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Please find below a selection of articles published this February in Highlights & Insights on European Taxation, plus one freely accessible article.

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– ***Navitours Sàrl* (C-294/21)**. Place where transport services are supplied. Tourist trips on the Moselle. Court of Justice

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The case is of a very particular nature as it raises for the first time the issue of levying VAT on transport services that are supplied entirely in a Condominium. As there is no other Condominium (entirely) within the EU, the case does not offer any directly transposable findings to similar situations. Yet, it does provide valuable insights into the CJ??'?s priorities and understanding of the neutrality principle. One could argue that the elaborate analysis of 'transport services' for Article 9(2)(b) of the Sixth Directive has been subsequently (partly) rendered superfluous because of the particular reference to Article 48 of the Recast VAT Directive (Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) to the place of supply of 'passenger transport', which shall be 'the place where the transport takes place, proportionate to the distances covered.'

The outcome of both the Opinion and the judgment appears to throw the ball to the two countries involved to solve the situation themselves and, thus, make use of Article 5 in the Treaty of 19 December 1984 between Luxembourg and Germany. Under the guise of the neutrality principle, both the CJ and the AG implicitly endorse a 'first come, first served' basis, on the grounds that as long as the obligation to levy VAT is fulfilled, then the obligations arising from the VAT Directive are met.

The reasoning behind this solution first highlights that the territoriality principle does not suffice to solve the problem in cases of joint sovereignty. While it could be used to ensure that all domestic activities are taxed in the territory of a country – however this is understood in the context of the

Condominium – (‘obligation to tax’), both the Court and the AG rely instead on the neutrality principle, as an expression of the general principle of equal treatment. This understanding is certainly not new, as the CJ has highlighted on several occasions that the general principle of equal treatment, of which the principle of fiscal neutrality is a particular expression in VAT law, requires similar situations not to be treated differently unless differentiation is objectively justified (see, for instance, CJ 19 December 2012, C?549/11 *Orfey Balgaria*, ECLI:EU:C:2012:832, para. 32). However, in the present case, the neutrality principle comes with a dual connotation: first, to justify the obligation of one Member State to levy VAT on services provided in the Condominium to ensure that taxable persons in the Condominium are not treated more favourably than similar taxpayers (‘obligation to tax’), but also to ensure that those services are not subject to double taxation as this would also disrupt the neutrality principle for treating the Condominium taxpayers less favourably (‘obligation of non-double taxation’). Indeed, while the territoriality principle could have satisfied the first condition, it would not suffice for the second.

But is the neutrality principle, in the sense of equal treatment, really satisfied here? First, if both Member States are competent to levy VAT on transport services supplied along the Condominium, then it is possible that similar, if not the same, operations are subject to different tax rates, depending on who levies VAT first. This result is probably a distortion of the neutrality principle, which is already limited by the different applicable tax rates in the EU. However, this limitation is accepted to the extent that those different rates do not apply to the same activities in the same territory, which is exactly what would happen in this case, compromising both the legal and economic aspects of the neutrality principle. This potentially different treatment of similar services also raises issues regarding another facet of the neutrality principle: VAT uniformity. As the Court clearly stated in the *Commission v France*judgment (CJ 3 May 2001, C-481/98 *Commission v France*, ECLI:EU:C:2001:237): ‘[T]he principle of fiscal neutrality […] also includes […] the principles of VAT uniformity and of elimination of distortion in competition.’

Second, if both Member States are competent to levy VAT in the Condominium, ensuring that double taxation is avoided may create an additional burden on tax administrations that will have to exchange information on the VAT charged on the services supplied there. While this issue may be solved by an agreement on the allocation of taxing rights, as proposed by the AG and the CJ, another administrative burden may arise on the taxpayers in the possible scenario of a quasi-simultaneous levy of VAT by both States. That would be the case, for instance, if VAT were levied by each State (inadvertently as to the double taxation arising), with a few days of difference. In that case, the taxpayer would have to collect and submit proof that they have already paid VAT in the first Member State that levied the tax.

Furthermore, as there are more boat tour operators along the Mosel, if no agreement is concluded between the two States and if the promoted solution remains the ‘first come, first served’, another fundamental principle of EU law may be compromised – that of legal certainty, the importance of which in VAT law was recently highlighted by the CJ in the *Agenzia delle dogane e dei monopoli* case (CJ 12 May 2022, C-714/20 *Agenzia delle dogane e dei monopoli*, ECLI:EU:C:2001:237, paras. 60-61). As was also raised by the parties before the domestic courts, if both Germany and Luxembourg could levy tax, taxpayers would be unable to properly foresee and predict how their activities would be taxed (by which State and at which rate).

The obligation to tax as a corollary of the neutrality principle appears, thus, to take precedence in the CJ??’?s reasoning. This is in line with the letter of the VAT Directive. However, this approach also raises certain questions, as highlighted above. Despite the possible inconsistencies that

emanate therefrom, it has to be acknowledged that the CJ could not have allocated a taxing right to one of the two involved Member States without going against the letter of the VAT Directive.

Aikaterini Pantazatou

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