaq u jinsisti sabiex ikun ipprezentat il-file intier ta' l-appellanti u dan maħluf xejn anqas mill-istess Kummissarju tat-Taxxi. Saħansitra kien hemm insistenza fuq il-minuti relatati mal-file imsemmi. L-esponenti kien appella mid-digriet mogħti minn dawn l-Onorabbli Tribunal f'dan is-sens u l-appell quddiem l-Onorabbli Qorti ta' l-Appell intilef. L-esponenti sottometta ruħu għad-disposizzjonijiet tas-sentenza mogħtija mill-Qorti ta' l-Appell u ppreżenta l-file intier maħluf mill-Kummissarju tat-Taxxi kif kien ordnat li jagħmel. Issa ma jistax, l-aġent ta' l-appellanti jaqbad din is-sentenza biss u jibni l-każ tiegħu madwarha! L-istess minuti tant mixtieqa mill-appellanti juru korrispondenza sħiħa tal-kalkoli neċessarji sabiex l-esponenti wasal għall-ammonti ta' taxxa li fuqu hemm imsejjes l-appell de quo. Li l-aġent ta' l-appellanti, f'dan l-isfond jista' minimament jitqies bħala selettiv f'dak kollu li jirriżulta mill-file intier maħluf mill-Kummissarju tat-Taxxi huwa ewfemiżmu. Illi l-appellanti kif anke jirriżulta mill-istess file imsemmi rredieġa t-tieni rapport tar-Review. Tali rapport kien immarkat bħala Dok. '171'. Dan mhux każ ta' akkaniment fil-konfront ta' l-appellanti, l-appellat għandu d-dmir li jħares l-erarju pubbliku. Illi f'dan it-tieni rapport mill-kalkoli godda li mexxa l-esponenti jirriżulta li l-istejjem proviżorji kellhom jitnaqqsu għal €72,687.05. Il-workings u id-dokumenti wżati mill-appellat juru kif hu wasal għal din il-konklużjoni. Jiġi rilevat ukoll li l-appellanti ntalbet sabiex tissottometti numru ta' dokumentazzjoni oħra li għar-raġunijiet li taf hi biss għoġobha ma tottemperax ruħha. Dan ukoll wassal sabiex l-appellat jieħu d-deċiżjoni li ħa fil-quantum ta' l-istejjem proviżorji li kien sejjer jikkonferma<sup>23</sup>.

In vista ta' dawn ix-xenjari differenti li rriżultaw mill-provi, huwa fid-dawl u fil-kuntest ta' l-istess li t-Tribunal għandu jiddetermina liema minnhom jista' jkun ix-xenjaru korrett u jekk, kif pretiż mis-soċjetà Rikorrenti, l-istimi maħruġa mill-Kummissarju tat-Taxxa fuq il-Valur Miżjud humiex eċċessivi o meno, tant illi għandhom jiġu revokati w ikkanċellat.

### **Mark up on overseas sales u mark up on local sales:**

Mill-provi prodotti mis-soċjetà Rikorrenti, senjatament mill-affidavit ta' Edward Fenech<sup>24</sup>, jirriżulta li l-kontestazzjoni tas-soċjetà Rikorrenti fir-rigward ta' l-istimi

<sup>23</sup> Para. 14 sa' 16 tan-Nota Responsiva tal-Kummissarju tat-Taxxi, fol. 107 sa' 117 tal-proċess.

<sup>24</sup> Fol. 157 sa' 163 ta' l-atti proċesswali tar-Rikors fl-ismijiet "XXXCo. Ltd. v. Kummissarju tat-Taxxa fuq il-Valur Miżjud" Rik. Nru. 91/12.

maħruġa fil-konfront tagħha tirrivolvi *inter alia* madwar il-kalkolu tal-mark up on Overseas Sales u mark-up on Local Sales. Fir-rigward tramite l-affidavit ta' Edward Fenech fil-fatt tikkontendi li: *Mark-up on Overseas Sales - the first critical error made by the VAT department was to assume that the mark up on local sales and overseas sales (i.e. exports + intra-community supplies) was the same. This was a fallacious assumption because the profitability on overseas sales is (as is normally expected) far lower than that on local sales. Due to this assumption, the VAT workings were completely wrong and it was for this reason that the initial workings showed 'under collected' VAT of EUR271,035. Due to this error, we had to prove the difference in the average mark-up between local and overseas sales to the VAT Department. Various samples were calculated by both the VAT Department and ELCOL and the resulting workings showed that the average mark up on local sales was 46.3% and the average mark up on overseas sales was in the region of 20-22%. After presenting these mark ups to the VAT Department and some discussion around them, these figures were no longer contested by the VAT Department. In fact we reiterated these mark ups in the second response made to the VAT department on 19<sup>th</sup> January 2011. However, during the review of the case, that was carried out just prior to the issuing of the assessment on 18<sup>th</sup> April 2011, the VAT department requested a revised sample on mark up workings on overseas sales and the resulting mark up on this particular sample was 27%. We knew that this sample did not reflect reality as we were sure that the mark-up figure was in the range of the low 20s. As a result Karl Vassallo (company accountant) was tasked to prepare a complete mark up exercise for a full year (2008) which confirmed our assertion that the average mark up was in the low 20s. However when this exercise was completed, the VAT department refused to look at the workings and proceeded with the issue of the assessments, stating that the review was already complete. It is important to outline that the completion date was never communicated to ELCOL. Mark-up on Local Sales - as stated above, the mark-up on local sales was calculated at 46.3%, a figure that the VAT Department have used in their workings. However the cost of postage and carriage was not included when this mark-up percentage was originally calculated. The postage and carriage cost reduces the mark-up by 0.78%. This was communicated to the VAT Department together with the sample workings on the response sent on 19<sup>th</sup> November 2010. This however has not been taken into consideration by the VAT Department when issuing the assessment to which ELCOL is appealing.*

Minn eżami tar-Review Reports imħejjija mir-Review Officer u tal-minuti fil-files esebiti mill-Kummissarju tat-Taxxi jirriżulta li għall-ewwel ir-Review Officer kien wasal għal persentaġġi viċini ħafna għal dawk indikati mis-soċjetà Rikorrenti. In effetti wara li ġie eżaminat *sample of sale and purchase invoices related to export ... of more than 40 items*, li s-soċjetà Rikorrenti ntalbet tipprovdi, ir-Review Officer ħareġ b'weighted average mark up ta' 21.5% għall-overseas sales, viċin ħafna għal dak ta' 21.5% indikat mis-soċjetà Rikorrenti. Ikkonstata wkoll li *when applying either the 20.5% or 21.5% mark up on purchases related to foreign sales, the percentage for purchases related to local sales resulted in 45% of purchases rather than 49.5%*, persentaġġ ta' 45% ukoll viċin ħafna għall-persentaġġ indikat mis-soċjetà Rikorrenti.

Meta r-rakkomandazzjoni tar-Review Officer dwar il-mark up giet ivaluatata internament - xi haġa li l-Kummissarju u d-Dipartiment għandhom kull dritt li jagħmlu - ġie espress ċertu xetticizzmu dwar tali konkluzjoni, hekk kif jirrizulta mill-minuti 138, 139 u 140 fil-file esebit mill-Kummissarju tat-Taxxi markat Copy of VAT File 1228-4035 Part 1(A), u ntabab l-intervent jew l-opinjoni ta' l-Analysis and Control Unit. Fil-minuta 141 fil-file hawn appena msemmi, fir-rigward tal-mark up ir-rappreżentant ta' l-imsemmija Unit osservat illi *following your request at Min. 140 above, I have taken a look at the various reports and documents pertaining to the investigation and proposed review's conclusion and would appreciate further information regarding the following points:- 1. Did the sample taken at review stage cover all 'overseas sales' as per Point 1 of the review report, that is both exports and ICS's?; 2. Should copies of sample invoices not be retained on file for greater transparency?; 3. Was the sample population of invoices selected by the Department or by the taxpayer? What criteria were employed?; 4. The weighted average mark up of 21.5% which was calculated by the Review Section in order to arrive at a potential under-declared sales figure, is based on exchange rates supplied by the taxpayer. Have these been verified for correctness?; .....*

In segwitu għal dawn l-osservazzjonijiet tar-rappreżentant ta' l-Anaysis and Control Unit dwar il-mark up, fil-Minuta 158<sup>25</sup> Jesmar Bilocca, Accountant fir-Review Section, osserva li *at review stage a number of sale invoices both exports and ICSs had been selected (red 154 A-C). Due to the numerous items in each invoice, the sample was reduced due to the limited time ... the most critical finding at this stage (ossia t-tieni stadju tar-Review), which altered the above result of €3,473.78, is the export sales. When the sample was reduced as per item 1 above, we did not confirm whether both ICSs and exports have been reselected. In fact those reselected where only ICSs. Hence following the meeting with the Analysis and Control Unit, the taxpayer was requested to provide the export invoices (red 152). ... Two main tests were carried out, this time including the export sales. First we used the daily Central Bank of Malta exchange rates to convert from Swiss Franc to Euro and resulted in a mark-up of 25.24% (vide Appendices A1 and C1-3) on foreign sales. This increased the purchases percentage related to local sales to 45.68% from 45%. Secondly we used his accounting records and this resulted in a mark-up of 26.08% (vide Appendices A2 and B 1-2) on foreign sales. This increased the purchases percentage related to local sales to 45.85% from 45%. Both mark-ups include 0.6909% as transport costs. ...*

Minn dan appena osservat jirrizulta li l-weighted average mark ups determinati fir-Review Report 1 ma kienux u ma jistgħux jitqiesu li kienu korretti stante li b'ammissjoni ta' l-istess Review Officer dan ma nħadmux fuq sample ta' l-overseas sales kollha, ossia fuq Intra-Community Supplies u fuq l-export sales, iżda biss fuq l-Intra-Community Supplies (ICS). Detto ciò t-Tribunal iqis li l-weighted average mark ups eventwalment adottati mill-Kummissarju tat-Taxxi, ossia 26.08% għal overseas sales u 45.85% għal local sales, u dan a bażi ta' exchange rates adottati mis-soċjetà Rikorrenti fl-accounts tagħha, xorta waħda ma jistgħux jitqiesu bħala korretti għar-raġuni li r-rata adottata ma hijiex dik prevista u kontemplata fil-Liġi.

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<sup>25</sup> Fil-copy of VAT File 1228-4035 Part 2(A).

Fir-rigward issir referenza għall-minuta 160 fil-file esebit mill-Kummissarju tat-Taxxi indikat bhala Copy of VAT File 1228-4035 Part 2(A), fejn fir-rigward tar-rata tal-kambju jingħad: *on verifying the exchange rates supplied by the taxpayer in respect of the original sample, it transpired that these varied both from the CBM middle rates and even more from the rates of exchange adopted by the taxpayer itself for accounting purposes, as at each applicable date. This had resulted in a lower mark up on foreign sales (ICS Items only) and a lower ratio for purchases to local sales than in fact should have ensued. Taking the correct rates, on the other hand, results in a higher mark up for foreign (ICS and export) sales which, although slight in value, in turn raises the percentage value of purchases to local sales, thus resulting by extrapolation in an assessment of €33,530 (as per Company accounts roE) or €27,675 (if CBM middle rates are used). May I point out at this stage that, according to Item 8 of Schedule 7 to the ACT: "Where any amount relevant for the determination of the taxable value of a supply is expressed in foreign currency the exchange rate applicable shall be the last selling rate determined by the Central Bank before the date when the supply takes place." This in itself constitutes a contradiction in terms since the selling rate is generally speaking always quoted by commercial banks and never by the Central Bank. While it may well be worth referring this anomaly to the Legal Section for eventual remedy, one should at this point consider taking the exchange rates adopted by the taxpayer in the Company's accounts for assessment purposes. ... the proposed assessment would rise to €72,687 as per tax payer's accounts RoE (or €66,691 if CBM middle rates were to be utilised).*

Mir-Review Report finali, ossia Review Report 3, jirriżulta b'mod ċar li l-Kummissarju tat-Taxxi finalment applika r-rati tal-kambju adottati mis-soċjetà Rikorrenti fl-accounts tagħha u a bażi ta' weighted average mark ups ta' 26.08% għal *foreign sales* u 45.85% għal *local sales* u, wara ċerta konsiderazzjonijiet dwar l-oġġetti on consignment li se jiġu trattati iktar 'l quddiem f'din is-sentenza, illikwida taxxa dovuta fis-somma ta' €72,687.05. Di fatti apparte dak li jirriżulta mill-minuta 160 appena citata, jekk terġa ssir referenza għall-minuta 158 fil-file esebit mill-Kummissarju tat-Taxxi markat bhala Copy of VAT File 1228-4035 Part 2(A), jirriżulta b'mod ċar li t-taxxa likwidata ta' €72,687.05 hija derivanti mill-applikazzjoni ta' *mark up using exchange rate as per accounts without adjustment for on consignment*.

It-Tribunal iqis però li l-mod kif il-Kummissarju tat-Taxxi ddetermina l-*foreign sales* mark up u l-*local sales* mark up fid-deċiżjoni finali tiegħu, ossia a bażi ta' rati tal-kambju applikati mis-soċjetà Rikorrenti fl-accounts tagħha, ma huwiex konformi mal-Liġi u b'hekk ma huwiex u ma jistgħax jitqies li huwa korrett.

Mill-minuta 160 già iktar 'l fuq citata johroġ ferm ċar li l-Kummissarju tat-Taxxi kien ben konxju tal-fatt li ai termini tal-Liġi, senjatament ai termini tal-partita 8 tas-Seba' Skeda tal-Kap.406 tal-Liġijiet ta' Malta, ir-rati tal-kambju applikabbli f'ċerta ċirkostanzi huma dawk mahruġa mill-Bank Ċentrali ta' Malta. L-imsemmij apartita 8 tas-Seba' Skeda tal-Kap. 406 tal-Liġijiet ta' Malta kif applikabbli fiż-żmien pertinenti għal dawn il-proċeduri kienet tipprovdi: *meta xi ammont rilevanti biex jiġi stabbilit il-valur taxxabli ta' provvista jingħata f'munita barranija, ir-rata ta' kambju li tkun tapplika tkun l-aħħar rata tal-bejgħ li tkun giet stabbilita mill-Bank Ċentrali qabel id-data li fiha sseħħ il-provvista*. Dan il-provvediment tal-Liġi huwa



marbut ma' l-Artikolu 18 tal-Kap.406 tal-Ligijiet ta' Malta illi jipprovdi li *l-valur taxxabli ta' provvisti, akkwisti intra-Komunitarji u importazzjonijiet għandu jiġi stabbilit bil-mod stipulat fis-Seba' Skeda.*

Minn dan il-provvediment tal-Ligi jidher ferm ċar li l-mod kif għandu jiġi determinat il-valur taxxabli ta' *inter alia* akkwisti intra-Komunitarji u importazzjonijiet huwa **tassattivament** regolat u determinat u b'hekk hadd, lanqas (anzi t-Tribunal iqis iktar u iktar) il-Kummissarju tat-Taxxi ma jista' jiskarta dak li tipprovdi l-Ligi sempliċement għaliex fil-fehma tiegħu dak hemm provdut għalih ma jagħmilx sens jew għaliex iqisu kontradittorju.

It-Tribunal josserva wkoll illi ai termini ta' l-Artikolu 8(1) ta' l-Att dwar id-Dazji ta' Importazzjoni, Kap. 337 tal-Ligijiet ta' Malta, anke kif applikabbli fiż-żmien pertinenti għal dawn il-proċeduri, *il-valur għad-Dwana bil-għan li tiġi applikata t-Tariffa tad-Dwana għandu jkun stabbilit skond id-disposizzjonijiet ta' l-Agreement of Tariffs and Trade 1994 kif japplika għal Malta, skond ir-regoli li jinsabu fis-Tielet Skeda li tinsab ma' dan l-Att u l-Annex li hemm magħha, liema Skeda u Annex għandhom ikunu fl-ilsien Inġliż biss.* L-Artikolu 9 tat-Tielet Skeda tal-Kap.337 tal-Ligijiet ta' Malta jipprovdi li *where the conversion of currency is necessary for the determination of the customs, value, the rate of exchange to be used shall be that determined by the Central Bank of Malta and the relative provisions of article 12 of this Act shall apply.*

Fid-dawl ta' dan kollu osservat jirriżulta għalhekk li l-weighted average mark ups kaolkolati mill-Kummissarju tat-Taxxi, jew aħjar mir-rappreżentanti tiegħu, a bażi tar-rati tal-kambju adottati mis-soċjetà Rikorrenti fl-accounts tagħha - liema rati kjarament irriżulta li ma humiex konformi mar-rati tal-kambju maħruġa mill-Bank Ċentrali ta' Malta - u minnu utilizzati biex wasal għall-likwidazzjoni ta' taxxa fil-konfront tas-soċjetà Rikorrenti, ma humiex u ma jistgħux jitqiesu li huma korretti. Fl-fehma tat-Tribunal il-mark ups korrettament kalkolati huma daww a bażi tar-rati tal-kambju maħruġa mill-Bank Ċentrali ta' Malta, li mill-minuti fil-file tad-Dipartiment u mir-Review Report 2 jirriżulta li huma **25.24%** għal *foreign sales* u **45.68%** għal *local sales*.

It-Tribunal hawn josserva li l-eżerċizzju esegwit mis-soċjetà Rikorrenti għall-fini li tiddetermina l-mark up fuq *foreign sales* u li minnu jirriżulta mark up ta' 23%<sup>26</sup>, ma jistax sodisfaċentement jegħleb il-konkluzzjonijiet tal-Kummissarju tat-Taxxi għar-raġuni li dan sar fuq sena waħda biss, ossia fuq is-sena 2008 u b'hekk ma jistax jitqies li adegwatament jirrifletti weighted average mark up fuq *foreign sales* fuq il-medda ta' snin li huma mertu ta' dawn il-proċeduri.

Kif già iktar 'l fuq osservat, fir-Review Report 2 ir-Review Officer hareġ b'erba' xenarji possibbli ta' taxxa dovuta mis-soċjetà Rikorrenti u dawn huma: *Result with mark up using CBM exchange rates with adjustment for the on consignment €27,675.07 (vide A3); 2 - Result with mark up using CBM exchange rates without adjustment for the on consignment - €66,690.53 (vide A4); 3 - Result with mark up using exchange rates as per accounts with adjustment for the on consignment - €33,530.08 (vide*

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<sup>26</sup> Anness mar-Rikors promotur.

A5); and 4 - Result with mark up using exchange rated as per accounts without adjustment for the on consignment - €72,687.05 (vide A6).

Stabbilit li l-mark ups rizzultanti bl-applikazzjoni tar-rati tal-kambju adottati mis-soċjetà Rikorrenti fl-accounts tagħha ma humiex korretti in kwantu mhux konformi mal-Liġi, mill-erba' xenarji prospettati mir-Review Officer huma biss tnejn minnhom li għandhom jiġu kkunsidrati, ossia l-ewwel jew it-tieni xenarju. Mill-imsemmija xenarji huwa evidenti li d-differenza bejniethom essenzjalment tirrigwarda l-applikazzjoni o meno ta' l-aġġustament dwar l-oġġetti *on consignment*. Huwa proprio dan il-punt li se jiġi issa trattat f'din is-sentenza.

### **Oġġetti *on consignment*:**

Is-soċjetà Rikorrenti tikkontendi li l-Kummissarju tat-Taxxa fuq il-Valur Miżjud kien żbaljat meta qies ċerta oġġetti *on consignment* importati minnha fl-2007 mingħand Chopard bħala bejgħ li ma ġiex minnha dikjarat fid-dikjarazzjonijiet tat-taxxa tagħha.

Fir-rigward ix-xhieda prodotti mis-soċjetà Rikorrenti, senjatament Malcolm XXX, Carl Vassallo u Edward Fenech, jikkontendu li:

**Malcolm XXX**<sup>27</sup> - *Fit-2007 ftaħna ħanut ġdid f'St. Julians, ftaħnieh f'xi Ottubru u nirrappreżentaw ditta jisimha Chopard. Chopard jagħmlu ħafna ġojjellerija w arloġġi ta' deluxe standard, very very expensive, meta ngħid very expensive jiġifieri 50,000 u 60,000, affarijiet hekk. Mistoqsi kemm inbiegħu minn dawn l-oġġetti huwa wieġeb ċurkett wieħed. Dwar l-importazzjoni ta' dawn l-oġġetti huwa ddikjara ulterjorment li dawn jagħmlu kull fejn xi rappreżentant tagħhom jiftaħ ħanut ġdid jew meta jkollhom xi event bħall-Oscars, li huma l-isponsors, jew Cannes fil-festival, jeħduhom u jagħtuhom lill-istars biex jilbsuhom. Dawn huma affarijiet li lanqas b'xejn ma nbiegħuhom hawn Malta għax huma affarijiet fantastiċi u għoljin immens. Jibgħatuhom biex jagħmlu exhibition, biex jimpressionaw in-nies x'inhuma kapaċi jagħmlu. In-nies jieħdu gost jarawhom, imbagħad kif jispiċċa l-event jew kemm iħalluna nżommuhom fid-display u nerggħu nibagħtuhom kollha lura. U aħna hekk għamilna ħlief one ring li irnexxielna nbiegħu. ... Il-Vat Department ma nistax nifhem kif iddeċidew li aħna ma bgħattnihomx lura, zammejnihom hawn, x'naħgmlu bihom ma nafx. Mistoqsi kif irribattew għall-posizzjoni tad-Dipartiment, Malcolm XXX wieġeb għandna dikjarazzjoni minn Chopard li huma rċievewhom kollha lura, aħna bgħattnihom u għandna l-airway bill u għandna kollox. ... Iddeċidejt li nagħmel affidavit li dan ix-xogħol bagħtnieh lura u židt ukoll xi tfisser gurament għalija. ... Nerġa' nirreperti li jien ma nistax nifhem kif il-VAT Department iddeċidew li aħna we are making a small profit u mhux kemm jidhrilhom huma, u ma nistax nifhem kif qatt ma fehm u li dawn il-goods ta' Chopard ma bagħtnihomx lura. Irrid inkun miġnun biex nixtrihom għal Malta. In kontro-eżami Malcolm XXX iddikjara li bħala prova tar-ritorn ta' dawn l-oġġetti lil Chopard is-soċjetà għandha l-airway bill ta' meta l-oġġetti intbagħtu lura u bħala insurance s-soċjetà għandha marine cover in general li jfisser li hemm assikurazzjoni ġenerali mingħajr il-bżonn li jsir insurance cover ma' kull*

<sup>27</sup> Xhieda mogħtija waqt is-seduta tat-3 ta' Diċembru 2012, fol. 30 sa' 38 tal-proċess.

esportazzjoni da parte tagħha. Għalkemm intrabat li jipprovdi kopja ta' din il-*general marine insurance*, dan id-dokument, għal raġunijiet li taf is-soċjetà Rikorrenti biss baqa' qatt ma gie esebit.

**Carl Vassallo**<sup>28</sup> ddikjara li dawn l-oġġetti kienu *goods on consignment, l-invoices ma kienux invoices imma kienu goods on consignment, jigiifieri fuq l-invoice wkoll, jigiifieri fuq id-dokument. ... Jigiifieri kienu affarijiet mislufin, or goods on consignment, li jekk tbiegħhom trid toħroġ invoice, kienu mislufin għall-exhibition ta' meta ftaħna l-ħanut ta' Spinola, they were exhibition pieces. ... aħna ma bieghna xejn minnhom. Xejn u ergajna rritornajnihom lura, I wasn't there at the time, fis-sens li dak iż-żmien kien għadu mhux impjegat tas-soċjetà Rikorrenti. Huwa kompli jispjega li hemm dokumentazzjoni li esportajnihom lura jew aħjar ħadnihom lura lejn ix-Chopard. Ix-Chopard għamlu dikjarazzjoni minn naħa tagħhom li rċevew l-affarijiet, issa mbaġħad it is another thing, you can verify from this, it is intra-community supply, it is called, the VAT Department can verify this. ... Għall-inqas l-intra-community supply, they can trace it, the VAT Department can trace the intra-community supply or the export because il-burdnar jagħmel id-dikjarazzjonijiet lill-Customs Department, issa jekk dawn għandhom access fil-Customs Department dawn ser jindunaw.*

**Edward Fenech**<sup>29</sup> iddikjara *during my review of the VAT department workings it cam to light that part of the intra-community acquisitions (i.e. purchase from EU countries) in the period 1/8/07-31/10/07 were in actual fact "consignment purchases" made by ELCOL. Since input VAT was charged and paid, these purchases were included in the VAT returns in order for ELCOL to reclaim the input VAT. However in reality these goods were not part of the company's purchases and were in actual fact removed from cost of sales, but were not deducted from the VAT returns when goods were eventually returned to the supplier. As a result the value fo these consignment goods should not have been used by the VAT department to work out the cost base on which to calculate the "assumed local sales". The value of the consignment goods was EUR341,941. It appears that the VAT department did eventually recognise this fact, however in the assessment issue on 18<sup>th</sup> April 2011, the value of the consignment goods was not deducted completely - only a deduction of EUR 108,965 for consignment goods was taken into account. The VAT Department did not explain why a full deduction was not taken. We insist that the whole value of EUR341,941 should have been deducted in the workings of the VAT department that accompanied the assessment. If this was so then, without prejudice, the VAT difference on the workings that accompanied the assessment should not have been EUR72,687 but EUR 44,558. However even this revised figure is incorrect because the calculation methodology used by the VAT Department is not reliable as explained below...*

Mix-xhieda kollha appena citati jirrizulta evidenti li s-soċjetà Rikorrenti tikkorobora dak minnha affermat, ossia li l-oġġetti *on consignment* ġew ritornati lil Chopard, fuq affidavit ta' Malcolm XXX datat 10 ta' Settembru 2012, ittra allegatament maħruġa minn Chopard Deutschland, airway bill li allegatament tirreferi għal dawn l-oġġetti u

<sup>28</sup> Xhieda mogħtija waqt is-seduta tat-3 ta' Dicembru 2012, fol. 39 sa' 47 tal-proċess.

<sup>29</sup> Affidavit a fol. 157 sa' 160 ta' l-atti proċesswali tar-Rikors fl-ismijiet "Edwards, Lowell Co. Ltd. v. Kummissarju tat-Taxx fuq il-Valur Miżjud" Rik. Nru. 91/12.

fuq ix-xhieda ta' żewġ persuni, ossia Carl Vassallo u Edward Fenech, li ma kienux impjegati u/jew direttament involuti fir-ritorn ta' dawn l-oġġetti iżda xehedu a bażi ta' informazzjoni li nġhatat lilhom mill-istess soċjetà Rikorrenti.

In kwantu rigwarda l-ittra allegatment maħruġa minn Chopard Deutschland datata 12 ta' Ottubru 2010<sup>30</sup>, it-Tribunal josserva li din l-istess ittra ma ġietx konfermata bil-ġurament jew b'dikjarazzjoni solenni da parte ta' min ħarigha, ossia rappreżentant ta' l-istess Chopard Deutschland. It-Tribunal ma jistax joqgħod fuq id-dokument esebit mis-soċjetà Rikorrenti bħala prova li l-oġġetti in kwistjoni fil-fatt ġew ritornati u dana billi huwa prinċipju assodat fis-sistema ġuridika nostrali li *il-Qorti ma tistax toqgħod fuq dokument li mhux konfermat minn min irredigieħ, li għandu jkun ukoll passibbli għall-kontro-eżami*<sup>31</sup>.

Għal dak li jirrigwarda l-airway bill markata Dok. "ML5" a fol. 29 tal-proċess datata 30 ta' Jannar 2008, jiġi osservat li għalkemm minnha jirriżulta li l-consignee hija Chopard Deutschland u li tirreferi għal *watches and jewellery - valuable cargo*, ma jirriżultax però b'mod sodisfaċenti li l-arloġġi u ġojellerija mibgħuta lil Chopard Deutschland kienu l-oġġetti mertu ta' din il-kwistjoni partikolari, u dana iktar u iktar meta fill-fatturi tal-konsenja maħruġa mill-istess Chopard Deutschland datati 27 ta' Ġunju 2007<sup>32</sup> hemm espressament stipulat li *we kindly ask you to return the above consignment within 20 days in case it was not sold*, u ma tirriżulta l-ebda dokumentazzjoni li turi li t-terminu ta' għoxrin ġurnata ġie b'xi mod estiż.

Fir-rigward tax-xhieda ta' Carl Vassallo u ta' Edward Fenech dwar din il-kwistjoni partikolari, liema xhieda hija kjarament *hearsay evidence*, japplika bla dubju ta' xejn dak provdut fl-Artikolu 598 tal-Kap.12 tal-Liġijiet ta' Malta, ossia li *bħala regola, il-qorti ta' tieħux qies ta' xhieda dwar fatti li x-xhud jgħid li ġie jafhom mingħand ħaddieħor jew li qalhom ħaddieħor li jista' jingieħ biex jagħti xhieda fuq dawk il-fatti*.

Skarati għalhekk l-ittra datata 12 ta' Ottubru 2010, l-airway bill datata 30 ta' Jannar 2008 u x-xhieda ta' Carl Vassallo u Edward Fenech dwar din il-kwistjoni partikolari, il-kontestazzjoni tas-soċjetà Rikorrenti dwar l-oġġetti *on consignment* tistriħ esklussivament fuq l-affidavit ta' Malcolm XXX datat 10 ta' Settembru 2012, Dok. "ML1" a fol. 22 tal-proċess, fejn jiddikjara li *this is to declare that in June 2007 Chopard Deutschland have sent us goods on consignment for the opening of our new shop in Spinola Bay, St. Julians. The consignments were 5384-53855-53856-53858-53859-53861. All the items were returned to suppliers in January 2008 with the exception of one ring which was duly invoiced in June 2007. This I confirmed by Chopard Deutschland in their letter of 12th October 2010, copy attached, I wish to add that, as a practising catholic I know the significance and consequences of taking a false oath, and I would not consciously do so under any circumstances whatsoever*.

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<sup>30</sup> Fol. 23 tal-proċess.

<sup>31</sup> Anthony Chircop et noe v. John Zammit noe et, Ċitaż. Nru. 1136/94 deċiża mill-Prim' Awla tal-Qorti Ċivili fl-14 ta' Novembru 2002.

<sup>32</sup> Fol. 51, 54, 55, 57, 59, 62 tal-proċess.

Fir-rigward it-Tribunal josserva li ai termini tal-partita 2(2) tad-Disa' Skeda tal-Kap. 406 tal-Liġijiet ta' Malta, *ikun dmir ta' l-appellant li jgħib prova li xi valur taxxabbli li ssir stima dwaru mill-Kummissarju jkun eċċessiv jew li xi kreditu li issir stima dwar mill-Kummissarju ma jkunx suffiċjenti*. Din id-disposizzjoni tal-Liġi tixhet fuq it-*taxpayer* oneru ta' prova tali li ma jistax u ma għandux jigi sodisfatt bil-mera preżentata ta' affidavit jew affidavits ta' l-istess *taxpayer* jew, bħal fil-każ in eżami tad-Direttur tas-soċjetà *taxpayer*, u bil-konsegwenti pretensjoni li l-Kummissarju tat-Taxxi l-ewwel u in segwitu dan it-Tribunal, għandhom joqgħodu f'kollox u għal kollox fuq dik id-dikjarazzjoni. Kwalunkwe dikjarazzjoni, anke jekk magħmula b'affidavit, neċessarjament għandha tiġi debitament u sodisfaċentement ikkorborata b'xhieda jew dokumentazzjoni oħra, korroborazzjoni din li fil-każ in eżami assolutament ma saritx.

Fic-ċirkostanzi għalhekk u tenut kont ta' dak kollu appena osservat, it-Tribunal iqis li l-parametri li għandhom jiġu adottati fil-każ in eżami għall-fini li jiġi determinat jekk hemm taxxa ulterjuri dovuta mis-soċjetà Rikorrenti, huma li: (i) il-mark ups għal *foreign sales* u *local sales* għandhom jiġu determinati a bażi ta' rati ta' kambju maħruġa mill-Bank Ċentrali ta' Malta; u li (ii) ma jiġi konċess l-ebda adjustments għall-oġġetti on consignment. Dawn il-parametri ġew ġustament adottati mill-Kummissarju tat-Taxxi u fil-fatt mir-Review Report 2 jirriżulta li applikati dawn il-parametri tirriżulta taxxa ulterjuri dovuta fl-ammont ta' **€66,690.53**.

Għalkemm tramite l-affidavit ta' Edward Fenech is-soċjetà Rikorrenti tipprova tpoġġi fid-dubju kwalunkwe kalkolu magħmul mill-Kummissarju li jista' jirriżulta f'taxxa dovuta minnha, it-Tribunal huwa tal-fehma li l-kalkolu tal-Kummissarju li wassal għal taxxa dovuta fl-ammont ta' €66,690.53 huwa korrett u fil-fatt għandu jiġi kkonfermat u b'hekk adottat.

Fl-affidavit tiegħu Edward Fenech<sup>33</sup> jikkontendi li *the VAT department has consistently used incorrect methodology in their workings, and this has been brought to the two responses made to them. The method used in the assessment issued on 18th April 2011 is also incorrect, because it makes an impossible attempt to calculate the portion of purchases that are the 'local apportionment' by applying an arbitrary percentage to the total purchases, The workings submitted with the assessment show that this proportion is 45.8% - a figure which the VAT department has not explained. We contend that this methodology is incorrect, and the only reliable methodology that can be applied to calculate the 'deemed local sales' is the following: a) start with the value of total 'declared purchases less stock allowance'. This amount is not being disputed by either party. However the full value of the consignment stock must be removed; b) deduct the cost of sales of all overseas sales. This is calculated by deducting a mean 22% mark up from the value of the overseas sale of EUR9,139,713; c) this produces a reliable figure for the cost of the local sales; d) apply the mark-up on local sales to the figure produced in c); e) this produces a figure for deemed local sales; f) compare this to actual declared sales to determine any over/under declaration. We have produced workings on this basis of the above-*

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<sup>33</sup> Fol. 157 sa' 163 ta' l-atti proċesswali tar-Rikors fl-ismijiet "XXXCo. Ltd. v. Kummissarju tat-Taxxa fuq il-Valur Miżjud" Rik. Nru. 91/12.

*explained methodology, including the adjustment to the mark-up on local sales explained in point B above. These are presented on Page 5.*

It-Tribunal huwa tal-fehma li l-mod kif għamel il-kalkoli tiegħu l-Kummissarju tat-Taxxi, partikolarment dawk li wasslu għall-konklużjoni 2 fir-Review Report 2, huma għal kollox korretti u fid-dawl ta' dak kollu iktar 'l fuq osservat jiġi ribadit li l-mark up għal *foreign sales* u l-mark up għal *local sales* korretti huma dawk bażati fuq ir-rati ta' kambju maħruġa mill-Bank Ċentrali ta' Malta u mhux dawk adottati mis-soċjetà Rikorrenti fl-accounts tagħha u li ma għandu jkun hemm l-ebda aġġustament fir-rigward ta' l-hekk imsejja oġġetti *on congisnment*.

Fid-dawl ta' dan għalhekk it-Tribunal jirribadixxi li hija dovuta mis-soċjetà Rikorrenti taxxa ulterjuri fuq il-perijodi ta' taxxa 01.08.04-31.01.10 fl-ammont komplessiv ta' €66,690.53, naturalment flimkien ma' dan l-ammont għandhom jiżdiedu t-taxxi amministrattivi w imghaxijiet dovuti ai termini tal-Liġi. Minn dan is-segwi għalhekk li l-istimi maħruġa mill-Kummissarju tat-Taxxa fuq il-Valur Miżjud għall-perijodi ta' taxxa 01.08.04-31.10.04, 01.11.04-31.01.05, 01.02.05-30.04.05, 01.05.05-31.07.05, 01.08.05-31.10.05, 01.11.05-31.01.06, 01.02.06-30.04.06, 01.05.06-31.07.06, 01.08.06-31.10.06, 01.11.06-31.01.07, 01.02.07-30.04.07, 01.05.07-31.07.07, 01.08.07-31.10.07, 01.11.07-31.12.07, 01.01.08-31.01.08, 01.02.08-30.04.08, 01.05.08-31.07.08, 01.08.08-31.10.08, 01.11.08-31.01.09, 01.02.09-30.04.09, 01.05.09-31.07.09, 01.08.09-31.10.09 u 01.11.09-31.01.10 għandhom jiġu debitament imnaqqsa biex jirriflettu r-riduzzjoni fil-valur tat-taxxa dovuta mis-soċjetà Rikorrenti.

In kwantu rigwarda l-imghaxijiet però t-Tribunal iqis li jkun ġust u ekwu li tali imghaxijiet dovuti ai termini tal-Liġi jkunu sospizi u b'hekk ma jiddekorru tul is-segweni perijodi: mit-18 ta' Mejju 2011 sa' 12 ta' Settembru 2012, ossia bejn li s-soċjetà Rikorrenti pprezentat ir-Rikorsi tagħha quddiem il-Bord ta' l-Appelli dwar it-Taxxa fuq il-Valur Miżjud u l-ewwel seduta miżmuma quddiem dan it-Tribunal; mis-16 ta' April 2013 u l-25 ta' Frar 2015, iż-żmien li ddekorra sakemm ġie deċiż l-appell tal-Kummissarju tat-Taxxi mid-Digriet ta' dan it-Tribunal tas-16 ta' April 2013; u mill-5 ta' Dicembru 2017 sad-data ta' din is-sentenza, it-terminu li lahaq iddekorra mid-data ta' l-aħħar seduta effettiva quddiem it-Tribunal sakemm effettivament ingħatat din id-deċiżjoni.

In fine t-Tribunal josserva li għalkemm fir-Rikorsi promoturi s-soċjetà Rikorrenti tikkontendi wkoll li *the VAT Dept. did not give up a fair hearing at investigation stage*, minn eżami akkurata tal-provi kollha prodotti, inklużi u b'maġġor riljiev il-files esebiti mill-Kummissarju tat-Taxxi indikati bħala Copy of VAT File 1228-4035 Part 1(A), 1(B), 2(A) u 2(B), dan l-aggravju tas-soċjetà Rikorrenti ma jsib assolutament l-ebda sostenn u jirrizulta għal kollox ingustifikat u bħala tali ma jisthoqqux li jiġi milqugħ.

Għal dawn ir-raġunijiet it-Tribunal jaqta' u jiddeċiedi billi filwaqt li jiċhad it-talba tas-soċjetà Rikorrenti għall-revoka u kancellament *in toto* ta' l-istimi maħruġa fil-konfront tagħha mill-Kummissarju tat-Taxxa fuq il-Valur Miżjud għall-perijodi ta' taxxa 01.08.04-31.10.04, 01.11.04-31.01.05, 01.02.05-30.04.05, 01.05.05-31.07.05, 01.08.05-31.10.05, 01.11.05-31.01.06, 01.02.06-30.04.06, 01.05.06-31.07.06,

01.08.06-31.10.06, 01.11.06-31.01.07, 01.02.07-30.04.07, 01.05.07-31.07.07,  
01.08.07-31.10.07, 01.11.07-31.12.07, 01.01.08-31.01.08, 01.02.08-30.04.08,  
01.05.08-31.07.08, 01.08.08-31.10.08, 01.11.08-31.01.09, 01.02.09-30.04.09,  
01.05.09-31.07.09, 01.08.09-31.10.09 u 01.11.09-31.01.10, jordna minflok li l-  
imsemmija stimi jiġu riveduti b'dana li t-taxxa komplessiva dovuta mis-soċjetà  
Rikorrenti għall-perijodi ta' taxxa in kwistjoni tonqos għall-valur komplessiv ta'  
€66,690.53.

Għandhom jiġu imposti wkoll il-muli amministrattivi w imghaxijiet dovuti ai termini  
tal-Liġi b'dana però li għal dak li jirrigwarda l-imghaxijiet dawn ma għandhomx  
jiddekorru tul il-perijodi hawn indikati: mit-18 ta' Mejju 2011 sa' 12 ta' Settembru  
2012; mis-16 ta' April 2013 u l-25 ta' Frar 2015; u mill-5 ta' Diċembru 2017 sad-data  
ta' din is-sentenza.

L-ispejjez ta' dawn il-proċeduri għandhom jiġu sopportati in kwantu għal 7/8 mis-  
soċjetà Rikorrenti u 1/8 mill-Kummissarju tat-Taxxi.

Ai termini tal-Partita 2(4) tad-Disa' Skeda tal-Kap.406 tal-Liġijiet ta' Malta, din id-  
deċiżjoni għandha tiġi komunikata lis-soċjetà Rikorrenti.

**MAĠISTRAT**

**DEPUTAT REĠISTRATUR**