



Burden of proof under scrutiny of Tax Courts of Justice



Presumptions and burden of proof – the jurisprudence of the CJEU



Agenda

- I. Introduction / Focus on tax law
- II. Infringement procedure
- III. Preliminary rulings
 1. Direct taxation
 2. Value Added Tax
- IV. Conclusion



I. Introduction / Focus on tax law

- The power to tax is in the hands of the Member States -> the EU has only limited competences.
- **Article 113 TFEU**: allows provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.
- **Art. 115 TFEU**: allows directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.



I. Introduction / Focus on tax law

- Presumptions and burden of proof are part of the procedural law.
- Even if the EU has tax competences, it is up to the Member States to form their own procedural law
- There is only **one exception**: The procedural autonomy of the Member States is circumscribed by the **principles of equivalence and effectiveness**.
- The rules must not be less favourable than those governing similar domestic situations (principle of equivalence) nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness).



II. Infringement procedure (Art. 258 TFEU)

- It is a special procedure in front of the CJEU with its own (EU) rules for the burden of proof (normally: COM against a Member State)
- see **C-105/08 - COM/Portugal, par. 26**: ...it should be borne in mind that, according to settled case-law, in proceedings brought under Article 258 TFEU for failure to fulfil obligations, **it is incumbent upon the Commission to prove the allegation** that an obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information required to enable the Court to establish that the obligation has not been fulfilled, and in so doing **the Commission may not rely on any presumption.**



III. Preliminary rulings (Art. 267 TFEU)

- It is a special procedure in front of the CJEU, that is **based on a national procedure** in front of a national court.
- Here, the CJEU has a very **special function**.
- **The CJEU does not decide the case**. It “only” helps the national court to decide a case, if EU law is necessary for the decision and has to interpret in an uniform manner.
- This function as a “**supporting court**” is recognisable in some text blocs of the CJEU.



III. Preliminary rulings (Art. 267 TFEU)

- **See C-106/16 – Polbud (par. 27 – 28):**

In that regard, it should be observed that, Article 267 TFEU establishes a procedure for direct cooperation between the Court and the courts of the Member States. In that procedure, any assessment of the facts of the case is a matter for the national court (...) whilst the Court is empowered to give rulings on the interpretation or the validity of an EU provision only on the basis of the facts which the national court puts before it.

Consequently, the questions referred must be answered on the basis of that premiss, the accuracy of which it is, however, for the referring court to check.



III.1. Direct Taxation

- **See C-115/16 e.a. – N Luxembourg 1 e.a. (par. 124 seq.):**

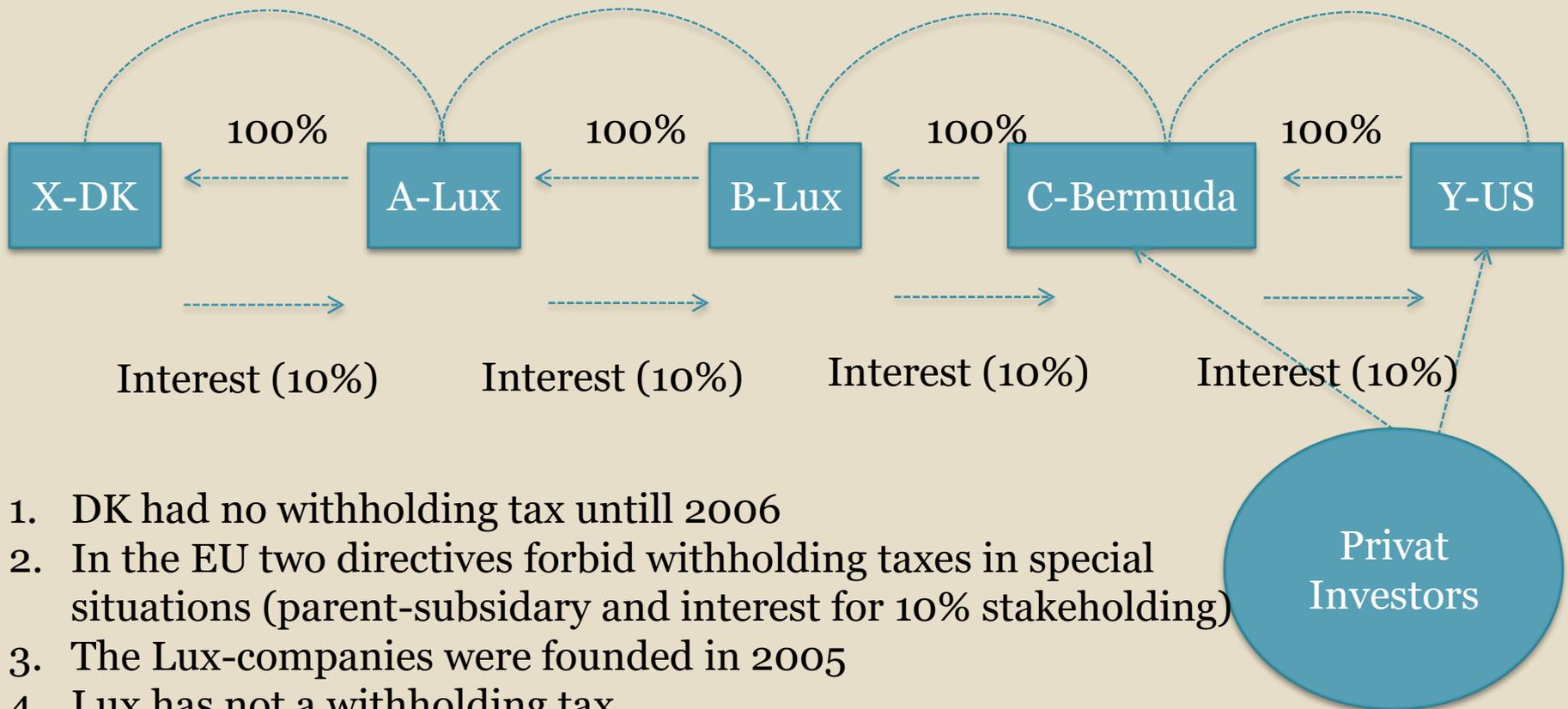
The constituent elements of an abuse of rights and the relevant evidence: As is clear from the Court's case-law, proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it



III.1. Direct Taxation

• “Danish-Cases” (C-115/16 – C-119/16 + 299/16)

Loan for buying an operative company in DK



1. DK had no withholding tax until 2006
2. In the EU two directives forbid withholding taxes in special situations (parent-subsidiary and interest for 10% stakeholding)
3. The Lux-companies were founded in 2005
4. Lux has not a withholding tax



III.1. Direct Taxation

- **See C-115/16 e.a. – N Luxembourg 1 e.a. (par. 124 seq.):**

It is not for the Court to assess the facts in the main proceedings. However, when giving preliminary rulings, the Court may, if appropriate, specify indicia in order to guide national courts in the assessment of the cases that they have to decide. In the main proceedings, whilst the presence of a number of such indications could lead to the conclusion that there is an abuse of rights, **it is nevertheless for the referring courts to establish whether those indications are objective and consistent, and whether the applicants in the main proceedings have had the opportunity to adduce evidence to the contrary.**



III.1. Direct Taxation

- **See C-115/16 e.a. – N Luxembourg 1 e.a. (par. 142 and 143):**

On the other hand, where a tax authority of the source Member State seeks, on a ground relating to the **existence of an abusive practice**, to refuse to grant the exemption provided for in Article 1(1) of Directive 2003/49 to a company that has paid interest to a company established in another Member State, **it has the task of establishing the existence of elements constituting such an abusive practice** while taking account of all the relevant factors, in particular the fact that the company to which the interest has been paid is not its beneficial owner.

Such an authority has the task not of identifying the beneficial owners of that interest **but of establishing that the supposed beneficial owner is merely a conduit company through** which an abuse of rights has been committed.

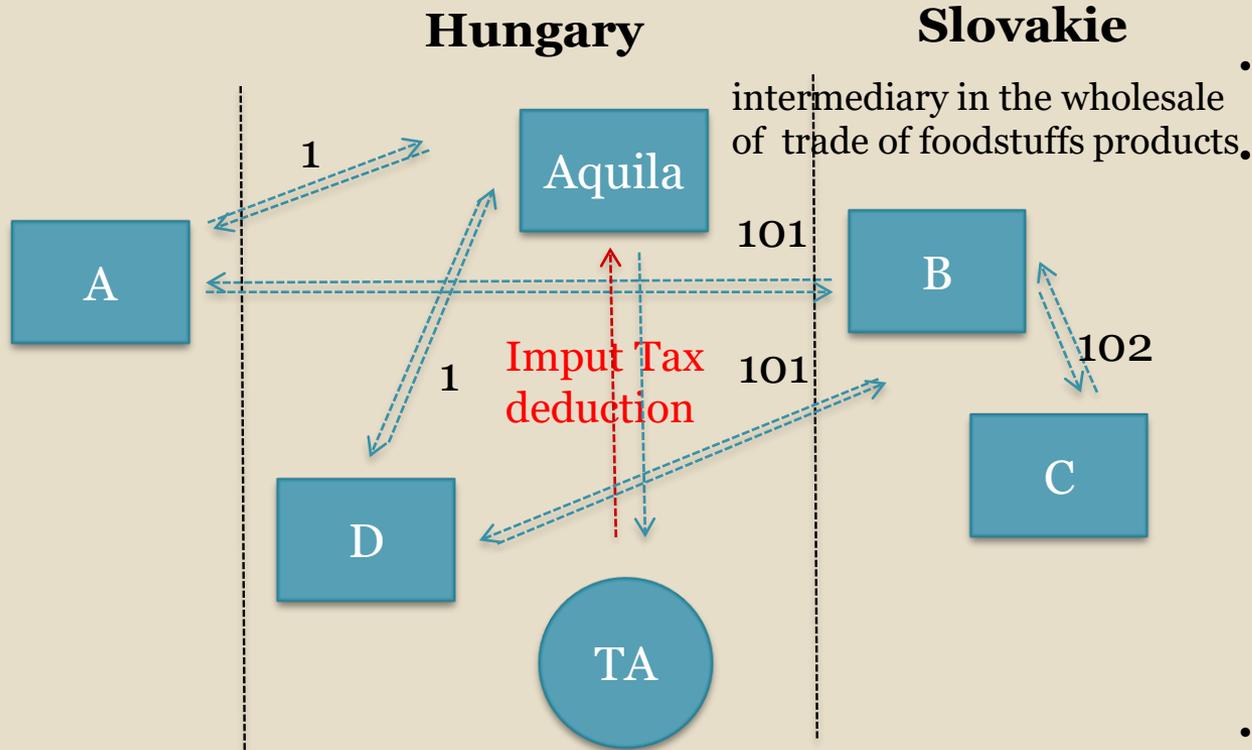


III.2. VAT

- The **prevention of tax evasion, tax avoidance and abuse** is an objective recognised and encouraged by Directive 2006/112.
- Since EU law lays down **no rules relating to the procedures for taking evidence in connection with VAT fraud**, that objective evidence must be established by the tax authorities in accordance with the rules of evidence laid down in national law. However, those rules must not undermine the effectiveness of EU law.

III.2. VAT

• C-512/21 – Aquila Part Prod Com



- VAT adjustment concerning the VAT refund claim
- taxable person had actively participated in a carousel fraud. It is based on the infringement of provisions of national law relating to the safety of the food supply chain, on the low commercial margin applied by companies and on the unreasonable commercial behaviour of some of them, which establish the existence of an invoicing chain aimed at acquiring an unlawful tax advantage and at knowingly evading taxation.
- Can the circumstances relied on by the Tax Administration be regarded as objective evidence?



III.2. VAT

(30) Furthermore, according to the settled case-law of the Court, since the refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, **it is incumbent on the tax authorities to establish**, to the requisite legal standard, **the objective evidence** from which it may be concluded that the taxable person committed VAT fraud or knew or should have known that the transaction relied on as a basis for the right of deduction was connected with such a fraud. **It is for the national courts subsequently to determine whether the tax authorities concerned have established the existence of such objective evidence.**

(31) Since **EU law lays down no rules relating to the procedures for taking evidence in connection with VAT fraud**, that objective evidence must be established by the tax authorities in accordance with the rules of evidence laid down in national law. However, those rules must not undermine the effectiveness of EU law



III.2. VAT

(32) Entitlement to the right of deduction can be refused only **if those facts have been established to the requisite legal standard, otherwise than by assumptions.**

(34) **That evidential requirement prohibits**, irrespective of the type of fraud or the conduct under examination, **the use of assumptions or presumptions which, by reversing the burden of proof**, would have the effect of undermining the fundamental principle of the common system of VAT constituted by the right of deduction and, therefore, of impairing the effectiveness of EU law.



III.2. VAT

(36) **It is for the tax authority**, on the one hand, to provide a precise description of the constituent elements of the fraud and to adduce evidence of the fraudulent conduct and, on the other hand, to establish that the taxable person actively participated in that fraud or that he or she knew, or ought to have known, that the transaction relied on as a basis for that right was connected with that fraud.

(50) However, the **tax authority may not oblige a taxable person to undertake complex and far-reaching checks** as to that person's supplier, thereby de facto transferring their own investigative tasks to that person.



III.2. VAT

Therefore:

- The existence of a circular invoicing chain is strong evidence of the existence of fraud, **but** there are no grounds for accepting that the tax authority may, for the purpose of proving the existence of carousel fraud, merely establish that the transaction in question forms part of a circular invoicing chain.
- The mere fact that the members of the supply chain, of which that transaction forms part, knew one other is not sufficient to establish the taxable person's participation in the fraud.
- The sole ground that he or she has failed to comply with the obligations arising from the national provisions or from EU law relating to the safety of the food supply chain is not enough.



III.2. VAT

- **Attention: C-281/20 – Ferimet:**

(41) So far as concerns the **burden of proof as to whether the supplier is a taxable person**, a distinction must be made between, on the one hand, establishing a material condition governing the right to deduct VAT and, on the other, determining the existence of VAT fraud.

(43) (I)t is for the taxable person to establish, **on the basis of objective evidence**, that the supplier has the status of taxable person, unless the tax authorities have the information necessary to check that that material condition governing the right to deduct VAT is satisfied. In that regard, it should be recalled that it follows from the wording of Article 9(1) of Directive 2006/112 that the concept of ‘taxable person’ is defined widely, on the basis of the factual circumstances (...), and therefore that the supplier’s status as a taxable person may be apparent from the circumstances of the case.



IV. Conclusion

- The procedural autonomy of the Member States is circumscribed by the **principles of equivalence and effectiveness**.
- Whilst the presence of a number of such indications could lead to the conclusion that there is an **abuse of rights**, it is nevertheless for the referring courts to establish whether those indications are objective and consistent.
- Entitlement to the **right of deduction can be refused only** if those facts have been established to the requisite legal standard, otherwise than by assumptions.
- But, it is for the taxable person to establish, on the basis of objective evidence, that the **material condition governing the right to deduct VAT** is satisfied.

Thank you for your attention

