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VAT Persons in the Sharing Economy: The Taxable, the Non-Taxable, and the In-Between – Part I

Giorgio Beretta (Editor) (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Lund University) · Thursday, November 17th, 2022

Value-Added Tax (VAT) is considered an efficient and neutral form of taxation. Yet, although its invoice-credit method and the system of fractioned payments make it a self-policing tax, the VAT can be rather complex and costly to administer for businesses, which spend significant time and resources to comply with obligations associated with this tax.

VAT complexity eventually surrounds also basic concepts. A case in point is the category of ‘taxable persons’, one of the main pillars of European (EU) VAT, as it defines the personal scope of the tax.

New business models such as those of the sharing economy, which turns every person into an entrepreneur almost instantaneously, redefine the conventional boundaries between the business and the private sphere so that it becomes challenging to establish who is a taxable person and whether that person is acting in his professional or personal capacity for VAT purposes [1].

The case of Booking.com, assessed for an outstanding VAT liability of around EUR 153 million in Italy in 2013-2019, shows the highs that VAT complexity can reach and its associated costs.

The case of Booking.com in Italy

Booking.com BV (hereinafter: ‘Booking.com NL’) is the Netherlands-based subsidiary of the online accommodation travel agency Booking.com Holding Inc., headquartered in the United States. During the relevant period (2013-2019), the Dutch company acted as an online intermediary in accommodation rentals by private individuals in Italy.

The company did not charge any VAT for its intermediation, most likely on the ground that the Italian landlords receiving its services were taxable persons for VAT purposes, and therefore they also had to account for Italian VAT based on the reverse charge mechanism laid down in Article 196 of Directive 2006/112/CE (hereinafter: ‘the VAT Directive’).

The Italian tax authorities disagreed, taking the view that the landlords not endowed with an Italian VAT identification number (hereinafter: ‘VAT ID’) were not taxable persons, and therefore Booking.com NL, as the supplier, was to account for Italian VAT for its intermediary services according to Article 193 of the VAT Directive. This resulted in an outstanding VAT liability for the Dutch company of around EUR 153 million for the relevant period (2013-2019).

Taxable persons and economic activities in EU VAT

The VAT Directive deals with the concept of ‘taxable persons’ in Title III (Articles 9 – 13). Article 9(1) of the VAT Directive contains the relevant definition of ‘taxable person’, described as ‘*any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity*’.

It follows from this definition that four elements are decisive for a person to be a ‘taxable person’: (i) any person; (ii) in any place; (iii) economic activity; and (iv) independently. All these four elements relate to the fulfilment of substantial conditions rather than only formal requirements, such as the possession by a person of legal personality [2] or a VAT ID [3]. It is also settled in the CJEU’s case law that the elements of the definition of ‘taxable persons’ under Article 9(1) of the VAT Directive must be interpreted widely [4].

Whether or not a supplier is a taxable person is strictly linked to the supplier’s performance of an ‘economic activity’ [5]. It is therefore crucial to determine whether and when an economic activity exists for VAT purposes [6]. Article 9(1), second paragraph of the VAT Directive lists, by way of an example, a series of economic activities, and clarifies that ‘*[t]he exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity*’.

The CJEU also explained that the scope of the concept of ‘economic activity’ is very wide [7]. However, not all activities must necessarily be considered ‘economic activities’ for VAT purposes [8]. Notably, from the wording ‘*whatever the purpose or result of that activity*’ under Article 9(1) of the VAT Directive, VAT scholars derive that a hobby should not be considered as an ‘economic activity’ under EU VAT since it is not carried out with a view to making a profit [9]. It also follows from the CJEU’s case law that no economic activity for VAT purposes arises from the simple acquisition and the mere sale of an asset [10]. On the other hand, an individual does not necessarily have to enter into a series of transactions since an economic activity can be completed even in a single day [11].

S?aby and Others (C-180/10) warrants particular attention. The case concerned the sale by an individual of plots of land to build residential properties, which was previously earmarked and used by that individual as unimproved agricultural land. In its decision, the CJEU observed that ‘*the mere exercise of the right of ownership by its holder cannot, in itself, be regarded as constituting an economic activity*’ [12]. The crux of the matter is to draw a clear line between the carrying out of economic activity (eventually, in the form of exploitation of tangible or intangible property), which is relevant for VAT purposes, and the mere exercise of the right of ownership by its holder, which falls outside the scope of VAT. In this connection, the CJEU explained ‘*the number and scale of the sales ... are not in themselves decisive*’ since ‘*a large volume of sales may also be carried out by operators acting in a private capacity*’ [13]. Nor is it decisive taking into account the fact that (i) before the disposal, the individual divided the land into plots to obtain a higher overall price from that land, (ii) the period of time over which the sales of plots of land take place, or (iii) the level of income derived from those sales. All those circumstances ‘*could fall within the scope of the management of the personal property of the party concerned*’ [14].

In its decision, the CJEU pointed to another as the ‘killer’ factor triggering a VAT-relevant economic activity, i.e., ‘*where the party concerned takes active steps to market property by mobilising resources similar to those deployed by a producer, a trader or a person supplying*

services within the meaning of the second subparagraph of Article 9(1) of the VAT Directive [15]. In the situation at stake in *S?aby and Others* (C-180/10), the CJEU found that ‘[s]uch active steps may consist, inter alia, in the carrying out on that land of preparatory work to make development possible, and the deployment of proven marketing measures’ [16].

Nonetheless, based on other CJEU’s case law, two caveats apply while distinguishing between private and economic activities for VAT purposes. The first caveat relates to the fact that even a property initially acquired or used to meet an individual’s personal needs can, at a later point in time, be exploited to exercise an economic activity with the meaning of Article 9(1) of the VAT Directive [17]. This applies even if the private assets are acquired using an individual’s personal resources [18]. Second, an individual having taxable person status may be liable to VAT also in respect of any other economic transaction for which he receives consideration, even on a purely occasional basis [19]. Therefore, an individual’s status as a taxable person may have ‘knock-on effects’ in respect of any other occasional activities carried out by that individual [20].

[1] For a discussion of the concept of ‘taxable persons’ in the context of the sharing economy, see G. Beretta, *European VAT and the Sharing Economy* (Kluwer Law International 2019), pp. 75 – 113. This work has been developed within the framework of the Amsterdam Centre for Tax Law (ACTL) research project “Designing the tax system for a cashless, platform-based and technology-driven society” (CPT project). The CPT project is financed with university funding and funds provided by external stakeholders (i.e., businesses and governments) interested in supporting academic research to design fair, efficient and fraud-proof tax systems. For more information about the CPT project and its partners, please visit its website <https://actl.uva.nl/cpt-project/cpt-project.html>. The usual disclaimers apply.

[2] See, e.g., *RBS Deutschland Holdings* (C-277/09, para. 53), considering that taxable persons ‘are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens’.

[3] See, e.g., *Alessio* (C-527/11, para. 33), considering that ‘the registration of a taxable person in the register of taxable persons subject to VAT is a formal requirement, such that a taxable person cannot be prevented from exercising his right of deduction on the ground that he had not been identified as a taxable person for VAT purposes before using the goods purchased in the context of his taxed activity’.

[4] See, e.g., *Polfarmex* (C-421/17, para. 39), considering that ‘Article 9 of that directive assigns a very wide scope to VAT’.

[5] See *Fini H* (C-32/03, para. 19), considering that Article 9(1) of the VAT Directive ‘defines “taxable person” by reference to the term “economic activity”’.

[6] See, e.g., *Rompelman* (268/83, para. 22), considering that ‘preparatory acts ... must themselves be treated as constituting economic activity’.

[7] See, e.g., *Marle Participations* (C-320/17, para. 22), considering that ‘[a]n analysis of those definitions [i.e., the elements of the definition of ‘taxable persons’ in Article 9(1) of the VAT Directive, GB] shows that the scope of the term “economic activities” is very wide and that the term is objective in character, in the sense that the activity is considered per se and without regard

to its purpose or results’.

[8] See AG Cosmas in *Enkler* (C-230/94, point 17), considering that ‘not every activity which is carried out independently and consists in the exploitation of tangible property ... is to be deemed an “economic activity”’ within the meaning of the VAT Directive.

[9] B.J.M. Terra & J. Kajus, *Introduction to European VAT* (IBFD 2022), para. 3.2.5.

[10] See, e.g., *BBL* (C-8/03, para. 39), considering that ‘the simple acquisition and the mere sale of other negotiable securities cannot amount to exploitation of an asset for the purpose of obtaining income on a continuing basis’.

[11] See AG Lenz in *Wellcome Trust* (C-155/94, point 32), considering that ‘[i]f an activity is treated as an economic activity within the meaning of the Sixth VAT Directive [now VAT Directive, GB], it will remain so even if completed in a single day’.

[12] *S?aby and Others* (C-180/10, para. 36). See also *AJFP Sibiu and DGRFP Brasov* (C-655/19, para. 35), considering that ‘the sale of the buildings at issue in the main proceedings in fact fell within the scope of a simple exercise of the right of ownership and of sound management of private assets, and, consequently, does not fall within the scope of the exercise of an economic activity’.

[13] *S?aby and Others* (C-180/10, para. 37).

[14] *S?aby and Others* (C-180/10, para. 38).

[15] *S?aby and Others* (C-180/10, para. 39) and, similarly, *Redlihs* (C-263/11, para. 36). For a discussion, see Beretta, *supra* n. 1, at pp. 84-88.

[16] *S?aby and Others* (C-180/10, para. 40).

[17] See *Redlihs* (C-263/11, para. 39), considering that ‘the fact that the applicant in the main proceedings acquired the tangible property in issue to meet his own personal needs, as is suggested by the wording of the first question in the reference, does not preclude that property from being subsequently used for the purposes of the exercise of an ‘economic activity’ within the meaning of Article 9(1) of the VAT Directive’.

[18] See *Trgovina Prizma* (C-331/14, para. 23), considering that ‘the fact that the subject-matter of the sale was acquired by the taxable person using his personal resources cannot have a decisive effect’.

[19] See *Kostov* (C-62/12, para. 31), considering that ‘a natural person who is already a taxable person for VAT purposes in respect of his activities as a self-employed bailiff must be regarded as a “taxable person” in respect of any other economic activity carried out occasionally, provided that that activity constitutes an activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive’.

[20] O. Henkow, *Taxable Persons in ECJ – Recent Developments in Value Added Tax 2014* (M. Lang. et al. eds, Linde 2015), p. 81.

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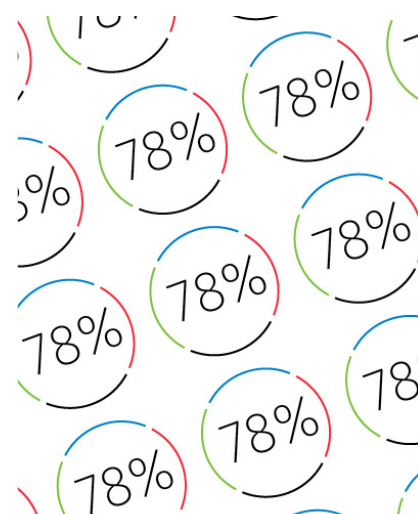
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