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Editorial

European Supervision on the Use of Vague and Undetermined Concepts in Tax Laws

Bruno Peeters*

1 Introduction

The use of vague and undetermined concepts in tax law provisions leads in practice often to interpretation and qualification problems. A term is *vague* when a lack of clarity exists about the applicability thereof. The more the content of a concept can be clarified on the basis of properties or on the basis of circumstances or objects in reality, the less vague it becomes. By way of example could be thought to the concept 'building'. The more properties are mentioned (e.g., human construction, built with durable materials, intended for habitation, etc.), or the more objects in reality are mentioned, which correspond with that word (e.g., residence, house, flat, etc.), the less vague a concept becomes. In addition to this, a concept can also qualify as *undetermined*. This is the case when the concept is too general for the factual context in which it is used. More particularly, the so-called evaluative concepts belong to the category of undetermined concepts. They are used to evaluate certain objects or a situation. Classical examples are the concepts 'public order', 'morality', 'reasonable', 'good faith', etc.

The injudicious use of vague and undetermined concepts in tax law provisions can represent a source of legal uncertainty. Legal certainty presupposes indeed that the legal subject must (be able to) have certainty about the legislation that should be applicable to him, or in other terms, that he must be able to foresee beforehand that the intended legal act will not give rise to disputes in court. This is why the principle of legal certainty compels the legislator to formulate laws clearly and unambiguously. The language used has to be correct and accurate and in principle, fit in with the accepted official language. Where necessary, precise, technical legal concepts can however also be used. The legal subject should indeed be able to determine his legal position with sufficient certainty. The standards set forth to that end should be sufficiently accessible, knowable and foreseeable for him. The clearer and more specific the phrasings of the law, the greater the certainty for the legal subjects, in the present case the taxpayers. This is why legal rules must fit as tightly as possible to the actual case and be minimally susceptible for diverging interpretations; insofar the application conditions as well as their legal consequences are concerned.

2 Equilibrium between precision and flexibility

Formulated in this way, it seems that the legal certainty is served best with a detailed legislation, in which clear, strict and quantified rules are stated for clearly described series of cases and the use of vague and indeterminate concepts should as much as possible be avoided. The consequences of vague and indeterminate concepts are indeed that the outcome of legal disputes is determined too often by the subjective perceptions of individual public servants and judges.

The above needs however to be put into perspective. The need for precision and completeness may not be understood too strictly. Sometimes, it is claimed, wrongly so, that a precise and very detailed legal provision can remove all legal uncertainty. A surplus of categories, enumerations and other detail provisions in law texts, indeed, can also lead to interpretation problems. They cause conflicts because, under the influence of social developments, they are rapidly rendered out of date and have to be adapted. A high frequency of law modification also represents a source of legal uncertainty. The law must therefore be enough supple, it has to be able to adapt to changing circumstances. To this end, a correct equilibrium is required between precision and flexibility. From the point of view of the legal certainty, a legal rule has to offer on the one hand, a minimum of precision, which is sufficient to allow forecasting and, on the other hand, from the point of view of justice, the legal rule has to be enough flexible to leave room to the concrete circumstances and towards the future. The application of vague and indeterminate concepts in legal provisions makes it possible to obtain such flexibility. They grant a wider margin of discretion to the administration and the judge. By their nature, such concepts are also better armed against the test of time. Furthermore, vague and

* Prof. Dr Bruno Peeters, University of Antwerp, Faculty of Law, Research Group Business & Law. He is also Chairman of the Antwerp Tax Academy of the University of Antwerp (www.antwerptaxacademy.be) and Lawyer-Tiberghien Lawyers.

indeterminate concepts can up to a certain level become more legally certain due to the fact that in the jurisprudence, they are more subject to interpretation. The administration too has here a task in the form of issuing rulings and the publication of circular letters, wherein is exposed according to which criteria and standards, the margin of discretion that has been granted to her will be exercised. The administration as well as the judge will – in the light of the principle of legal certainty – search for objective and legally conformable criteria. They will in first instance find inspiration in the explanatory statement of the law, in which the legal context, the objectives and the general policies are outlined and in which possibly potential application cases are mentioned as examples.

It becomes immediately clear that also the legislator will have to make the necessary efforts in this domain, certainly when he applies vague and indeterminate concepts.

From all this can however not be concluded that the inclusion of vague and indeterminate norms in tax legal provisions is not without risks. It is a question of searching for a correct equilibrium between the interests of the taxpayer on the one hand and – possibly at odds with – the interests of the tax administration, on the other hand. This is why the equilibrium to be pursued, translates as mentioned, in a balance between precision and flexibility.

3 Supervision by the ECHR and EU CJ

In assessing this equilibrium, the European Courts of Justice and more particularly the European Court for Human Rights (ECHR) and the Court of Justice (EU CJ) also fulfil an important role.

This is why the ECHR has emphasized in a number of judgments the importance of sufficiently accessible, clear and predictable and consistent legislation. In its judgment Shchokin versus Ukraine of 10 October 2010 the Court considered in view of the application of Article 1 of Protocol No. 1 as follows:

When speaking of 'law', Article 1 of Protocol No. 1 alludes to the same concept to be found elsewhere in the Convention (. . .). This concept requires firstly that the measures should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned, precise and foreseeable in its application (. . .).[1]

Particularly concerning the application of a progressive tax rate to a certain category of income, the Court came to the conclusion that:

the lack of the required clarity and precision of the domestic law, offering divergent interpretations on such an important fiscal issue, upset the requirement of the 'quality of law' under the Convention and did not provide adequate protection against arbitrary interference by the public authorities with the applicant's property rights.[2]

For this reason the Courts held that there has been a violation of Article 1 Protocol No. 1. In a later judgment of 7 July 2011 concerning the contradictory application by the Ukraine Supreme Court of a VAT exemption for small businesses, the ECHR considered that the possibility of such divergent interpretations of the same legal provisions was essentially generated by the inappropriate state of domestic law on this issue. Accordingly, in the Court's opinion, the lack of the required foreseeability and clarity of the domestic law on such an important fiscal issue, producing opposing judicial interpretations, upset the requirement of 'quality of law' under the Convention. In this case the Court also decided that there has been a violation of Article 1 Protocol No. 1.[3]

Also the Court of Justice exercises control on the quality of the phrasings that are used in legal provisions. The Court has thus recently confirmed in a tax matter that the clarity of (tax) provisions constitutes an independent requirement of the principle of legal certainty.[4] In its preliminary ruling in the SIAT case the Court needed to judge on the compatibility with EU law – especially with the freedom to provide services (Article 49 EC) – of the 'special rule' laid down in Article 54 of the 1992 Income Tax Code, which the Belgian tax authority relied on as a basis for refusing the taxpayer's (SIAT) application for the deduction of business expenses. Under that provision, payments for supplies or services made by Belgian taxpayers to non-resident taxpayers, in which the latter are not subject to tax on income or are subject there, as regards the relevant income, *to a tax regime which is appreciable more advantageous than the applicable regime in Belgium*, are not to be regarded as deductible business expenses unless the Belgian taxpayer provides proof that such payments relate to a genuine and proper transaction and do not exceed the normal limits'. The aforementioned presumption that business expenses are not deductible, as well as the substantive conditions for their deductibility, as laid down in Article 54 of the 1992 ITC , make it more difficult to obtain such a deduction on the basis of that provision than under the 'general rule' laid down in Article 49 of that Code. Under the general rule the taxpayer must only provide proof of the authenticity and amount of the expenditure incurred, there being a presumption on the part of the tax authority, according to the Belgian Government, that the

[1] ECHR, 14 Oct. 2010, nos 23759/03 and 37943/06, Shchokin/Ukraine, www.echr.coe.int. paras 50 and 51.

[2] ECHR, 14 Oct. 2010, nos 23759/03 and 37943/06, Shchokin/Ukraine, www.echr.coe.int. para. 56.

[3] ECHR, 7 Jul. 2011, no. 39766/053/06, Serkov/Ukraine, www.echr.coe.int. paras 41 and 42.

[4] EUCJ, 5 Jul. 2012, C-318/10, SIAT, www.curia.eu.

expenditure is necessary for acquiring or retaining taxable income.

Without going into the details of the case, it is noteworthy that the Court of Justice stresses the fact that as the Belgian Government acknowledged, in the absence of a statutory definition, or administrative instructions as to what is to be understood by *a tax regime which is appreciably more advantageous than the applicable regime in Belgium*, the assessment concerning the applicability of the 'special rule' is carried out on a case-by-case basis by the tax authority, under the supervision of the national courts.[5] Therefore the Court considers that:

a rule framed in such terms does not make it possible, at the outset, to determine its scope with sufficient precision and its applicability remains a matter of uncertainty. Such a rule does not, therefore, meet the requirements of the principle of legal certainty, in accordance with which rules of law must be clear, precise and predictable as regards their effect, in particular where they may have unfavourable consequences for individuals and undertakings (. . .). As it is, a rule which does not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued.[6]

In the light of all of the foregoing the Court ruled that Article 54 of the Belgian ITC precludes Article 49 EC.

We believe that this judgment demonstrates that for the Court, the use as such of the undetermined (evaluative) phrasings in Article 54 ITC is not so much problematic, than the absence of statutory provisions and or administrative instructions, which give more directives to the tax authority for the application of this provision. The undetermined phrasings of Article 54 ITC should have been made more legally secure (cf. *supra*).

With such judgments, the ECHR as well as the Court of Justice have underscored the importance of well formulated and sufficiently clear applicable legal provisions. Let this in any case be an incentive for the tax legislators to continue to promote high quality legislation.

[5] EUCJ, 5 Jul. 2012, C-318/10, SIAT, www.curia.eu. paras 25, 26 and 27.

[6] EUCJ, 5 Jul. 2012, C-318/10, SIAT, www.curia.eu. paras 57, 58 and 59.