

Is the issuance of guidelines, explanations or instructions by the Commissioner for Revenue consistent with Maltese legal theory?

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In this article, Dr **Gianluca Barbieri** analyses the issuance of guidelines, explanations or instructions by the Commissioner for Revenue and their consistency with classical Maltese legal theory.

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By virtue of Act II of 2003, the Income Tax Act¹ conferred the power to the Commissioner of Inland Revenue to issue guidelines, explanations, or instructions (hereinafter: “documents”). In recent history, this provision was replicated in the Commissioner for Revenue Act², Value Added Tax Act³ and the Duty on Documents and Transfers Act⁴ through Act XIII of 2015. This latter enactment has sought to further streamline the operations of the unified office of the Commissioner for Revenue following the statutory merger in 2014.

The Commissioner for Revenue has resorted to issue several documents in recent years which have now been made widely available on the website of the Commissioner for Revenue. These documents, which are largely sought by tax professionals, have become a means through which clarity is achieved in both the interpretation and practical application of the law.⁵ However, these documents have also allowed the Commissioner for Revenue to adduce legal force to a single legal interpretation, which has arguably been one of the pitfalls in the development of domestic tax jurisprudence.

Therefore, my contention in this article is such that these documents go further than mere horizontal rulings and arguably, they are repugnant to classical Maltese legal theory. At this juncture, it is important to state that this article does not refer to the FAQs issued on the Commissioner’s website which are meant to educate taxpayers. Instead, I will discuss the previously mentioned documents which, all things being equal, have allowed for more legal difficulties to come into sharper focus. In this regard, I would like to discuss four areas which posit areas for concern:

Firstly, a dichotomy in these documents blurs the divide between doctrinal interpretative tools and supplements to the law. On the one hand, interpretation refers to the examination of a principle or provision of law with the purpose of ascertaining its meaning and/or applicability regarding a given set of facts. Supplement of law, on the other hand comes in only when there is a gap in the law, a vacuum which is not provided for in any way. These documents seem to present us with a hybrid of the two, since they present the reader with indispensable information in the absence of which the law cannot be applied. This situation detracts from classical Maltese legal theory, where

¹ Income Tax Act, Chapter 123 of the Laws of Malta.

² Commissioner for Revenue Act, Chapter 517 of the Laws of Malta.

³ Value Added Tax Act, Chapter 406 of the Laws of Malta.

⁴ Duty on Documents and Transfers Act, Chapter 364 of the Laws of Malta.

⁵ ‘Legal and Technical’ (*Office of the Commissioner for Revenue*) <<https://cfr.gov.mt/en/inlandrevenue/legal-technical/Pages/Legal-Technical.aspx>> accessed 24 October 2020.

it is presumed that the law in and of itself already presents the interpreter with a multitude of general principles, which cover in some way or another for all possible cases.

Secondly, the most apt characterisation for such documents would be that of secondary legislation. The thought of secondary legislation springs to mind Article 8 of the Interpretation Act⁶. Indeed, we see that such documents have resembling characteristics to secondary legislation outside of parliamentary scrutiny as envisioned in Article 11(1) of the Interpretation Act⁷. In this regard, it may seem that Parliament has irrevocably devolved legislative power to the Commissioner for Revenue or his authorised representative. If this understanding is correct, this article raises constitutional concerns on the accountability of this devolved legislative practice.

Transcending these issues is the third aspect pertaining to arbitrariness and discretion which is found in the application of these provisions. The enabling acts allowing for these documents do not give discretion to the Commissioner to carve out documents from the scope of these provisions. Yet, we see that the Commissioner has taken different approaches. Indeed, there are documents where it is clearly stated that such documents are issued on the basis of the enabling act; in others it is silent, and further still, in others it is clearly stated that these documents only serve as guidance and should not be seen to be legally binding. This arbitrariness is also seen in the application of Article 8 of the Commissioner for Revenue Act⁸. This provision requires that every document issued by the Commissioner for Revenue is to be signed by himself or by an authorised subordinate. Indeed, there are different approaches currently being practised, with the majority not including a signature therein.

The final issue is the duplication of enabling acts leading to risks of inconsistencies in the law. Notwithstanding the statutory merger into a single office of the Commissioner for Revenue, the revenue acts have to the large part remained uncodified with separate revenue departments. However, it is generally understood that the provisions in the Commissioner for Revenue Act⁹ would constitute the general law whilst the laws in the separate revenue acts constitute the special laws (*lex specialis derogat lex generalis*). In some cases, the enabling act in the special law has been extended even further through subsidiary legislation¹⁰. Therefore, the Commissioner needs to determine the applicability of the general law which has a wider scope (e.g. electronic communication) and a narrow scope in other situations. In other

⁶ Interpretation Act, Chapter 249 of the Laws of Malta.

⁷ *ibid.*

⁸ See (n 2).

⁹ *ibid.*

¹⁰ 'Cooperation with other Jurisdiction on Tax Matters Regulations', S.L. 123.127, Article 23 and Article 36; 'Guidelines in relation to the Anti-Tax Avoidance Directives. Implementation Regulations', S.L. 123.187, Article 4.

situations, we may have to rely on the *lex posteriori derogat lex priori* principle as is the case of dead letter, such as Article 58(b) of the Income Tax Management Act¹¹, which only sanctions electronic communications regulations for income tax purposes through legal notices.

In view of these difficulties, one can understand that there is an element of dissonance which risks uncertainty down the road. This is not to say that the issuance of documents by the Commissioner should be discarded. On the contrary, these documents provide interesting sources of law which as much as possible should be codified and disseminated. However, their legal binding nature on the taxpayer may foreseeably pose difficulties from a juridical point of view. In this regard, the Office of the Commissioner for Revenue needs to ensure the streamlining and correct usage of such documents. This includes a better understanding of what needs to be included in subsidiary legislation as opposed to what should remain in the realm of soft law. It goes without saying, this process should be coupled with more administrative transparency to ensure that any proposed source of law receives wider scrutiny, especially as tax legislation is becoming more complex and prescriptive.

¹¹ Income Tax Management Act, Chapter 372 of the Laws of Malta.

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