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Present and future of Value Added Tax in Europe

THESES OF THE DOCTORAL DISSERTATION

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I have been active in the tax control division of the tax authority for almost twenty years so the experiences underlying my theme selection and my motivation are mostly based on my work. Tax control activities are, of course, manifold and involve companies of different sizes and pursuing different activities, and also private persons, but the major tax type involved is undoubtedly general turnover tax, or GTT for short. One of the reasons is that this is the tax most frequently targeted by tax fraudsters and the current rate of general turnover tax in Hungary makes it a very lucrative option on account of the tax savings that can potentially be achieved by tax evasion. However, my research was not focussed on tax fraud but on a thorough analysis of the questions arising in the course of continuous development of this tax – questions that are often hard to answer and that affect the very foundations of general turnover tax.

Maybe I could say I am presenting a comprehensive snapshot of the present of VAT but this would overly simplify my original intention and goal. The biggest mystery for me as a law practitioner is seeing how ambiguous normative law, a discipline that is considered by outsiders as strict and that, typically for tax law, sets forth meticulously specific provisions, can become when it comes to concrete cases.

My research focussed on three areas of VAT that are mutually interdependent and embrace the entirety of VAT from European legislature to its application by tax authorities. First, I thought it was important to give a global overview of the development and formation of not only the entirety of VAT but also of its individual areas. I also intend to present how legislature reacts to economic processes, how it assists taxation and how it eliminates ever renewing tax evasion phenomena and what new questions it raises while doing so. I intend to demonstrate that the conflicts of interest between those who apply the law, taxpayers and the institutions of the EU and its member states keep legislation and the interpretation of the law in constant movement. The analysis and monitoring of legislative processes may seem complicated or even impossible because the decision-making system of the European Union can enforce its will by way of complicated processes only. This results in a more sluggish legislation compared to non-EU countries but also facilitates thorough contemplation and debate.

An overview of the above issues will provide a theoretical framework for practical problems and legislative interpretation processes. So, my second area of investigation is the interpretation of legislation, i.e. finding out if and how the general rules and principles of VAT can be applied to new types of economic activities and how stable a foundation the conceptual definition and case law provide for the positioning of economic processes within the system of VAT. Here I

wish to mention the activity of the Court of Justice of the European Union (CJEU) because today's innovative economic environment sets the bar ever higher for the case law of courts that forms a closed system of consequent and successive decisions. My examination involved those areas of the law or rather those basic concepts that provide the strongest motivation for said movement of the application of legal provisions and the legislative processes affecting VAT. This selection cannot be labelled as arbitrary because the amount of judgements and the changes and, in some cases, the ambiguity of reasons behind those judgements have marked the path for my analyses. While introducing the case law of the Court of Justice I wish to pinpoint its law interpretations that serve as a substitute for legislation and that have a profound practical effect. The Court of Justice arrives at conclusions regarding more than one legal constructs that – in my view – do not obviously follow from legislation but still have a definitive effect on the taxpayer's position and on the legal relationship of the taxpayer and the tax authority.

There is a significant amount of uncertainty and law application ambiguity all over Europe when it comes to taxpayer behaviour expected in the application of certain legal constructs created by the Directive. My third area of investigation is, therefore, a critical review of the law application questions generated by the above processes. Such review was, in many cases, based on the experiences I gathered during my day-to-day work. Accordingly, this is the lengthiest part, in which I wanted to devote the closest attention to topics such as the right to deduct and the tax-free supply of goods because these pose the most frequent problems in law application and have a rich history also in Hungarian court practice.

I. Summary of the research task

My research was based on the following five research aspects:

(i) Definition of which branch of law VAT falls into and a short overview of its various forms. I investigate if European tax law, of which value added tax is an important element, can be considered as a separate branch of law.

(ii) Development of VAT in Europe from the Green Book to today, in view of the most important documents created by the decision-making bodies of the European Union. Here I attempt to summarize the developments of the past almost one decade in more detail because this is the period that had the most profound effect on law interpretation, and I highlight some of the most characteristic principles and goals of European legislation.

(iii) Potential future directions of VAT regulations in the European Union. I touch upon the milestones of our common European thinking which would implement the system of cross-border taxation by a radical change of the current system of VAT. This new system would mainly be defined by the 'place of consumption' principle and the technical feasibility of taxation.

(iv) The role as the European Court of Justice as a developer of legislation in the application of VAT. The Court is the key law application body that fills the provisions of the directive and of secondary sources of law with actual content. I will investigate what principles the European Court of Justice is guided by as far as VAT is concerned and what is the logic behind its specific decisions.

(v) Practical problems of law interpretation and law implementation within the scope of core legal constructs of VAT. In close relation to the previous item (iv) I perform the investigation of these legal constructs partly on the basis of case law of the European Court of Justice and point out the disputed topics of law interpretation that diverted law application to previously uncharted territory. In this chapter I use a comparatively deep analysis to make the boundaries of selected concepts visible and to demonstrate that dissimilarities of individual cases can lead the law applicator to distinctly different conclusions. I am sure that this is not the only area of law that raises questions but it is fair to expect that a set of rules defining the financial burdens of taxpayers should be unambiguous and have a distinct logical order.

Based on the above goals I set up seven hypotheses:

- VAT is an integral part of European tax law.
- European VAT is a harmonised tax whose regulation is in a transitory state.
- The current VAT legislation has a negative effect on the competitiveness of the European Union.
- VAT forms a closed logical system that can be applied to new economic phenomena, too.
- The Court of Justice of the European Union fills legal provisions with content that serves as guidance for legal practitioners in EU member states.
- Transformation of law interpretation also affects the core constructs of VAT Directive.
- The gap between the applicability of court case law and the practice of law application of authorities is continuously widening.

In the introductory chapter of my dissertation I intend to underline the global financial significance of VAT, briefly comparing the VAT regulations of European and non-European states. I wish to mention, however, that my dissertation focusses on VAT legislation as a set of EU-specific legal provisions and on the legal practice of VAT; any comparative analyses with non-EU member states are by way of example only.

The introduction of this tax is the outcome of complex legal policymaking procedures and the different socio-economic system of individual countries can result in different models – let us mention the USA, one of the superpowers with the most advanced economy as an example, where the more relaxed relationship of the state and the society resulted in a different structure of taxation from that of European countries. The USA mainly relies on income taxes while European countries– often with historically different timing – exhibit a mixed reliance on direct and indirect taxes. In my dissertation I briefly touch upon Hungarian tax policy trends in the light of VAT. The competitiveness of Europe as a uniform economy does not depend solely on tax burdens: it is also affected by how complicated and costly the administration of tax obligations of taxpayers is. Therefore, I also refer to research projects and surveys dealing with the interdependence of the efficiency of tax collection and administration tasks.

Also in the introductory chapter, I attempt to position the European system of tax legislation within the branches of law and ask the question if there is a concept called ‘European tax law’. There is no straightforward answer in spite of the fact that there are many summative legal

books with that title. There are basic differences between international tax law and the European regulation of tax relationships: the former resolves a conflict between states with tax sovereignty while in the latter case states waive part of their own sovereignty and entrust a system of mutually empowered organisations to carry out the task of taxation legislation within this jointly defined field – especially as regards indirect taxes. VAT is part of this system. VAT is a revenue designated for the state budget of member states, it is regulated by legal provisions of the member states but the overall framework is still formed by legal norms – directives, to be specific – at EU level. What is more, as far as VAT is concerned, there are even regulations apart from the Directive, which results in a tax with a rather varied but still harmonised character.

Apart from the primary and secondary sources of law I also highlighted the significance of court case law and of soft law. In connection with legislation more and more emphasis is gained by the preparatory materials issued by the Commission, the VAT Commission and the VAT Expert Group that provide further details, explain and adapt the interpretation to the assigned goal. As far as the application of law is concerned, the explanations, guides and other documents related to the Directive, the regulations and court case law are also gaining importance. The analysis of the relevant legal constructs of VAT also highlight the significance of soft law because the primary provisions of the Directive can only be interpreted successfully in the light of relevant case law and the applicable documents of other sources of law.

In the second part of my dissertation – that is in chapters V through IX – the issue of law interpretation is discussed in more detail: this is where I underline the role of the Court of Law of the European Union as the 'oracle' of law interpretation and attempt to introduce the underlying principles of the workings of this key player of the VAT system. These underlying principles also enable us to explain and clarify the concept behind the core constructs of the VAT system. VAT-related issues have a numerically high proportion among the decrees of the Court because, as Endre Juhász put it, "The high number of VAT cases reflects the differences between the point of view of Hungarian tax authorities, the European Union and the Court itself."[1]

In the chapters mentioned above I touch upon the core concepts of the Directive to demonstrate how resistant current legislation is against new socio-economic phenomena and law

[1] Endre JUHÁSZ: Magyarország és az Európai Unió Bírósága. *Közgazdasági szemle,* April 2014. 383. http://real.mtak.hu/17279/1/Kszemle_CIKK_1469.pdf

interpretation. These core concepts I investigate include business activity, taxability, consideration (remuneration), economic establishment, and proper exercise of rights, as a legal principle transpiring the entire system of VAT in the light of the right to deduct VAT. The analysis of business activity as a behaviour resulting in taxability spans multiple chapters. My intention here is to demonstrate that concepts laid down in legal provisions many decades ago can be subject to scrutiny in the new digital world, but also the concept itself is in continuous change nevertheless. Adapting the VAT system to new challenges of globalisation is difficult[2] but not impossible.

[2] Ad van DOESUM – Herman van KESTEREN – Gert-Jan van NORDEN: *Fundamentals of EU VAT Law*. The Netherlands, Wolters Kluwer, 2016. 9.

II. Method of research and material collection, discovery and use of sources

The research methods I applied in the two main parts of my dissertation were somewhat different. The introduction – from the point of view of law history – of changes affecting legislation was mainly based on the preliminary documents preceding such changes, i.e. the direction of my analysis was defined by the working materials of the Commission and the documents preparing the decisions of the Council, the Parliament and of the VAT Commission. In this chapter I attempt to highlight the factors that are contrary to the interests of member states and the questions resulting from the common rules of this tax that have been raised in the course of law application and by practical problems.

The number of judgements passed by the Court of Justice of the European Union in connection with the VAT system is exceptionally high, even compared to all other areas of law: it is close to 800, which means this area has the biggest share from the case load of the Court of Justice[3]. Reviewing the entirety of these judgements was beyond the scope of this work; it is important to note however, that the unspoken principle of the Court of Justice is consistence. This means that the judgements the Court of Justice has passed over the decades constitute, in theory, a linear system with a single direction, with interconnected reasons and very few changes of direction. The VAT system is still faced with challenges that require a new evaluation of the logic behind a judgement and often complements current legal practice with new ways of interpretation. I believe the underlying research was long but rewarding. The reasons (explanations) published by the Court of Justice along with the individual judgements are, of course, relevant in themselves, as is the logic behind them, but in the course of their further analysis I was, in certain areas, relying upon Hungarian court practice and upon international literature.

Neither the analysis nor the conclusion could ignore procedural law which exhibits a very heterogeneous character in Europe because the principles of substantive law ruling this tax at European level cannot be hermetically sealed off from procedural law that gives effect to such principles and often blend with substantive law.

I made an attempt to base my dissertation on the most current of summative works on the VAT system that had been compiled in the light of the latest law interpretations by legislators and courts. By their nature, summative works always lag behind new tendencies, while as few as 5-

[3] DOESUM –KESTEREN –NORDEN (2016) 17.

7 years can bring significant changes in the VAT system. Relevance was one of my objectives when using the latest studies published in international journals, mainly those published in VAT Monitor, VAT/GST Journal and VAT Notes but I also used research works published by various European universities as sources.

III. Summary of results

1. Proving the hypotheses

The current structure of the European VAT system has been around since 1993 and it was expressly meant to be temporary by its creators. According to original plans the final system should have been set up by 1997 but this never happened. This delay of more than 25 years is indicative of how sensitive economic sovereignty is to supra-national regulations.[4] As Professor Vanistendael put it[5], the VAT system should be like a snooker table where the balls can travel from one end to the other unobstructed. Achieving a consensus regarding the introduction of a consumption-based taxation system to replace the principle of origin is a highly challenging task for European legislators. In my dissertation I attempted to provide a short summary of the milestones of European thinking and of the slow and arduous route to the solution. On account of the regulations pertaining to transactions between member states the current system is highly vulnerable to tax fraud. This has been the main motivation for legislators, with special emphasis on eliminating this vulnerability in the light of the share of VAT from the overall revenues realized by the individual member states.

As indicated in the title, I intended to present, based on a limited number of aspects, a deep analysis of the present state of VAT and facilitate a glimpse of the future of the VAT system. A quick glance at my dissertation may suggest that certain topics have been dealt with in overly meticulous detail, but the issues legal practitioners are facing could not be exposed from a bird's eye perspective. VAT as an EU-wide and uniform tax can only be effective if the Directive and the related sources of law regulate VAT-relevant legal concepts in an unambiguous and uniform manner in all member states. This ideal state of matters is yet to be achieved and the sluggish decision-making mechanism of the Union has many substantive law and procedural law obstacles yet to overcome, but we can declare that the process has seen some speeding-up lately. It may partly be due to the fact that the modernisation of the economic processes these rules regulate has also accelerated which creates a constant demand for new legislation or law interpretation. Cross-border trade is changing not only in its volume but also in its form, and digital development has created the tools that help in finalising a uniform VAT system. This is one of the definitely positive effects of globalisation and it means that not only the business

[4] Robert GOULDER: Building a Better VAT: Europes's Big Risk. *Tax Notes International* 7 May 2018. 805-806.
[5] Frans VANISTENDAEL: "The Definitive EU VAT System: Much Ado About Nothing?" *Tax Analysts* 2017 X_worldwide-tax-daily_value-added-tax_definitive-eu-vat-system-much-ado-about-nothing_2018_01 2.

partners but also the tax authorities are part of the digital world, which facilitates the creation of a final system, especially after the general adoption of the one-stop-shop system.

In my dissertation I also attempted to highlight that this uniform VAT system is one of the pillars of the competitiveness of the EU which would be weakened by all heterogeneity introduced by idiosyncratic methods applied by various member states. The key motivation for the transformation of the European VAT system is the elimination of tax fraud; when it comes to tax-free community transactions the current structure offers, on the one hand, an opportunity of unauthorised tax deductions or tax reclaims, and sets the ground for 'carousel' transactions on the other. A final VAT system can be created if we equate domestic and cross-border transactions, i.e. if we treat them the equally from a taxation point of view. I made an attempt to present the various suggestions alongside the theoretical questions that had emerged. Such a large-scale legislative undertaking will surely trigger new responses from taxpayers and tax authorities will need to find new answers to those responses.

Another area I attached great importance to was the application of law. My primary objective was to show, from the practitioner's perspective, the challenges the slow but perceivable change of the core concepts of this tax poses when it comes to evaluating successive but slightly different legal concepts. For me the keys are consistence and a closed logical order. The framework of this logical order is formed by legislation and is filled with content by the Court of Justice of the European Union and, consequently, by the law applicators of the member states.

In my dissertation I attempted to provide research evidence for the hypotheses outlined in Chapter 1. Please find a short summary of my conclusions below.

My first hypothesis was that VAT is an integral part of European tax law. This is a relevant issue because we may even ask if tax law has a separate area that is limited to Europe. Europe is an autonomous economical and international entity with its own trade space, organisational structure and legislation that may, from an external point of view, assume the existence of a proprietary system of tax law. Therefore, defining the concept of 'European tax law' was one of the starting points of my dissertation where I outlined the relationship of international and European tax legislation and touched upon the various aspects of European tax law as a branch of law. It is safe to declare that VAT is a uniquely harmonised type of tax, even by European standards, and that it forms a distinct mechanism. There are many countries with a tax similar to VAT and it forms a significant source of budgetary revenue – I thought this was important

to underline because it is, nonetheless, a tax type in Europe that is undergoing constant changes and is raising many questions. The conceptual definition of international tax law and European tax law is far from unambiguous, but the rules that compulsorily apply to all member states of the European Union and that include the rules of VAT form a special set of legislation we like to call ‘European tax law’, of which VAT is a part. However, the European VAT system has significant differences compared to the individual member states that have also introduced this tax. We must consider the fact that there is no Pan-European tax authority: member states separately enforce compulsory pieces of legislation. This results in several problems, including the transitory character of the entire system. Another difference is the variability of the calculation method of the taxable amount (tax base). Comparisons show that as a result of the allowances, exemptions and the exemptions granted to various member states through the derogations the European VAT system is operating way below full taxation. Unfortunately, this also means that the because of these different rules and procedures of the member states VAT is currently not driving European tax law as a whole towards better competitiveness.

According to my second hypothesis European VAT is a harmonised tax whose regulation is in a transitory state. In my dissertation I have already referred to the provisional character of the VAT system – as of today, the level of harmonisation is but a stage of development of this tax. It mainly affects cross-border transactions that have, by way of the combined application of the reverse charge mechanism and of the right to deduction, opened a wide gate for tax fraud. The ‘Missing Trader Fraud’ and the ‘Carousel Fraud’ are both consequences of this transitory character that the authorities of member states have been trying to combat with administrative measures. On account of the danger of tax evasion the goal of a final VAT system can only be taxation at the place (member state) of consumption which, however, involves immense administrative difficulties. Therefore, I attempted to support my hypothesis with an introduction of the legislative and preparatory activities of various bodies of the European Union. However, there is already a solution in sight whereby the biggest task will be to ensure that direct taxation is not interrupted in the chain of cross-border transactions (or only in justified cases). Assuming a tax system comprising of multiple tax authorities this seemed almost impossible. The key is the ‘one-stop-shop’ system which has undergone a long development and its application has proved the most effective and the least complicated for taxpayers. It remains to be seen, however, how the efficiency of the system will suffer as a result of the division of the roles of the member states collecting and imposing the tax. The tax owed to the member state of settlement of the taxpayer employing the services will be collected by the member state of

settlement of the taxpayer effecting the transaction which, in this form, will be a previously unseen phenomenon. We could also see that currently, harmonisation does not or not directly affect procedural law. Today, theoretical models of the tax system tend to lay greater emphasis on the unity of procedural and material law than before – as an example, Péter Bordás considers this to be one of the pivotal points of a smart taxation system[6]. As a result of the current differences acts/transactions related to a specific tax entail different obligations in different member states. To name a few of these differences: taxpayers need to file their tax returns by different deadlines and comply with different formalities using different communication channels (e.g. electronic procedures), and there are different rules pertaining to hearings, endorsements, audits etc. This results in dissimilarities – as seen in the cases underlying some judgements discussed in my dissertation – that affect the enforcement of substantive law, which, consequently, also needs to be harmonised among member states if they wish to stick to the schedule of taxation integration.

According to my third hypothesis the current VAT regulations have a negative effect on the competitiveness of the European Union. Competitiveness of market players could be ensured primarily by an economic area with a uniform and stable set of rules. As of now, this does not exist as far as VAT is concerned. Considering the fact that VAT has a profound effect on the free flow of goods and the provision of services, it would be important to ensure that the application of VAT should impose the smallest possible expense to business players. However, the current variety of administrative procedures results in demonstrable extra costs. The tax rates of the current system that are different in every member state, the different product categories that are subject to these various rates, and the different procedural and technical requirements present, through the extra costs referred to above, insurmountable obstacles to companies that have smaller sizes, less financial strength or to those that lack the human resources dedicated to tackling these tasks. In this context, I referred to the fact that currently, the taxation system of the European Union cannot compete with uniform economic areas such as the United States of America, not even if VAT is, from a taxation law perspective, a modern concept. However, legislation is constantly striving to achieve this goal: the 2020 Work Programme of the European Commission[7] refers to the "One In, One Out" approach to ensure

[6] BORDÁS Péter: Okos adózás, mint a fenntartható adójog pillére? *Iustum Aequum Salutare* XV, 2019. 3. 20. http://real.mtak.hu/103652/1/Bord%C3%A1sP_IAS_Okos%20ad%C3%B3z%C3%A1s%202019.pdf

[7] COM(2020) 37 final – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The 2020 Work Programme of the Commission. A Union that strives for more. https://eur-lex.europa.eu/resource.html?uri=cellar:7ae642ea-4340-11ea-b81b-01aa75ed71a1.0011.02/DOC_1&format=PDF

that newly introduced administrative burdens are offset by relieving people and businesses – notably SMEs – of equivalent administrative costs at EU level in the same policy area.

My fourth hypothesis was that VAT forms a closed logical system that can be applied to new economic phenomena, too. A gap-free set of rules that is applicable to domestic and cross-border transactions is the starting point of any legislation. Additionally, for a tax like VAT we can assume that its abstract and generally formulated rules can be applied to all business transactions, i.e. not only to conventional ones but also to new constructs brought along by socio-economic development. This socio-economic development posed challenges to the concepts of 'business activity' and 'taxability' that I am dealing with in Paragraphs V. and VI. In the latter, I give an overview of new economic processes brought to life by digitalisation and I attempt to position them within the frame of reference of VAT. It is safe to declare that this is, in many cases, not an automatic process, i.e. the current system of rules cannot be adapted to new phenomena without careful analysis: the applicability of traditional constructs requires more accurate and detailed definitions by legal practitioners. Life always prevails and legislation is – with some delay – doing its best to keep up with new developments. As far as VAT is concerned, this delay has increased somewhat in the past decade and it now forces legislators and legal practitioners to exhibit far more flexibility than in the previous decades.

The fifth hypothesis was that the Court of Justice of the European Union fills legal provisions with content that serves as guidance for legal practitioners in EU member states. Apart from meeting its regulatory obligations as legislator the Court of Justice of the EU also needs to ensure the consistency of the application and interpretation of legal provisions. Here I attempt to demonstrate that even though the Court is doing its best to create a consistent and logically contiguous chain of judgements pertaining to the individual legal constructs, in many cases new elements crop up that may not question the legitimacy of previous decisions but still set a new direction for law-abiding taxpayers. This key mission of the Court is based on the core principles of the VAT system, of which the first is the principle of neutrality. Therefore, the Court is filling in the gap between the Directive and real life events by enforcing these principles and, by way of the interpretation of the individual cases it practically creates obligations for the member states. This quasi legislative activity bears utmost importance in the field of VAT: the Court has become a driving force urging law interpretation to constant development or, to put it more appropriately, change. In the next parts of my dissertation I made further attempts to demonstrate how these principles guide the sense of justice of the Court that is reflected in the explanations of its judgements. The manifestation of the core principles in the individual

judgements can only really be demonstrated via a thorough analysis of the judgements, this is why I thought it was important to draw my conclusions from the legal explanations/reasons accompanying the Court's judgements.

My sixth hypothesis was that the transformation of law interpretation also affects the core constructs of VAT. In this respect I found that such core constructs of the VAT directive – e.g. business activity, consideration, taxability, the concept of settlement, the right to deduct tax and the application of tax exemption – are all facing challenges that are either external, such as digital innovation, or are determined by the development of VAT-relevant law by way of prevalence of the basic principles. In my opinion there is evidence that these factors fill in or complement certain areas of these constructs. My choice of the area of investigation was not arbitrary. I picked concepts that, by virtue of the Directive, form the core constructs of this tax and that are in the cross-hairs of legal disputes. I devoted the closest attention to the introduction of the chain of decisions related to the most 'dangerous' element of the entire VAT-system[8], the right to tax deduction.

Performing a business activity is the key precondition of taxability. Both the Directive and the VAT Act set forth a detailed list of activities that qualify as business activity and the definition is very broad. In this context I presented a few legal cases to illustrate the conceptual gap that exists when it comes to the conceptual requirements of 'business activity'. Such requirements are regularity, the existence of compensation, the direct relationship between the transaction and the compensation, and the intention of obtaining revenue. The last one is a subjective element, and means it is necessary to investigate the taxpayer's intention. Business phenomena are highly complex and it is, in many cases, very difficult to establish taxability in the context of whether the fact that a business activity is performed can be ascertained or not. A closely related question is the business exposure of public authorities that I am discussing within the logical framework of the same chapter. I demonstrate under what circumstances some activities of public authorities become the subject of VAT and also how the external business environment of such transactions influence the way they are judged. One of the reasons is a key principle that says VAT exemption must not result in a distortion of competition. The conclusion in this case, too, is that there is no exact solution for each and every legal case and

[8] Gabriella ERDŐS– Balázs FÖLDES– Tamás ŐRY: *Az Európai Unió adójoga*. Budapest, Wolters Kluwer, 2013. 171.

if there are doubts all the circumstances must be evaluated meticulously to find out if the activity of an entity is subject to VAT or not.

I made an attempt to illustrate the financial and business opportunities that have been made possible by the increasing penetration of the internet from the aspect of taxability. These new phenomena, e.g. social economy and crowd financing have already been addressed by the European Union and current literature is trying to assign these activities to currently existing categories which runs the risk of many activities that are currently not considered business-related would become subject to VAT. Therefore, my objective was to illustrate that the boundaries of business activity that used to be (more) stable are becoming increasingly soft, the current set of concepts and the related definitions are ambiguous or, rather, can only be applied to the set of facts under investigation at the expense of some serious abstractive law interpretation. In view of digitalisation I would complement the above hypothesis with the question of taxability of activities that are difficult to discover and, therefore, to levy taxes on. Bitcoin mining is a typical example whose VAT administration and indeed, discovery, is problematic given the current legal environment and the structural framework of tax authorities. At present, these activities are practically invisible, so when it comes to the theoretical possibility of levying taxes on any activities pursued in the digital realm practical feasibility shall be seriously considered, too.

One of the key conceptual elements ‘business activity’ is consideration, but there is a group of transactions where the consideration is not paid or is paid using alternative methods (vouchers). I dealt with these topics in a separate chapter. Two questions arise in connection with the VAT rules pertaining to transactions without consideration: is the sale really taxable, or can it be considered as an inseparable part of another transaction, and how to establish the taxable amount. In these cases, too, the Court is continually filling in the gap between theory and practice, which means that its judgements are part of an ongoing legislative activity. Also, as far as the taxation of transactions without consideration is concerned, there are significant interpretation difficulties when it comes to non-direct taxation. The issue of vouchers is also highly relevant, both as regards their economic role and the regulations they are subject to. Although legislation attempts to adjust the framework of this legal construct to real-world economic processes and to ensure optimum taxation, it is still the Court that it setting the conceptual boundaries. As I mentioned above, this, too, is a legal construct in constant change and, judged by the cases dealt with by the Court, the biggest challenge is its conceptual separation from advance payment. Defaults constitute another group of cases of key importance

and lead us on into the realm of differences in procedural law mentioned earlier. The Directive facilitates the adjustment of the taxable amount in the event of default of the debtor, but its limits were not set in stone – let us recall the judgement passed in the Enzo case. Therefore, this is another area where the Court plays a gap-filling role.

The seventh hypothesis goes as follows: The gap between the applicability of court case law and the practice of law application of authorities is continuously broadening. In past years, the practice of Hungarian tax authorities was basically influenced by the judgements of the Court of Law of the European Union and court practice has been following suit. The enforcement of the key principles may, however, pose demands on law practitioners that can be met in the rarest of cases only. I made an attempt to demonstrate that often, when it comes to finding out the exact goal of a business activity or a specific transaction the question of taxpayer's intention arises, which is the *ultima ratio* of law application within the VAT system. Event though from the point of view of legal theory it is utterly justified to demand that concrete cases are judged by authorities and courts on the basis of the original intent, especially to facilitate the tax law classification of the case, the means at the disposal of the tax authority of finding the facts are very limited, be it a supply of products without consideration, the exercise of the right to tax deduction or the creation of a place of business – all of these were illustrated by cases in the dissertation – and it is, in many cases, impossible to uncover the intention as a conscious element and prove it beyond doubt. The demonstration of the conscious element during retrospective tax audits – which is required to support doubts regarding compliance – is, more often than not, a matter of chance as opposed to planning. The majority of VAT cases dealt with by the Hungarian tax authority is a result of the tax authority contesting the right to tax deduction of the taxpayer and most court cases revolve around this issue. This is why I devoted more space to this topic, especially to the conceptual delineation of 'objective circumstance' as a standard of proof. Namely, the Court and, consequently, Hungarian forums of legal remedy – following the essence of the judgements briefly introduced earlier – expect a series of objective circumstances, although there is no specific recipe for doing so. Some of the Curia judgements set forth guidelines for the management of objective circumstances but these are of help in the case of certain specific sets of facts and the evidentiary value of the various elements of the set of facts vary on a case by case basis. This recognition led to the publication of the Resolution of the Administrative and Labour College of the Curia of Hungary and to the setting up of the Legal Practice Analysis Team of the Curia but maybe it is no exaggeration to say that the fog has not been cleared.

2. De lege ferenda suggestions

Apart from endorsing a critical attitude it is not easy to provide a clear recipe for solving the problem raised above, especially as far as modifications on the EU level are concerned. However, there are a few suggestions that may help.

A) Focussing on regulation-based legislation

I believe it would be important to focus on regulation-based legislation, especially to standardise the solutions formulated by the Court and to create joint procedural rules. This would serve the creation of an unambiguous and uniform legislation for every member state. This could be complemented with a uniform interpretation and explanation of the directly applicable statutes which could eliminate the need to analyse the different taxation legislation of the 28 member states. A further step in the evolution of this approach would be the inclusion of the procedural legislation into the regulation-level legislation discussed in B) below.[9]

It would entail some significant sacrifice regarding the member states' sovereignty but would also result in a significant acceleration of procedures if the Council could pass its resolutions with qualified majority as opposed to unanimously.[10]

B) Harmonisation of procedural law

One of my findings whose validity spans more than one chapters is that the VAT system does not result in the unification of the procedural law. It would be of course an overly simplistic suggestion to demand a complete and full-scale harmonisation of the procedural rules of taxation law, but the creation of an effective VAT system requires an overview and, as far as possible, approximation of procedural rules that facilitate the enforcement of VAT legislation. Looking at the case law we could see that procedural law can be an obstacle to the execution of VAT legislation. This issue is already touching upon the sovereignty of member states because none of the sources of law at Community level make this binding.

As a first step, it would be reasonable and necessary to harmonise the scope of most important documents, i.e. the VAT return, online data supply (online invoicing, SAF-T etc.) not only as far as their content is concerned, but also the schedule of introducing the obligations, as this

[9] Ine LEJEUNE: European Union - EU VAT to Become a Win-Win-Win: A Dream to Come True? *International VAT Monitor*, IBFD, 2020. https://research.ibfd.org/collections/ivm/printversion/pdf/ivm_2020_02_e2_4.pdf
[10] Michael van de LEUR: The European Unin's Push to Abolish Unanimity on Tax Policy. *International VAT Monitor*, IBFD, 2019. https://research.ibfd.org/collections/ivm/printversion/pdf/ivm_2019_04_e2_2.pdf

would simplify compliance, too. I also think the rules of the one-stop-shop system fall into category and should be regulated at the regulation level because this would help avoid the drawbacks of current regulation differences. As a second step the procedural options and deadlines should be standardised that are related to the meeting the tax payment obligations, such as the periodicity of filing tax returns, refund options and deadlines etc.

C) Simplification of proof by means of transforming the "reliable" status

In the previous parts of my dissertation I repeatedly referred to the requirement of proving the conscious element in taxpayer behaviour because it has a profound effect on legal practice. Proving the intentions of a taxpayer is beyond the administrative means of tax authorities. As a de lege suggestion, the following may be a realistic solution. The applicability of "due diligence", a long-standing legal concept, could be simplified by the creation of categories that are stricter, where a "reliable" status would be sufficient proof of due diligence on the part of the party receiving an invoice. In current Hungarian taxation system reliable taxpayers comprise approximately 45 per cent of all taxpayers. This is a rather broad circle of taxpayers who simply meet general requirements and that, in my view and in its present form, does not guarantee the necessary level of trustworthiness.

This would, to some extent, simplify the investigation of the criterion "was or should have been aware". If both the taxpayer and its business partner have a reliable status, then the intention of tax evasion should be demonstrated by the tax authority, similarly to current practice. If, however, the parties involved have no reliable status, then they would incur extra obligations regarding the documentation of the transaction, and the tax authority would have no obligation to investigate the taxpayers' intentions. Setting up taxpayer categories is already part of the plans of the EU, too: the final VAT system also features the concept of 'qualified taxpayer' which would, in Hungary, based on the reliable category, and, as a consequence of their higher level of reliability, product sales within the Community continues to be subject to reverse taxation.

Therefore, it would be important to have an EU-wide uniform category for qualified taxpayers.[11]

[11] Fernando MATESANZ: The Certified Taxable Person Status. *International VAT Monitor*, IBFD, 2018. 213-214. https://research.ibfd.org/#/doc?url=/linkresolver/static/ivm_2018_06_e2_1.pdf

As far as Hungarian taxation system is concerned, narrowing the circle of reliable taxpayers could be achieved by way of the following set of suggestions:

- No taxpayer should be allowed to hold a reliable status that has failed to file its VAT return in two consecutive periods and is featured on the "disclosure list" of taxpayers in arrears.

- No taxpayer should be allowed to hold a reliable status whose seat is registered at a registered seat service provider because tax audits show that companies employing such services are generally not characterised by lawful operation.

- The criterion of positive tax performance should be conditional upon a higher sum to ensure that only taxpayers who actively support the state budget can enjoy the privileges related to the reliable taxpayer status.

- It would also be expedient to extend the requirements of reliability so that they apply to affiliated companies, too.

D) Transformation of the burden of proof

The efficiency of the objective facts based evidencing system developed by the Court is uncertain. First, the tax authorities of the individual member states have different procedural options at their disposal, and second, proving the conscious state of the taxpayer precludes the discoverability of several tax evasion practices. In the case of non-reliable taxpayers who wish to employ tax benefits (tax exemption, tax deduction, etc.) a presumption could be based on requiring proofs that evidence the business transaction with a high level of certainty but can be rebutted by the tax authority. In relation to sales within the Community the Regulation has partially set out on this path, and the same approach could be applied in connection with the right to deduct, too.

IV. List of Publications

- A családi adózás kérdései. Pázmány Law Working Papers, 2014/2. http://plwp.eu/docs/wp/2014/2014-02.Szlifka.pdf
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