

JURISPRUDENTIAL ACCENTS ON THE NOTION OF ECONOMIC ACTIVITY IN VALUE ADDED TAX MATTER

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Abstract

Value Add Tax is the tax with the deepest harmonization level on the European single market. A crucial role in determining the unity of the legislative national formulas on Value Added Tax came to the Court of Justice of the European Union. The present study is a synthesis of these jurisprudential solutions with the aim of amply defining the notion in cause.

Key-words: *Value Added Tax, Court of Justice of the European Union, economic activity, definition, exemptions.*

Introduction

Value Added Tax is the result of a European construction, with intense jurisprudential interference. The Court of Justice of the European Union has been called upon to specify the notions of legal text. The Court has ruled frequently on the fundament of the Value Added Tax, the concept of economic activity. The Court identified several nuances to the cases presented by the national fiscal jurisdiction, and by doing so; it consolidated the concept in question. This case law brings contractual and factual criteria to the legal definition and extends the concept to its limits, underlining its true mining.

A. General provisions

The legal definition of the taxable persons resides in article 9 from Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax¹. The text stipulates: “Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income there from on a continuing basis shall in particular be regarded as an economic activity.

¹ Precedent regulation has found in the article 4 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment: 1. “Taxable person” shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity. 2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

The current definition is the result of systemic evolution, through jurisprudential intervention. The criteria for determining the taxable person, on which reside the current definition are: conducting an economic activity, on an independent manner and on a continuing basis.

B. The definition of economic activity

The definition in par. 2, enumerates a series of activities with economic nature: production, trade, services, mining, agriculture and professions². ECJ jurisprudence emphasized since early stages the onerous nature of the Value Added Tax taxable activity, *which is due only if the service is provided for a fee (...) so there must be a direct link between the services provided and the consideration received*³.

The Court held that it is not a taxable person, that who performs in all cases free services (consulting foreign markets) to various merchants⁴; nor the person who holds bonds, as this activity is a simple investment which does not go further than mere management assets and the generated interest, if there is such interest, cannot be regarded as remuneration for a business⁵. As to the quantification of the counterparty, it can be expressed in money or in kind, provided that the price is determinable in monetary form⁶.

An economic activity consists also in exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis. Providing road infrastructure for road tax represents a paid service, *there is a direct and necessary link between the service ensured and the consideration received*⁷.

C. Specific jurisprudential nuances

On jurisprudential basis, some specific conditions and nuances can be underlined. Generically, nonprofit activities do not fall within the definition of economic activity⁸. However annual subscriptions of members of sports associations may represent counterparty under the condition of a direct link to service provided to those members⁹. An external advertising activity conducted by the organization of a political party is not economic activity¹⁰.

The preparatory activities fall within the definition of economic activity, determining the collection of Value Added Tax. Such is the case of assets acquisitions (a building under construction for later renting), which will take part of future taxable operations¹¹. The contract (for renting a space), forwards fulfilled, although the economic activity which used its juridical effects ceased, constitutes an economic activity¹². The activity of an association which has as only purpose to prepare the activities of a capital company is consisting with the

² For details, please see: L. Țătu, M. Brăgaru, H. Sasu, *Impozite, taxe, contribuții*, ed. C.H. Beck, București, 2011.

³ ECJ, C-154/80, *Staatssecretaris van Financiën v. “Coöperatieve Aardappelenbewaarplaats GA”*.

⁴ ECJ, C-89/81, *Staatssecretaris van Financiën v. Hong-Kong Trade Development Council*.

⁵ ECJ, C-80/95, *Harnas & Helm CV v. Staatssecretaris van Financiën*. 330/95.

⁶ ECJ, C-330/95, *Goldsmiths (Jewellers) Ltd v. Comisiaers of Customs & Excise*; ECJ, C- 409/99, *Metropol Treuhand WirtschaftsstreuhandgmbH v. Finanzlandesdirektion für Steiermark et Michael Stadler v. Finanzlandesdirektion für Vorarlberg*.

⁷ ECJ, C-358/97, *Commission of the European Communities v Ireland*, ECJ, C-359/97 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, ECJ, C-408/97, *Commission of the European Communities v Kingdom of the Netherlands*.

⁸ ECJ, C-150/99, *Svenska staten v. Stockholm Lindöpark AB et Stockholm Lindöpark AB v. Svenska staten*.

⁹ ECJ, C-174/00, *Kennemer Golf & Country Club v. Staatssecretaris van Financiën*.

¹⁰ ECJ, C-267/08, *SPÖ Landesorganisation Kärnten v. Finanzamt Klagenfurt*.

¹¹ ECJ, C-268/83, *D.A. Rompelman et E.A. Rompelman-Van Deelen v. Minister van Financiën*.

¹² ECJ, C-32/03, *I/S Fini H v. Skatteministeriet*.

definition of economic activity¹³. Instead, the contribution to the establishment of a legal entity or the mere holding of shares in the company does not constitute an economic activity¹⁴.

The economic activity is a direct activity with involvement in economic decisions. Simple acts of ownership executed by a holding company do not fall within the definition of economic activity¹⁵; if services are provided by the holding company to the subsidiary then, the activity has economic content¹⁶. *Per a contrario*, buying and selling shares or other securities by an administrator during a charity asset management is an economic activity, because, similar to a private investor, it seeks to maximize dividend or income, even if for non-commercial goals¹⁷. It is also an economic activity the provision of a service consisting especially in eliminating the flow and the risk that the debt will not be collected¹⁸.

An economic activity is the assignment by the parent of all the shares of wholly owned subsidiaries¹⁹. In this case, the nature and purpose of the operation are economic.

A secondary activity, such as setting up a pension fund for employees is an economic activity²⁰.

The economic activity is based on a legal act, resulting from an agreement of the participants to bilateral, onerous report²¹, even if it lacks enforcement warranty as when the supplier agrees to provide those services on moral basis²². The Court excluded from Value Added Tax field, a transaction in which the trustee does not have a contractual relationship with none of the parties at the conclusion of the credit agreement which contributed²³.

The economic activity is carried out only on the basis of legal relations that determine reciprocal performances²⁴; the condition is not met in the case of musical activities in public space, for which there is no provision for compensation, even if the artists receive donations from the public. Free disposal of assets purchased with deducted Value Added Tax, is a paid delivery²⁵, as long as any part of the price paid is not covered by the voucher upon which goods are offered. Contractual bond is directly related to the onerous and reciprocal mechanism of Value Added Tax. An activity is economic only if delivered under price condition. The lack of any contractual basis empties the relation of any economic purpose, as the parties do not prevail of any contractual means to ensure execution. Consequentially, the counter part is no longer a certainty, but a probability. Or this probable remuneration is contradictory to the neutral purpose of Value Added Tax. The economic activity does not necessarily involve multiple acts²⁶ of execution; a physical person's single operation consisting of an asset lease to an association whose member and representative that individual is,

¹³ ECJ, C-137/02, Finanzamt Offenbach am Main-Land v. Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR.

¹⁴ ECJ, Cauzele reunite, Gemeente Leusden (C-487/01) et Holin Groep BV cs (C-7/02) v. Staatssecretaris van Financiën.

¹⁵ ECJ, C-60/90, Polysar Investments Netherlands BV v. Inspecteur der Invoerrechten en Accijnzen.

¹⁶ ECJ, C-16/00, Cibo Participations SA v. Directeur régional des impôts du Nord-Pas-de-Calais; C-496/11, Portugal Telecom SGPS SA v. Fazenda Pública

¹⁷ ECJ, C-155/94, Wellcome Trust Ltd v. Comisiaers of Customs and Excise.

¹⁸ ECJ, C-305/01, Finanzamt Groß-Gerau v. MKG-Kraftfahrzeuge-Factoring GmbH.

¹⁹ ECJ, C-29/08, Skatteverket v. AB SKF.

²⁰ ECJ, C 26/12, Fiscale eenheid PPG Holdings BV cs te Hoogezand v. Inspecteur van de Belastingdienst/Noord/kantoor Groningen

²¹ ECJ, C-16/93, R. J. Tolsma v. Inspecteur der Omzetbelasting Leeuwarden.

²² ECJ, C-498/99, Town & County Factors Ltd v. Comisiaers of Customs & Excise.

²³ ECJ, C-453/05, Volker Ludwig v. Finanzamt Luckenwalde.

²⁴ ECJ, C-291/92, R. J. Tolsma v. Inspecteur der Omzetbelasting Leeuwarden.

²⁵ ECJ, C-48/97, Kuwait Petroleum (GB) Ltd v. Comisiaers of Customs & Excise.

²⁶ Pentru detalii, a se vedea: M. Collet, *Droit Fiscal*, Ed. Presse Universitarire de France, Paris, 2007.

represents an economic activity²⁷. Alternatively, however, the Court reveals the nature of independency, *stressing that leasing activity does not that depends neither on the management nor on the association's representatives.*

An internal activity of operating a building by installing a photovoltaic system to supply electricity consumption even below that building's necessities constitutes of an economic activity²⁸ as long as power is supplied to the grid in exchange for a continuing income. So, a third condition resulting from the case law is the continuous nature of the activity and of the revenue it ensures.

Force majeure does not change the economic nature of the activity; supplying with timber by an individual in order to cover the consequences of an event of force majeure part of the exploitation must be to be regarded as 'economic activity'²⁹, because these deliveries are performed to obtaining income there from on a continuing basis.

D. Illegal activities

The principle of fiscal neutrality does not differentiate between legal and illegal operations *unless, due to the particularities of certain products, the economic competition between the legal and illegal is excluded entirely*³⁰. Illegal export of goods covered by the Directive should be treated in the same manner as legal export of the same goods; *organizing illegal gambling*³¹ *or operations involving counterfeit products - perfumes*³² *or smuggled goods*³³ - *alcohol is concurrent with the principle of fiscal neutrality laws prohibiting activities to be treated differently.*

This position was refined by the case law; the Court held primarily on Value Added Tax for trading illicit materials. The Court decided that the importation of illicit drugs³⁴, qualified as a criminal act, is not an economic activity for Value Added Tax purposes, *as there are no economic channels strictly monitored by the competent authorities to be used for medical or scientific purposes*³⁵. Unlawful delivery of amphetamines is not subject to Value Added Tax³⁶, nor of any products that contain cannabis substances³⁷; could not collect Value Added Tax for the import of banknotes or counterfeit coins³⁸. The criterion that emerges from this jurisprudence allowing to tax illegal activities is the existence of a state of competition between legal and illegal domains.

On the other hand, legitimate transactions as nature (providing of cafe places) used for illicit activities (drug use) are taxable transactions as they are carried out in a lawful economic activities³⁹.

D. Public institutions activities

Involving an element of public authority in the activity does not exclude it from the scope of economic activities; such is the case of notaries and bailiffs, which are providing services to third parties in exchange for fees⁴⁰.

²⁷ ECJ, C-23/98, Staatssecretaris van Financiën v. J. Heerma.

²⁸ ECJ, C 219/12, Finanzamt Freistadt Rohrbach Urfahr v. Unabhängiger Finanzsenat Außenstelle Linz.

²⁹ ECJ, C-263/11, Ainārs Rēdlihs v. Valsts ieņēmumu dienests.

³⁰ ECJ, C-111/92, Wilfried Lange v. Finanzamt Fürstfeldbruck.

³¹ ECJ, C-283/95, Karlheinz Fischer v. Finanzamt Donaueschingen.

³² ECJ, C-3/97, Criminal proceeding v. John Charles Goodwin and Edward Thomas Unstead.

³³ ECJ, C-455/98, Tullihallitus v. Kaupo Salumets et autres.

³⁴ For details, please see: S. Deleanu, G. Fábíán, C. F. Costaş, B. Ioniţă, *Curtea de Justiție Europeană. Hotărâri comentate*, Wolters-Kluwer Publishing House, Bucharest, 2007, p. 338-342.

³⁵ ECJ, C-294/82, Senta Einberger v. Hauptzollamt Freiburg.

³⁶ ECJ, C-269/86, W. J. R. Mol v. Inspecteur der Invoerrechten en Accijnzen.

³⁷ ECJ, C-289/86, Vereniging Happy Family Rustenburgerstraat v. Inspecteur der Omzetbelasting.

³⁸ ECJ, C-343/89, Max Witzemann v. Hauptzollamt München-Mitte.

³⁹ ECJ, C-158/98, Staatssecretaris van Financiën v. Coffeeshop "Siberië" vof.

Equally, a significant problem is the quality of taxable person of public entities. The rule is that public institutions are not taxable for activities that are conducted as public authorities, even if such activities shall collect dues, fees, royalties or other charges. The exception is that activity which produces distortion of competition; activities expressly indicated by law (telecommunications, water supply, gas, electricity, heat, transport of goods and people, trade fairs and exhibitions activities, activities of travel agencies, etc.).

Related to the concept of competitive distortion⁴¹, the public entity that acts as a trader in areas not related to the exercise of public authority, and could be space for private action cannot be exempt from Value Added Tax, as his services would advantage over competitors such as the Value Added Tax due. If the activities are carried out in the same legal conditions as the private operators, then they exceed the scope of authority and are taxable transactions.

In this regard, the Supreme Court of Justice, in tax matter, applied these dispositions in Decision no. 9094/2004: *In the case of security contracts for private businesses there is a competitive distortion as not including Value Added Tax fee is prices charged by the Public Guardians creates an economic disadvantage to other providers of security and protection services.*

Equally, ECJ case law references in this matter: the activities carried out in the same conditions as private operators are taxable activities⁴²; collecting money for the use of public roads is taxable activity⁴³. Rather, legal aid services of public offices, partially paid users are not taxable services as remuneration has little value and there is a direct link between services and the consideration offered⁴⁴, the allocation of frequencies is not an economic activity, while control is limited to the actions⁴⁵.

Conclusions

The challenges that a complex tax, such as Value Added Tax brought before the Court are extremely various. The positive effect is the continuous evolution of the notions as they refine. In Value Added Tax matter, this evolution transformed the legal ground and its premises. Therefore, the Court plays a vital and be energetic role in adapting a European tax institution to the various hypotheses in business practice in all state members. The present study underlined several conditions imposed by the case law to the legal definition. Further evolution of the jurisprudence, will only bring us closer to a more accurate definition.

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⁴⁰ ECJ, C-235/85, Commission of the European Communities v Kingdom of the Netherlands.

⁴¹ ECJ, C-288/07, Comisiaers of Her Majesty's Revenue & Customs v. Isle of Wight Council et autres.

⁴² ECJ, C-231/87, Ufficio distrettuale delle imposte dirette di Fiorenzuola d'Arda and others v. Comune di Carpaneto Piacentino and others.

⁴³ ECJ, C-359/97, preci.t.

⁴⁴ ECJ, C-246/08, Comisia des Communautés européennes v. République de Finlande.

⁴⁵ ECJ, C-284/04, T-Mobile Austria GmbH et autres v. Republik Österreich.