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Organisational unit without legal personality as a VAT taxable person

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1. Introduction

Within the framework of the VAT tax system, the definition of taxable personality takes on a special meaning as this status determines the obligation to pay the tax and the related right to deduct the tax that is paid when purchasing goods and services. The passive subjective scope of taxation for VAT purposes is regulated under Article 9–13 contained in Title III of Directive 2006/112/EC of the Council of 28 November 2006 on the common system of value added tax (OJEU L 2006, No. 347, item 1, as amended[1]).

The term 'taxable person' in the context of VAT is an autonomous concept of EU law.[2] Thus, this term should be applied

[1] Hereinafter cited as Directive 2006/112.

[2] Cf. judgments of the Court of Justice: Commission/Sweden of 25 April 2013 in case C480/10, EU:C:2013:263, point 34; Skandia America (USA), filial Sverige of 17 September 2014 in case C7/13, EU:C:2014:2225, item 23.

uniformly in all European Union countries. To a large extent, this concept has been elaborated in the case law of the Court of Justice of the European Union. Its jurisprudence focused primarily on the interpretation of Article 9(1) of the VAT Directive[3] according to which a "taxable person shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity". This demonstrates that the subjective taxability in terms of VAT is determined by independent activity. However, due to the very wide scope of the term 'economic activity', the concept of a taxable person must also be interpreted broadly. This notion covers not only natural and legal persons but also organisational units without legal personality.[4]

While there is no doubt that all natural persons and all legal persons are VAT-taxable, there are doubts as to whether all organisational units, regardless of their legal status, could also be considered as taxpayers of this tax. The latter issue has been less frequently considered by the Court of Justice of the European Union (CJEU). Indeed, CJEU case law does not seem to establish all of the criteria on the bases of which it could be decided each time and without any doubts, whether a specific organisational unit without legal personality possesses the status of a VAT taxpayer.

In this article, the authors attempt to indicate which criteria should be taken into account to assess whether the status of a VAT taxpayer can be assigned to a specific organisational unit without legal personality. To this end, the case law relating to the concept of independent activity will first be analysed. Then, the slim body of case law in which the CJEU ruled on the question of subjective taxability of organisational units without legal personality will be reviewed. And finally, an approach will be proposed on the base of which it would be possible to assess the VAT taxability of such units.

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[3] Previously Art. 4(1) of the Council Directive.

[4] Cf. judgments of the Court of Justice: Staatssecretaris van Financiën v. J. Heerma of 27 January 2000 in case C23/98, EU:C:2000:46; Wrocław Commune of 29 September 2015 in case C276/14, EU:C:2015:635, item 28.

2. VAT taxable personality through the prism of the case law of the CJEU

It follows from the case law of the CJEU that the definition of a taxable person is created on the basis of the concept of independent economic activity. Therefore, in order to determine whether a particular entity is a taxable person within the meaning of that tax, it is necessary to examine whether the entity is engaged in an economic activity and whether its activities are carried out independently.

The definition of 'economic activity' is set out in Article 9(2) of Directive 2006/112. It covers all activities of producers, traders, and persons supplying services, in particular the exploitation of tangible or intangible goods in order to obtain income therefrom on a continuing basis.[5] Furthermore, all activities must be of a permanent nature and performed in return for remuneration received by the entity carrying out the transaction.[6] Hence, a person whose activity is provided free of charge, and therefore does not perform taxable activities, cannot be considered a taxable person in terms of value added tax. Only services provided for remuneration are subject to it.[7] This view is consistent with the logic of the common system of value added tax. In this case, the service provider acts as the final consumer and, therefore, his situation cannot be equated with that of an entity carrying out an economic activity.

It was mentioned above that, according to the first sentence of Article 9(1) of Directive 2006/112, the concept of a taxable person is also defined by reference to independent economic activity. Directive 2006/112 itself does not positively define the term "inde-

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[5] Cf. judgments of the Court of Justice of 26 May 2005 in case C465/03 Kretztechnik AG v. Finanzamt Linz, EU:C:2005:320, item 18, and in case Hutchison 3G et al. of 26 June 2007 in case C-369/04, EU:C:2007:382 item 27.

[6] See, for example, the judgment of the court of 13 December 2007 in case C408/06 Landesanstalt für Landwirtschaft v. Franz Götz, EU:C:2007:789, item 18.

[7] Judgment of the Court of Justice of 1 April 1982 in case 89/81 Hong Kong Trade Development Council, EU:C:1982:121.

pendent". However, Article 10 of the Directive contains a negative definition of this term, according to which employees and other persons are excluded from independent economic activities to the extent that they are bound to their employer by a contract of employment or by any other legal ties creating the relationship of employer and employee with regard to working conditions, remuneration and the employer's liability. Hence, this provision could serve to reconstruct the meaning of the term 'independently' only from a positive perspective. The CJEU did so in concluding that, in order for an activity to be considered independent, it is necessary to establish whether an entity is acting for its own benefit and on its own responsibility, whether it freely organises the conditions for performing its work, and collects remuneration constituting its income.[8] The court also indicated that, in order to determine the existence of a relationship of subordination, it is necessary to examine whether the person in question performs its activity in his own name, for its own benefit and on its own responsibility, and whether he bears the economic risk associated with such an activity.[9]

Undoubtedly, according to case law of the CJEU, the criterion of autonomy may be used to assess the subjective taxability of both natural and legal persons under private law as well as organisational units under public law.[10] In the case of examination of tax status of organisational units without legal personality, it is possible to apply independent economic activity criterion. In fact, as the analysis of the case law shows, it is precisely this criterion that has been used by the CJEU to assess the VAT status of organisational units without legal personality, as will be discussed in the next section.

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[8] Cf. e.g. the judgment of the Court of Justice of 23 March 2006 in case C-210/04 FCE Bank plc, EU:C:2006:196.

[9] Cf. e.g. the judgment of the Court of Justice of 25 July 1991, Ayuntamiento de Sevilla, case C-202/90, Rec. p. I-4247, item 6; see also the judgment of 20 March 1987, Commission v. Pays-Bas, case. 235/85, Rec. p. 1471, item 14.

[10] Judgment of 29 September 2015, Wrocław Commune v. the Minister of Finance, case C276/14, ECLI:EU:C:2015:635, item 35.

3. VAT taxable personality of organisational units without legal personality through the prism of the case law of the CJEU

The first case in which the CJEU ruled on the VAT status of an organisational unit without legal personality was the Heerma case.[11] The subject of the dispute in that case was to determine whether the lease of a property by a civil partnership from a partner of that partnership constituted an act subject to VAT under Dutch law. The CJEU held that there was no subordination relationship between J. Heerma and the company's lessee, analogous to that mentioned in Article 4(4) of the Sixth VAT Directive. According to the court, Mr Heerma acted in his own name, for his own benefit and under his own responsibility when leasing the tangible assets to the company, even if he managed the lessor company at the same time. Moreover, the court stated that the Dutch civil law partnership in which J. Heerma was a partner – while having no legal personality – was de facto independent and carried out economic activities independently, so that the partnership was subject to VAT by virtue of its activities.[12] Although partnerships in Dutch law are not legal persons, they, like legal persons, possess de facto independence and carry out business activities on their own account, with the result that the business activity can be attributed to the partnership and not to the partner(s) who carry it out.[13] Furthermore, under Dutch law, a civil law partnership is an entity capable of entering into a valid lease agreement, which provides the legal independence necessary to create a solid formal framework for its eventual financial, economic and organisational

[11] Cf. judgment of the Court of Justice of 27 January 2000 in case C23/98, Staatssecretaris van Financiën v. J. Heerma EU:C:2000:46.

[12] Ibidem, item 17–19.

[13] Ibidem, item 8.

dependency.[14] Hence, in accordance with Article 4 of the Sixth VAT, the company must be considered a taxable person.[15]

The CJEU also considered the tax and legal status of an organisational unit without legal personality in the FCE Bank plc case.[16] In that case, the CJEU analysed the VAT personality of a bank branch that was an organisational unit without legal personality separate from the bank itself. In deciding the case, the CJEU stated: "the interpretation of Article 2(1) and Article 9(1) of the Sixth Council Directive [...] should be made in such a way that a permanent establishment seated in another Member State, which is not legally separate from the company to which it belongs, to which the company provides services, cannot be regarded as a taxable person because it is charged with the costs of providing these services". In its reasoning for this decision, which referred to the judgments in the Tolsma[17] and Krennemer Golf[18] cases, the court pointed out that a supply of services is taxable only if there is a legal relationship between the supplier and the recipient of the services on the basis of which mutual benefits are exchanged.[19] In order to establish, for VAT purposes, that such a legal relationship exists between a non-resident company and one of its branches, it must be examined whether FCE Bank carries out an independent economic activity. For this purpose, it is necessary to examine whether the branch can be deemed independent as a bank, in particular regarding bearing the economic risk associated with

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[14] Opinion of Advocate General Cosmas of 20 May 1999 in case C-23/98, Staatssecretaris van Financiën v. J. Heerma, item 22.

[15] Opinion of Advocate General Cosmas of 20 May 1999 in case C-23/98, Staatssecretaris van Financiën v. J. Heerma, item 18.

[16] Judgment of the Court of Justice of 23 March 2006 in case C-210/04 Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. FCE Bank plc, EU:C:2006:196.

[17] Judgment of the Court of Justice of 3 March 1994 in case C-16/93 R. J. Tolsma v. Inspecteur der Omzetbelasting Leeuwarden, EU:C:1982:80.

[18] Judgment of the Court of Justice of 21 March 2002 in case C-174/00 Kennemer Golf & Country Club v. Staatssecretaris van Financiën, EU:C:2002:200, item 39.

[19] Ibidem, point 34.

its activities.[20] The branch itself does not bear the economic risk associated with the activities of the credit institution, but this risk is borne by the bank as a legal entity and, therefore, is subject to financial stability and solvency controls in its home Member State.[21] Consequently, that branch is dependent on the bank, and they collectively constitute a single taxable person.[22]

Another judgment in which the CJEU examined the tax personality of an organisational unit without legal personality for VAT purposes was issued in the Wrocław Commune case. In this case, the court had to decide whether communal budgetary units being organisationally separate units without separate legal personality have VAT taxpayer status. In this case, the Court of Justice used similar arguments to those in the previously mentioned FCE Bank plc case. Due to the fact that municipal budgetary units are entrusted with activities consisting of the performance of municipal tasks and therefore can carry out activities which have the characteristics of an economic activity within the meaning of the VAT Directive, it considered that they meet the first condition for their recognition as VAT taxable persons. Next, the court took into account the fact that the municipal budgetary units were performing the economic activity in the name and on behalf of the Municipality of Wrocław. Therefore, they were not liable for the damage caused by this activity as this liability was borne solely by the Municipality itself.[23] It also held that they did not bear the economic risk associated with those activities, as they they did not possess their own property, did not generate their own income, and did not bear the costs associated to the activity because the income received was transferred to the budget of the Municipality of Wrocław, and the expenses were covered directly from that budget.[24] Hence, the court held that public law entities, which in the main proceedings were municipal budget units, could not be

[20] Ibidem, point 35.

[21] Ibidem, item 36.

[22] Ibidem, item 37.

[23] Ibidem, item 37.

[24] Ibidem, item 38.

considered VAT taxpayers because they did not meet the criterion of independence.

Finally, the CJEU examined the issue of VAT-taxable personality in the case of Christine Nigl.[25] This case was multifaceted, however, one of the issues considered in the case was whether civil partnerships under Austrian law could be considered to be VAT-taxable.

Pursuant to the Austrian Civil Code, a civil partnership consists of two or more persons who agree, by contract, to pursue a common goal together. Such an entity does not have a legal personality.

In this case, the Court of Justice examined whether these companies independently carried out an economic activity. It therefore analysed whether they performed the activity in their own name, on their own behalf, and under their own responsibility, and whether they bore the economic risk involved.[26] This allowed the court to argue that the fact that two civil partnerships, such as the companies in the main proceedings, separately operate vineyards owned or leased by them (also separately), that each uses almost exclusively its own means of production and employs its own staff, that each has independent dealings with its suppliers, public authorities and, to a certain extent, with its customers, demonstrates that each of these companies carries out activities in its own name, on its own account and under its own responsibility.[27] Therefore, the court concluded that they are in fact VAT taxpayers.

In the foregoing, very synthetic review of the case law it is shown that, the court used uniform criteria taken from Article 9(1) of the VAT Directive to determine whether various unincorporated entities have the status of a VAT taxable person. The court held that it is this provision that defines a VAT taxable person by reference to the characteristics the possession of which determines subjective taxability for VAT purposes. Thus, a taxable person is anyone who independently carries out an economic activity.

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[25] Judgment of the Court of Justice of 12 October 2016 in case C-340/15 Christine Nigl et al. v. Finanzamt Waldviertel, EU:C:2016:764.

[26] Ibidem, item 27.

[27] Ibidem, item 30.

Accordingly, the court first analysed whether such an entity was carrying out an economic activity. It then examined whether such activity was carried out by that entity independently. In the case of bodies governed by public law, the court additionally examined, as a third step, whether that body was exempt from taxation under Article 13(1) of the VAT Directive.

The condition of conducting an economic activity independently is negatively defined in Article 10 of the VAT Directive. According to this article, the activity is not carried out independently. Thus, it does not give rise to VAT insofar as there is a relationship of subordination between a specific person and their employer that is comparable to that established by an employment contract. From this provision, the Court of Justice has derived three criteria regarding the relationship of subordination that relate to the existence of a situation of dependence in terms of working conditions, terms of remuneration, and liability.[28] It is on the basis of these criteria that the Court of Justice has identified the circumstances to be taken into account when assessing the independence of an economic activity. These were indicated, inter alia, in the van der Steen judgment.[29] These circumstances include the pursuit of an activity by a person in his own name, for his own benefit, and on his own responsibility as well as the situation in which the person bears the economic risk of the activity.[30]

In order to establish the independence of the activity of public entities, the court took into account the absence of any ties of hierarchical subordination of entities that do form part of the public administration structure to public authorities and the fact that these entities act on their own behalf and on their own responsi-

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[28] Opinion of Advocate General P. Léger in case of FCE Bank, C210/04, EU:C:2005:582, item 39.

[29] Judgment of the Court of Justice of 18 October 2007 in case C355/06 J. A. van der Steen v. Inspecteur van de Belastingdienst Utrecht-Gooi/kantoor Utrecht, EU:C:2007:615.

[30] Judgment of the Court of Justice of 18 October 2007 in case C355/06 J. A. van der Steen v. Inspecteur van de Belastingdienst Utrecht-Gooi/kantoor Utrecht, EU:C:2007:615, item 21–25, and Judgment of the Court of Justice of 27 January 2000 in case C23/98, Staatssecretaris van Financiën v. J. Heerma EU:C:2000:46, item18.

bility, that they freely determine the rules for the performance of work, and that they themselves collect their basic remuneration, which makes up their income.[31]

In the opinion of the Court, the independence of the business activity is evidenced by the fact that the entity independently secures and organises, within the limits of the law, the personal and material resources necessary to carry out the activity and that it bears the liability arising from the legal relations established by it in the course of the activity and for damages caused to third parties in the course of the activity.[32] On the other hand, the economic risk premise was discussed in the FCE Bank judgment,[33] in which the Court of Justice held that a bank branch was not independent as a bank because, lacking initial capital, it did not bear the economic risks of its own activities. Consequently, the bank branch could not be classified as a taxable person for VAT.[34]

4. Criticism of the CJEU approach to VAT taxable personality

In order to establish an in-depth assessment of the CJEU jurisprudence on the VAT taxation of organisational units without legal personality, it is necessary to provide a definition of legal capacity in tax legal theory.

The subjective aspect of the object of the taxation has been the focus of tax law jurisprudence since its very beginning. Early

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[31] Judgment of the Court of Justice of 26 March 1987 in case 235/85 Commission/Netherlands, EU:C:1987:161, item 14 and opinion of Advocate General P. Léger in case of FCE Bank, C210/04, EU:C:2005:582, item 40.

[32] Judgment of the Court of Justice of 25 July 1991 in case C-202/90 Ayuntamiento de Sevilla, EU:C:1991:332, item 11–15.

[33] Judgment of the Court of Justice of 23 March 2006 in case C-210/04 Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. FCE Bank plc, EU:C:2006:196.

[34] Judgment of the Court of Justice of 23 March 2006 in case C-210/04 Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. FCE Bank plc, EU:C:2006:196, item 35–37, and opinion of Advocate General P. Léger in case of FCE Bank, C210/04, EU:C:2005:582, item 46.

writings on this subject include the work of Albert Hensel who analysed the concept referred to as 'attribution' or 'imputation' (*Zurechnung*).

Analysing the provisions of positive tax law, Hensel noted that some of them characteristically attribute objects of taxation to taxed entities. As an example, he indicated legal provisions that required recognizing any person who owned an item in his own name as the owner for tax purposes. Another example of a similar type of phenomenon that he referred to was the recognition of a group of people as a taxpayer by attributing income to the group rather than to its individual members. He referred to the essence of this type of regulation as 'attribution'. Based on such observations, he concluded that attribution is a fiscal fact.[35]

As Hensel pointed out, the regulation of the objective and subjective elements in the law is not sufficient to create a tax obligation. He explained: "if it is decided that A is a person liable to pay wealth tax, and there is a certain mass of goods that may be considered as property within the meaning of wealth tax, it is still necessary to clarify what relations must exist between A and property X so that the property could be attributed to this person through the prism of taxation".[36] Further, he went on to state that, in most cases, this attribution is made implicitly. On the other hand, in some cases, an explicit legal regulation is necessary to regulate.[37]

This issue was examined more comprehensively by Dino Jarach. As he pointed out, the obligation to pay the tax arises as a result of an event regulated by the hypothesis of the tax legislation. Its occurrence is the legal cause of the tax. It is also an indicator of economic ability to pay the tax. This ability to pay the tax manifests itself in the entity in which the event took place. Hence, under the tax regulations, the taxpayer is the person who is directly related to this event. Thus, the taxpayer is the entity that is obligated to pay

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[35] Cf. A. Hensel, *Derecho tributario*, Madrid 2005, pp. 199–200.

[36] Ibidem, p. 157.

[37] Ibidem.

the tax due to the fact that an event regulated in the tax regulation has taken place.[38]

The normative criteria for this attribution depend on the nature of the event itself, the occurrence of which gives rise to the obligation to pay the tax.[39] In the tax provisions, the effect of attribution is achieved through by using the words 'do' or 'have'.[40] These are verbs that describe activities or situations. They therefore constitute predicates, i.e., sentence-forming functors, that determine the relationship between the taxable person and the subject of the tax relevant in the field of tax law. When the provisions of tax law use such phrases in sentences in which a specific person is indicated as the taxpayer, in order to link it with the subject of the tax which, in this case, will be an object in the sentence, the attribution of this subject to the taxable person will only occur when a specific entity can be placed in the situation described by the object.

Therefore, it should be concluded that tax obligation requires one condition to be met, specifically, an event specified in the tax regulation must have occur. Obviously, this event must occur regarding a specific person who consequently becomes a taxable person. In order to be able to conclude that a legal relationship within the meaning of tax law to which a specific person is a party has been created, it is necessary to ascertain that this person is in the situation specified in the hypothesis of the tax regulation. In other words, it is necessary to attribute a taxable event to that person. These attribution criteria make it possible to establish whether a taxable event has occurred in relation to a specific person. Thus, making it possible to attribute the object of taxation to be assigned to that person, they are always normative in nature.

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[38] D. Jarach, *El hecho imponible. Teoria general del Derecho tributario sustantivo*, Buenos Aires 1982, p. 168.

[39] Ibidem, p. 169. See also F. Sainz de Bujanda, *Concepto del hecho imponible*, in: *Hacienda y Derecho*, Vol. 4, Madrid 1966, pp. 332, 390–399.

[40] See for example C.M. López Espadafor, *Nuevos aspectos en el elemento subjectivo del hecho imponible*, "Civitas. Revista Española de Derecho Financiero" 2011, No. 150, p. 372.

These conclusions are part of the canons of tax law science and are not currently undoubted.[41] The justifications for these findings on the personality of the taxpayer can also be found in legal theory's consideration of the legal norm, which is a theoretical tool used by lawyers in the analysis of positive law.

Disregarding various types of disputes regarding the structure of a legal norm, it is possible to point to a normative formula with the structure of a conditional sentence, which, for the purposes of this analysis, is often referred to in case law studies. It reads as follows: "As for each X, if X has the characteristic of A and is in circumstances of type B, then X should perform an act of type C".[42] It follows from this formula that, in order to establish that someone may be subject to a legal obligation indicated in the disposition of a legal norm, two things must be determined. First, it is necessary to establish what personal characteristics or conditions described in the hypothesis of the legal norm must be possessed by someone to whom a legal obligation is assigned. Secondly, it is necessary to ascertain whether the person may find himself in the situation specified in the hypothesis of this norm. In other words, it must be determined whether it is possible to attribute the event to that person. Only a positive answer to these two questions allows establishing that someone can be attributed the effects of an event arising from the disposition of the legal norm. This determination, although general it may be, applies to the entire field of law, is valid in the entire area of law, including tax law, and is reflected in the foregoing considerations on taxable personality.[43]

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[41] See, for example, ibidem, p. 372; L. Ferlazzo Natoli, *Riflessioni in tema di capacit giuridica tributaria*, "Rivista di diritto tributario" 1998, No. 1, p. 21, 28–29; M. Cortés Domínguez, *Sujetos de la obligacion tributaria*, "Revista de Administración Pública" 1968, No. 48, p. 16.

[42] Z. Ziembiński, *Problemy podstawowe prawoznawstwa*, Warszawa 1980, p. 152.

[43] See A.M Linares Luque, *La sujeción los entees sin personalidad jurídica*, in: *El tributo y su application: perspectivas para el siglo XXI*, Vol. 1, ed. C.G. Novoa, C.H. Jiménez, Buenos Aires 2008, p. 986–989, for which the starting point for considering a taxable personality are the findings of legal science regarding the essence of legal personality.

In tax law, the legal entity that is endowed with the ability to enter into legal relations and acquire rights and obligations is not and cannot be the starting point for the capacity to be taxed as is the case with legal capacity under civil law. For this branch of law, the starting point is the event specified in the hypothesis of a tax regulation for the occurrence of which is tantamount to possession of a part of the national income to be taken over in the form of tax while also substantiating the ability to pay taxes.[44] In turn, a person becomes taxable precisely because of the occurrence of this event. The capacity to be taxed, therefore, is an attribute of an entity in relation to whom a taxable event has occurred and which has caused such an event to take place as prescribed in the hypothesis of a tax regulation. The fact that someone has the capacity to be taxed is asserted because of his or her conduct that led to the event specified in the hypothesis of the tax provision. It is for this reason that the capacity to be taxed under tax law cannot be regarded as an internal and *a priori* characteristic of the taxpayer. The capacity to be taxed is therefore similar to capacity in criminal law. An individual is subject to criminal law only because that person has committed a criminal act and is liable for it. Consequently, whereas legal capacity in civil law is an inherent and intrinsic or primary characteristic of a legal entity, the capacity to be taxed is an external or secondary characteristic.[45]

There are circumstances in which it can be concluded that it is possible to consider subjective taxability in terms of liability for individual taxes rather than as a category that is specific to the entire tax law system. This case occurs when a taxable personality can be reduced to the possibility of finding oneself in the situation specified in the tax regulation hypothesis, and this event is specific to the individual taxes taken into account. The normative description of the event contained in the regulation determines

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[44] L. Ferlazzo Natoli, *Fattispecie tributaria e capacità contributiva*, Milano 1979; idem, *Rifflesioni*, pp. 16–17.

[45] L. Ferlazzo Natoli, *Fattispecie tributaria*; idem, *Rifflesioni*, pp. 24–32; idem, *El hecho imponibile*, in: *Tratado de Derecho tributario*, Bogotá 2001, pp. 94–97.

whether an individual can find himself in such a situation. The event triggers the obligation to pay the tax, which in the modern science of tax law is referred to as the subjective aspect of the object of taxation.[46]

Therefore, taking into account the above considerations, it must be concluded that in order to assess whether a given organisational unit has the status of a taxable person for VAT, it is necessary, first, to establish the chargeable event which triggers the obligation to pay this tax and then to attribute it to a specific person.

In the VAT Directive, taxable events are indicated in its articles 2–4 and are regulated in detail in Title IV. These events include, among others:

1. the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;
2. the provision of services for consideration within the territory of a Member State by a taxable person acting as such.

It follows from the provisions cited above that activities subject to VAT are taxed when they are supplied against remuneration[47] and are generating income of a permanent nature.[48] The concept of 'for consideration' is to be understood as meaning that the recipient provides remuneration for the supply of goods or services that must be expressible in money.[49] There must therefore be a 'direct

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[46] On the subjective aspect of the object of the taxation, cf. e.g. D. Jarach, op.cit., pp. 167–195; G. Ataliba, *Hipótese de incidência Tributária*, São Paulo 1999, pp. 72–80; F. Sainz de Bujanda, op.cit., pp. 332, 390–399; M. Kalinowski, *Przedmiot podatku*, Toruń 2013, pp. 179–183.

[47] Cf. judgments of the Court of Justice: Staatssecretaris van Financiën v. Coöperatieve Aardappelenbewaarplaats GA of 5 February 1981 in case 154/80, EU:C:1981:38, item 12; judgments of the Court of Justice: Staatssecretaris van Financiën v. Hong-Kong Trade Development Council of 1 April 1982 in case 89/81, EU:C:1982:121, item 10.

[48] Cf. judgments of the Court of Justice: Jarosław Słaby v. Minister Finansów and Emilian Kuć, Halina Jeziorska-Kuć v. Dyrektor Izby Skarbowej w Warszawie of 15 September 2011 in joined cases C180/10 and C181/10, EU:C:2011:589, item 45.

[49] Cf. judgment of the Court of Justice: Staatssecretaris van Financiën v. Coöperatieve Aardappelenbewaarplaats GA of 5 February 1981 in case 154/80, EU:C:1981:38, item 13.

link' between the value of the goods and services provided and the mutual consideration. However, as is clear from the jurisprudence of the Court of Justice, the fulfilment of the two above-mentioned conditions is not sufficient for a supply of goods or services to be considered taxable. As can be seen from the Tolsma judgment,[50] the court requires a third criterion that can be described as a 'legal test' for a transaction to be considered an 'economic activity'.[51] Through the prism of this ruling, the absence of a legal relationship under which mutual benefits would be performed would imply the absence of a direct relationship between them. This thought was also expressed by the CJEU in a number of its subsequent judgments.[52]

On the basis of the provisions of the Directive and the CJEU jurisprudence, it should therefore be concluded that the taxable event for VAT purposes is the supply of goods or services for consideration carried out within the framework of the legal relationship linking the provider of those services to the beneficiary. Consequently, the event defined in this manner will have to be attributed to those entities that can establish into a legal relationship under which mutual benefits will be exchanged.

This conclusion also requires a change in the perception of the meaning of Article 9 section 1 of Directive 2006/112 according to which a taxable person is defined by reference to an independent economic activity. It should be considered that the independent

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[50] Cf. judgments of the Court of Justice of 3 March 1994 in case C-16/93 R. J. Tolsma v. Inspecteur der Omzetbelasting Leeuwarden, EU:C:1994:80, item 14.

[51] D. Berlin held that paragraph 14 of the judgment cited should rather be understood as meaning that the Court of Justice stated in it that, in the absence of a legal relationship between the service provider and the beneficiary, it must be considered that the renumeration criterion was not met; D. Berlin, *Politique fiscale*, Bruxelles 2012, p. 176; J. Lemarque, O. Négrin, L. Ayrault, *Droit fiscal général*, Paris 2009, p. 527–528.

[52] Cf. judgment of the Court of Justice of 21 March 2002 in case C-174/00 Kennemer Golf & Country Club v. Staatssecretaris van Financiën, EU:C:2002:200, item 39; of 3 September 2009 in case C37/08 RCI Europe v. Commissioners for Her Majesty's Revenue and Customs, EU:C:2009:507, item 24, and judgment of the Court of Justice of 27 March 2014 in case C-151/13 Le Rayon d'Or, EU:C:2014:185, item 29.

exercise of an economic activity is a feature that must characterise the activity of the person to whom the chargeable event is attributed. Therefore, if, once it has been established that the event can be attributed to a particular entity on the basis of the aforementioned criterion, it will be necessary to carry out a test to determine whether it is an event falling within the concept of economic activity.[53] Subsequently, it will also be necessary to examine whether the activity is performed independently as the criterion of lack of independence excludes the possibility of attributing a specific transaction to a distinct person.[54] Only after examining these issues can it be decided whether or not a particular entity is a VAT taxpayer.

Currently, to enter into a legal relationship with the exchange of mutual benefits, it is necessary to have legal capacity.[55] Undoubtedly, all natural and legal persons have such capacity. The situation is different in the case of organisational units that do not have legal personality. In various jurisdictions, some of them have legal capacity which means that they can acquire rights and incur obligations on their own behalf. Thus, they can obtain the status of taxable persons in terms of VAT. Conversely, in other legal systems, such units are not granted legal capacity and, therefore, in the case of corporate-type units, the persons forming a corporation act jointly as one party to the legal relationship. Thus, each

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[53] J. Lemarque, O. Négrin, L. Ayrault, op.cit., p. 527–528.

[54] Advocate General J. Kokkot considered however that the criterion of independence is concerned with the allocation of the transaction to a particular person; cf. Advocate General J. Kokkot in the opinion of 23 April 2020 XT v. Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos and Vilniaus apskrities valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos, in case C312/19, EU:C:2020:310, item 33. Also the court took the position that the criterion of independence concerns allocation of the transaction concerned to a particular person or entity; judgment of the Court of Justice: XT v. Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos and Vilniaus apskrities valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos of 16 September 2020, in case C312/19, EU:C:2020:711, item 40.

[55] Recently, this aspect of taxable personality for VAT was brought to the attention of Advocate General J. Kokkot in the opinion of 23 April 2020 XT, in case C312/19, EU:C:2020:310, item 34–37.

of these persons, and not the corporation itself, will have to be granted a VAT taxable status. Furthermore, when a taxable event occurs for these persons, they will all be one party to the resulting relationship under tax law and joint taxpayers.

To summarise the above discussion concerning the VAT Directive, the taxable status of a taxable person may be acquired by an organisational unit in relation to which an event subject to this specific tax may occur autonomously.

Obviously, since the question of taxability is reducible to the attribution of a taxable event to a specific entity, and because this attribution results from the applicable law, the legislator may decide that the effects of such an event on one entity will be assigned to another entity. Such a provision is established in Article 11 of the VAT Directive which states: "After consulting the advisory committee on value added tax, each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links". The exercise by a Member State of the option provided for in this provision has the de facto effect of attributing taxation to an entity other than the one in relation to which the VAT-table event has occurred.[56] As a group of legally independent entities acquires fiscal personality on the basis of this provision, each of them will separately enter into legal relationships in which goods and services will be exchanged, i.e. events subject to VAT. However, all tax consequences of these events, including the obligation to pay tax or the right to deduct input tax, will be unequivocally attributed to the group as a whole.

However, where there is no provision in the legal system similar to that contained in Article 11 of the VAT Directive to attribute the consequences of a taxable event occurring in relation to one person to another, the former must be regarded as the taxable person.

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[56] On group taxation in VAT see more for example A. van Doesum, H. van Kesteren, *The International Market and VAT; intragroup transactions of branches, subsidiaries and VAT groups*, "EC Tax Review" 2007, No. 1, p. 34 et seq.; A. van Doesum, G.-J. van Norden, *T(w)o one: the communication from the Commission on VAT grouping*, "British Tax Review" 2009, No. 6, p. 657 et seq.

As indicated above, whether a particular organisational unit can acquire the status of a taxable person in terms of VAT is determined by whether it may cause a taxable event which, as indicated above, means that the possibility of establishing a legal relationship under which goods and services are exchanged arises. Therefore, this circumstance should be examined in the first instance when analysing whether an individual is a VAT payer in a particular situation. However, it is not possible to proceed to the examination of whether the entity performs an economic activity and whether this activity is carried out independently until it has been established that the entity meets this condition. The independent pursuit of an economic activity is a compulsory characteristic of an entity in relation to which a taxable event has occurred. If it does not possess this characteristic, the event will not create a tax obligation.

5. Conclusions

The analysis leads to the conclusion that, in order to determine whether an explicit organisational unit has the status of a VAT-taxable person, it is first necessary to examine whether a VAT-taxable event may occur. As this event involves the exchange of goods and services in the context a legal relationship, the entity must have the legal capacity to establish such a relationship. Natural and legal persons have such capacity. The legal capacity may also be possessed by those organisational units without legal personality which, under a particular legal system, have been granted the capacity to acquire rights and incur liabilities on their own behalf without simultaneously being granted legal personality. Only once this circumstance has been established should it be examined whether such an entity carries out an economic activity within the meaning of Article 9(1) of the VAT Directive and whether it does so independently.

STRESZCZENIE

Jednostki organizacyjne nieposiadające osobowości prawnej jako podatnik VAT

W niniejszym artykule autorzy analizują orzecznictwo Trybunału Sprawiedliwości i odpowiadają na pytanie, jakie kryteria powinny być brane pod uwagę przy ocenie, czy określonej jednostce organizacyjnej nieposiadającej osobowości prawnej można przypisać status podatnika VAT. Jak wynika z orzecznictwa Trybunału Sprawiedliwości – zdaniem autorów – kryterium samodzielności powinno być stosowane do oceny podmiotowości podatkowej zarówno osób fizycznych i prawnych na gruncie prawa prywatnego, jak i jednostek organizacyjnych na gruncie prawa podatkowego. Przeprowadzona analiza prowadzi autorów do wniosku, że w celu ustalenia, czy dana jednostka organizacyjna posiada status podatnika VAT, należy w pierwszej kolejności zbadać, czy u tego podmiotu może wystąpić zdarzenie powodujące powstanie obowiązku podatkowego w VAT. Ponieważ zdarzenie to polega na wymianie towarów i usług w ramach stosunku prawnego, jednostka ta musi posiadać zdolność prawną do nawiązania takiego stosunku. Taką zdolność mają osoby fizyczne i prawne. Mogą ją również mieć jednostki organizacyjne nieposiadające osobowości prawnej, którym w danym systemie prawnym przyznano zdolność do nabywania praw i zaciągania zobowiązań we własnym imieniu, bez jednoczesnego przyznania im osobowości prawnej.

Słowa kluczowe: zdolność podatkowa; podatnik; podatnik VAT; podmiotowość podatkowa; jednostka organizacyjna

SUMMARY

Organisational unit without legal personality as a VAT taxable person

In this article, the Authors analyse the CJEU jurisprudence and answer the question of what criteria should be taken into account when assessing whether a certain organisational unit without legal personality can be ascribed the status of a VAT taxpayer. Undoubtedly, in accordance with the CJEU case law, in the Author's view, the criterion of independence should be applied to assess the subjective taxability of both natural and legal persons under private law and organisational units under public law. The analysis carried out leads the Authors of this article to the conclusion that,

in order to determine whether a distinct organisational unit has the status of a VAT-taxable person, it should first be examined whether a VAT-taxable event may occur. As the event involves the exchange of goods and services as part in a legal relationship, the entity must have the legal capacity to establish such a relationship. Such capacity is possessed by natural and legal persons. It may also be possessed by those organisational units without legal personality that have been granted in a particular legal system the capacity to acquire rights and incur obligations in their own name without being simultaneously granted legal personality.

Keywords: tax capacity; taxpayer; VAT taxpayer; taxable person; tax personality; organisational unit

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