

Is a Municipal Sales Tax Compatible with VAT?

Benjamí Anglès Juanpere

ABSTRACT

This paper analyses the Judgement of the Court of Justice of the European Union (CJEU) of 7 August 2018, case C-475/17, on the request for a preliminary ruling made by the Estonia Supreme Court on the compatibility between the municipal sales tax, which said country's legislation allows municipalities to establish, and value added tax (VAT), which is Community-wide in scope. Pursuant to its interpretation of the VAT Directive, the CJEU concluded that this municipal tax is compatible with VAT and therefore endorses its levying. Based on an analysis of said Judgement, this paper assesses its potential transference into domestic Spanish legislation, be this within the current legal framework or as a possible new tax type within a future reform of the local finance system.

Keywords: Tax; VAT; local taxation; local tax authority; CJEU.

Submitted : April 09, 2021

Published : May 05, 2021

ISSN: 2507-1076

DOI: 10.24018/ejbmr.2021.6.3.848

Dr. Benjamí Anglès Juanpere *
University Oberta de Catalunya, Spain.
(e-mail: bangles@uoc.edu)

**Corresponding Author*

I. INTRODUCTION

In 2017, the Supreme Court of Estonia made a request for a preliminary ruling from the Court of Justice of the European Union (CJEU) on the compatibility between the municipal sales tax said country's legislation allows its municipalities to establish and VAT, which is Community-wide in scope. In general, for Lamensch [1] the "value added taxes are considered to be consumption taxes that are collected by taxable persons on a transaction basis, i.e., upon the supply of goods and services, which is also why, as noted already, they are, without exception, classified as indirect taxes". In the main proceedings, the plaintiff taxpayers argued that the local tax was incompatible with VAT, in that it was contrary to Article 401 of the VAT Directive, its incompatibility stemming from it being levied at a good's or service's retail sale stage and with the consumer being exclusively liable therefor.

Firstly, it should be borne in mind that, pursuant to the aforementioned Directive, the common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that, within the territory of each Member State, similar goods and services bear the same tax burden, whatever the length of the production and distribution chain. According to Bird and Gendron [2], "Most analysts think that a value-added tax (VAT) is the best form of general consumption tax available. If a country needs such a tax as most developing countries certainly do, then VAT is the one to have in almost all cases. [...] Since every developing country needs some form of general taxation and VAT seems likely to have less bad effects than would obtaining similar revenues from other forms of general consumption (let alone income) taxation, the case for VAT remains strong in developing countries".

Estonia's municipal sales tax is levied at a maximum rate of 1% on the price of goods sold or services provided by taxpayers within municipal limits, with "taxpayers" being defined as businesses holding a licence for retailing, catering, or the provision of services in said municipality.

In its Judgement, the CJEU accepts the possibility of municipal authorities levying upon local retailers and service providers a sales tax, without this being incompatible with VAT. In this regard, it states that, provided that it is not levied on commercial transactions in a way comparable to VAT, a tax such as the sales tax at issue in the main proceedings does not adversely affect the operation of the common system of VAT within the EU. In opinion of Ebrill et al. [3], "The particularity of value added taxes is that they are strictly speaking not imposed on the addition of value to products and services by taxable persons, but on the consumption, or rather acquisition, of the products and services by the end consumer".

Furthermore, bearing in mind the fact that the application to the sale price of the tax depends on the sellers, the Court holds that only the conduct of the seller can determine the difference in its tax treatment compared with a competitor and the possible differences in price borne by consumers compared with others, such that neither all of the latter shall be required to pay it, nor always.

In the case of Spain, the principle 'no taxation without representation' (or 'reserva de ley' in Spanish) is the one under which the Spanish Constitution (CE) specifies that certain areas of the law, like local taxes, may only be regulated by primary legislation in the Spanish Parliament. By application of the 'no taxation without representation' principle, local taxes are established by the Law on Local Taxation, as their creation and basic regulation are the competence of the Spanish State. It will therefore be necessary to ascertain and assess whether this new tax will fit

within the current framework for local tax revenue in the country.

Nevertheless, should this not prove possible, this Judgement will be important in any future reform of the local financing system, as it would open the doors to a new type of tax that could possibly be applied by Spain's local authorities, most of whose revenue is insufficient.

II. THE CJEU JUDGEMENT UNDER REVIEW

On 1 August 2017, the Supreme Court of Estonia issued a request for a preliminary ruling of the CJEU, case C-475/17, on the interpretation of Article 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (also known as the VAT Directive). The request was made within the framework of proceedings between Viking Motors AS, TKM Beauty Eesti OÜ, TKM King AS, Kaubamaja AS and Selver AS, on the one hand, and the *Tallinna linn* (City of Tallinn, Estonia) and the *Maksu- ja Tolliamet* (Tax and Customs Authority, Estonia), on the other, concerning the reimbursement of amounts paid by those companies due to application of the municipal sales tax, as they regarded it as incompatible with VAT.

Paragraph 8 of the *kohalike maksude seadus* (Estonian law on local taxes) states that the sales tax shall be paid by sole traders and legal persons having a trading or service licence within the territory of a municipality or city pursuant to those regulations established by each municipal council. Said tax shall be charged on the value, in the sale price, of the goods and services sold in the territory of the municipality or city by the taxpayer. The amount of the sales tax, which must not exceed 1% of the value, shall be established by the municipal or city council in the sale price of said goods and services.

To this end, the taxpayer shall: a) calculate the sales tax on the value of the goods and services sold by him in the territory of the municipality in accordance with the amount laid down in the council's tax regulation; b) submit to the tax administrator determined in the council's decision, by the 20th day of the month succeeding the quarter, the tax declaration determined by the Ministry of Finance with respect to sales tax, and c) pay the sales tax into the budget of the local tax authority by the deadline for submission of the declaration.

Additionally, local authorities shall be entitled to grant abatements and exemptions from the sales tax on the conditions and in the cases determined by tax regulations issued by their councils.

Pursuant to the provisions of the aforementioned Law, Tallinn City Council introduced a Municipal Sales Tax Regulation, which levied said tax on goods and services supplied in or from the territory of the city of Tallinn to any natural person in the fields of retailing, catering or the provision of services.

Additionally, said Regulation defines "taxpayers" of this new tax as traders who satisfy all of the following conditions:

- 1) The trader is registered in the register of economic activity.
- 2) The trader's place of business is located in the territory of the city of Tallinn.
- 3) The trader operates in the field of retailing, catering, or the provision of services.

According, again, to said Regulation, the tax liability shall arise on the day on which the first of the following acts takes place: a) the goods are dispatched or made available to the purchaser, or the purchaser is provided with the service, or b) payment for the goods or service is received in full or in part.

Whichever the case, the taxable value of goods or services subject to the sales tax shall be the sale price of the goods or service, or any other consideration (not including VAT), which the seller of the goods or the provider of the service receives or has received from the purchaser of the goods, the recipient of the service or a third person for the goods or the service.

The *Riigikohus* (Supreme Court, Estonia) initially held that, even though, from a formal point of view, the sales tax at issue in the main proceedings did not have all the characteristics of VAT, since it is not charged at each stage of the production and distribution process and it does not give rise to a deduction of the tax paid at an earlier stage, it also held that the fiscal burden of that sales tax was ultimately borne by the end consumer. It also had doubts as to whether the application of this local sales tax could also adversely affect the operation of the common system of VAT, resulting in similar goods and services bearing a different tax burden at national level.

Given all the above, the Estonian Supreme Court decided to stay the proceedings and to refer the following question to the CJEU for a preliminary ruling on the levying of the local sales tax: "Is Article 401 of [the VAT] Directive to be interpreted as precluding a national tax which applies generally and is proportionate to the price, but which, pursuant to the relevant provisions, is to be levied only at the stage of the sale of goods or services to a consumer, with the result that the final tax burden rests ultimately with the consumer, and which compromises the operation of the common system of value added tax and distorts competition?"

With regard to this matter, it is firstly necessary to remember that, under Article 2 of the VAT Directive, the principle of the common system of VAT involves the application to goods and services, up to and including the retail trade stage, of a general tax on consumption exactly proportional to the price of the goods and services. Lamensch [4] affirms that, in practice, "a value added tax is thus collected by the supplier in the framework of a taxable transaction (the 'taxable person') and paid by the customer or consumer (the 'taxpayer') as a part of the sales Price". This is regardless of the number of transactions which take place in the production and distribution process before the stage at which the tax is charged.

However, VAT is chargeable on each transaction only after deduction of the amount of VAT borne directly by the costs of the various price components of the goods and services. The procedure for deduction has been arranged by Article 17(2) of the aforementioned Directive in such a way that taxable persons are authorised to deduct from the VAT for which they are liable the input VAT already charged on the goods or services, and that the tax is charged, at each stage, only on the added value and is ultimately borne by the final consumer. Lejeune [5] says on the right to deduct Input VAT: "VAT should not be a cost of doing business. Businesses collect the VAT but are not the end consumers. The neutrality

of VAT is guaranteed by granting businesses a right to deduct input VAT. For businesses that are VAT registered in the EU member state where the input VAT is paid, the right to deduct input VAT is exercised via their VAT return. For businesses that are not VAT registered in the EU member state where the input VAT is paid, the deduction is, in principle, granted through a refund procedure”.

In order to decide whether a tax, duty or charge can be characterised as a turnover tax within the meaning of Article 401 of the VAT Directive, it is necessary to determine whether it has the effect of jeopardising the functioning of the common system of VAT by being levied on the movement of goods and services and on commercial transactions in a way comparable to VAT. The CJEU has stated in this regard, via its Judgement of 3 October 2006, case C-475/03, that taxes, duties, and charges must in any event be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT, even if they are not identical to it in every way, in all the following regards:

- 1) They are applied generally to transactions relating to goods or services.
- 2) They are proportional to the price charged by the taxable person in return for the goods and services which he or she has supplied.
- 3) They are charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place.
- 4) The amounts paid during the preceding stages of the production and distribution process are collected and deducted from the tax payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at that stage, and the final burden of that tax rests ultimately on the consumer.

Remember that taxable persons, must assess the amount of tax due in accordance with the applicable rules (i.e., base, exemptions, rates, or any special regime) and pay that amount to the tax administration which having taxing rights over the transaction. They bear the costs related to these collection obligations and are liable for the correct payment of the tax, although they do not receive any payment for that activity. In opinion of Lejeune and Dale [6] this is why they often see themselves as ‘unpaid tax collectors’.

With regard to the third and fourth essential conditions for VAT, that is to say, the collection of the tax at each stage of the production and distribution process and the existence of a right to deduct the tax paid at an earlier stage of that process, the CJEU acknowledges, as the referring Estonian Supreme Court previously did, that the tax at issue does not satisfy those conditions.

Furthermore, the sales tax at issue in the proceedings does not require taxpayers to add the amount of that tax to the sale price or to indicate separately on the invoice delivered to the purchaser the amount of the tax to be paid. Thus, the passing-on of that tax to the final consumer was a possibility and not an obligation for the retailers, who could at any time choose to bear that tax themselves, without increasing the prices of the goods and services provided.

Therefore, it cannot be certain that the burden of the sales tax at issue in the main proceedings was ultimately borne by the final consumer in a way similar to a tax on consumption

such as VAT. In this regard, the CJEU had already held that a tax levied on production in such a way that it is not certain that it will be borne by the final consumer as with a tax on consumption such as VAT is likely to fall outside the scope of Article 401 of the VAT Directive (CJEU Judgement of 27 November 2008).

In other words, whereas through the VAT deduction mechanism that tax is charged only to the final consumer and is completely neutral as regards the taxable persons involved in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved, that is not the case with a tax such as the municipal sales tax applied in Estonia. We cannot forget that the fundamental advantage for tax authorities that VAT possesses over sales tax is the self-enforcing mechanism it has in business-to-business (B2B) transactions. With VAT, a business purchasing goods needs an invoice issued by a seller to deduct the VAT incurred on the transaction, but, with no VAT, the seller would prefer not to issue the invoice and under-declares its sales to the tax authority. This difference in incentives gives rise to the self-enforcing mechanism since the buyer will demand the invoice to ensure he receives the deduction. However, with sales tax, the buyer has no need to demand an invoice and it is up to the seller to declare the sale to the tax authority [7]. That circumstance is sufficient to conclude that, where the sales tax does not satisfy the essential characteristics of VAT, it will therefore avoid the prohibition laid down in Article 401 of the VAT Directive.

Furthermore, bearing in mind the fact that the application to the sale price of the municipal sales tax depends on the sellers, who may or may not decide to transfer the burden of the tax to the purchaser, it is important to remember that only the conduct of the seller can determine the difference in his or her tax treatment compared with a competitor and the possible differences in price borne by consumers compared with others.

In theory, the VAT and a sales tax are equivalent taxes. For Martínez-Vázquez et al. [8], “This means that, on paper, the two taxes impose the same impact on the economy. However, in practice, the taxes are not equivalent because of the penchant for the sales tax to tax business inputs and to not tax all consumer purchases. The two taxes therefore can have different impacts on prices, production decisions, consumption, and revenue. Both taxes raise the price of consumer goods, but the VAT guarantees a more uniform burden over all commodities”. Consequently, the neutrality of the common system of VAT is not liable to be jeopardised.

For Westberg [9], the principle of neutrality in respect of VAT has frequently been emphasized by the ECJ and applies to almost all provisions. It should be observed, in the context of consumption taxation of the digital economy, that the principle of neutrality is essential to fair competition between suppliers of different types, independent of whether they are supplying goods or services or a mix thereof, and independent of the country of establishment and the country from which the supply takes place or is deemed to take place.

In light of all of the above, the CJEU concludes its Judgement of 7 August 2018 by stating that, provided that it is not levied on commercial transactions in a way comparable to VAT, nor adversely affects the operation of the common

system of VAT, the municipal sales tax established in Estonia is compatible with VAT and upholds its levying.

III. TRANSFERRING THE CJEU JUDGEMENT UNDER REVIEW INTO THE SPANISH LEGAL SYSTEM

A. Local Taxes in Spain

Article 142 CE states that local authorities' revenues are sourced, fundamentally, from their own taxes and levies and from their participation in the revenues of the Spanish State and the country's Autonomous Communities. Although independent of one another, both sources of revenue must act on an integrated basis to provide local authorities with enough economic resources to guarantee the fulfilment of their functions. So, within the field of local financing, local taxes are one of the keys, core resources of local authorities.

According to Article 133.2 CE, applying the 'no taxation without representation' principle, local authorities may establish and levy taxes pursuant to Spanish State legislation. Accordingly, local authorities' powers to raise tax revenues are limited since, as they lack any legislative powers, they cannot create new taxes and may only implement via regulations, in the form of local tax bylaws, taxes previously provided for by the law. According to Casado Ollero [10], as local bodies lack any legislative powers (given that the powers of bylaws, giving external form of local normative competences, are reglementary in nature, within the scope predetermined by law), they lack full normative competence to establish and regulate their own taxes. Local tax powers are necessarily shared tax powers.

The Spanish Constitutional Court (*Tribunal Constitucional*, TC) itself acknowledges said limitations, amongst others, via its Judgement 233/1999, of 16 December (Legal Basis 22), in denying that the local autonomy recognised in the Spanish Constitution implies giving local authorities the freedom to impose their own taxes. In any case, and pursuant to Articles 133.2 and 140 CE, local authorities' powers entail the possibility of having their own taxes and being involved in their establishment or levying.

Nevertheless, despite their classification as "local" taxes, municipal authorities do not, in fact, have absolute power over said resources, firstly because they do not have the power to create taxes and, secondly, because they also cannot implement their content beyond the parameters established by the law. However, for Simón Acosta [11], local taxes are not those whose collection is assigned entirely to local authority revenues, but rather those that (either exclusively or jointly with other Spanish State or regional taxes) are created or established by decision of a local authority, even when regulation of other aspects does not fall within its powers. Thus, a local tax is that for which a local authority is directly responsible before its electorate.

Nevertheless, this principle should not be extended to the point that it stops them from having any role in regulating their taxes or levying them within their territorial scope (TC Judgement 19/1987, of 17 February, Legal Basis 4). The constitutional guarantee of local autonomy and recognition of their powers in the tax system requires local authorities to have the capacity to be involved in the establishment and levying of local taxes, although not necessarily in all taxes

nor to the same degree, such that this principle would not equally affect all the elements making up the tax.

Local authorities are thus limited, with regard to both their powers and their management, by law. However, this legality is, in turn, limited by the principle of local autonomy. For Morell Ocaña [12], this represents an attempt to square indispensable local autonomy with the framework or limits stipulated by law. The representative assembly of a local authority must retain a degree of freedom of decision, such that their autonomy cannot solely entail the creation of their own local reglementary regulations, but also the legal possibility of making decisions at a local level pursuant to each local authority's way of acting.

Although the degree of specificity of the law is at its greatest when it comes to governing the taxable event, it will be less specific when governing other aspects, such as the tax rate. VAT rates should be the same for competing products or services on the same market, [13]. In this latter case, the Spanish State legislator may partially regulate the tax rates to be applied, stipulating criteria or limits, leaving local bodies to implement the rate to be finally applied (TC Judgement 221/1992, of 11 December, Legal Basis 7).

So, the aim is to achieve a balance between the fact that regulation of local taxes cannot lie entirely in the hands of town and city councils, and the fact that the latter may not be completely denied the right to be involved in their configuration. So it is that the Spanish State, via its laws, creates tax types and shapes their key elements, whilst local authorities, via their tax bylaws, establish and levy their taxes pursuant to said laws.

Accordingly, in the opinion of Aragonés Beltrán [14], the law should leave to municipal political representatives, as reflected in bylaws, a field of action that is much broader than that which can and should be left to the Spanish State Executive, as required by both the principle of local autonomy acknowledged in Article 140 of the Spanish Constitution and the establishment in its Article 142 of local taxes as a key part of local finances. The law must guarantee a unified basic framework for local revenue collection but must also grant municipalities broad scope of action [14].

In this regard, the first to create a local taxation system, following the passing of the CE in 1978, was Law 39/1988, of 28 December, governing local tax revenues, subsequently reformed by Law 51/2002, of 27 December and now integrated in the Recast Text approved by Royal Legislative Decree 2/2004, of 5 March (TRLRHL).

According to this legislation, local taxes encompass a range of different types of income and tax categories. More specifically, Article 2.1.b) TRLRHL establishes that local taxes are classified as either taxes (*impuestos*), rates (*tasas*) or special levies (*contribuciones especiales*). Based on this preliminary classification, Article 59 TRLRHL states that local councils must compulsorily levy the following taxes:

- The Property or Council Tax (*Impuesto sobre Bienes Inmuebles*, IBI).
- The Tax on Economic Activities (*Impuesto sobre Actividades Económicas*, IAE).
- The Vehicle Tax (*Impuesto sobre Vehículos de Tracción Mecánica*, IVTM).

Additionally, should they wish, they may also establish and levy the following optional taxes:

- The Tax on Constructions, Installations and Works (*Impuesto sobre Construcciones, Instalaciones y Obras, ICIO*).

- The Tax on the Increase in Value of Urban Land (*Impuesto sobre el Incremento de Valor de los Terrenos de Naturaleza Urbana, IIVTNU*).

Rubio de Urquía [15] clarified that, to be able to levy these optional taxes, local authorities must expressly agree on their simultaneous levying and regulation. In this regard, “levying” refers to the local authority’s political decision to establish a specific tax, within its attributed taxation powers, whilst “regulation” means the local authority’s decision to exercise its reglementary power, i.e., that of regulating a specific tax [15].

Pursuant to Articles 60ff TRLRHL, the IBI is an obligatory, direct and in rem tax levied on the value of properties (be they rural or urban) located within the municipal limits, with the taxable event being title to rights to the administrative concession, surface area, usufruct, or ownership over said properties, with the taxable persons of this tax being those holding any of said entitlements, in the aforementioned order.

Pursuant to Articles 78ff TRLRHL, the IAE is an obligatory, direct and in rem tax whose taxable event is constituted by the mere carrying out, within Spanish territory, of business, professional or artistic activities, whether or not carried out in specific premises or specified or not within the tax’s rate listings. In this regard, an activity of a business, professional or artistic nature is deemed carried out when it entails the arrangement, on one’s own account, of the means of production and human resources, or either thereof, for the purpose of becoming involved in the production or distribution of goods or services. The taxable persons of this tax are those natural and legal persons carrying out, within Spanish territory, any of the activities giving rise to the taxable event.

For their part, Articles 92ff of the same Law state that the IVTM is an obligatory, direct and in rem tax levied upon ownership of motor vehicles suitable for driving on public roads, whatever their class or category. Taxable persons in this case are those persons owning vehicle in whose name the vehicle is placed on record in the driving licence.

Additionally, according to Articles 100ff TRLRHL, the ICIO is an optional and indirect tax, whose taxable event is constituted by the carrying out, within the municipal limits, of any construction, installation or works which require the relevant works or planning permit, whether or not this permit has been obtained, providing that its issuing is the responsibility of the town or city council levying the tax. The taxable persons of this tax are, by way of taxpayers, those persons owners of the construction, installation or works, whether or not they are owners of the property where it is being carried out. Nevertheless, those applying for the relevant permits or, in their absence, those actually carrying out the construction, installation or works, shall be classified as taxable persons in replacement of the taxpayer.

Finally, and pursuant to Articles 104ff of the aforementioned Law, the IIVTNU is an optional, direct and in rem tax levied upon the increase in value undergone by urban land as a consequence of the transfer of title for any reason, or the constitution or transfer of any right in rem of

enjoyment limiting title thereover, provided that, as a result of said transfer, there is an increase in the value of the land (TC Judgement 59/2017, of 11 May, Legal Basis 5).

In addition to the aforementioned taxes, Article 57 TRLRHL states that local councils may establish and levy rates for the provision of services or the carrying on of activities falling within their competence, as well as the privative or special use of municipal public assets. For its part, Article 58 TRLRHL states that, similarly, special levies may be established and levied for the carrying out of works or for the establishment of expansion of municipal services. Lastly, Article 41 TRLRHL provides that public prices may also be established for the provision of services or the performance of activities falling within the local body’s competences, provided that none of the following circumstances occur:

- a) That they have not been requested or voluntarily received by the public. For these purposes, request or receipt by the public shall not be regarded as voluntary when:

- Imposed by the provisions of law or regulations.

- The goods, services or activities are essential to the applicant’s private or social life.

- b) That they are not provided or performed by the private sector, whether or not they are reserved in favour of the public sector pursuant to applicable regulations.

Unlike taxes, whose levying is required without any form of counter-consideration, the establishment of these rates and public prices always entails the provision of a public service, the carrying on of an administrative activity or the privative use or enjoyment of a public asset. For their part, the regulation and imposition of special levies necessarily entails the existence of a special benefit for the general public arising from local works or the inauguration or expansion of a municipal service. In other words, with these other categories of revenue (rates, public prices, and special levies), there is always some service, activity or consideration from the administration directly associated with the payment thereof [16].

B. Incorporating a Sales Tax into Local Revenues in Spain

Given the local taxes and duties listed in the preceding section and their configuration, it is clear that Spain currently has no local tax similar to the municipal sales tax leviable in Estonia. Perhaps the closest would be the IAE, in that affects the same taxpayers, i.e., businesses in the aforementioned sense, but in Spain it is based not upon turnover but on the mere fact of carrying on a business activity within the municipal limits.

Now, bearing in mind the ‘no taxation without representation’ principle that governs the establishment and configuration of local taxes in Spain, it would not be possible for the country’s municipal authorities to directly levy such a sales tax unless previously so provided for by the Spanish State legislature since, firstly, local councils are prohibited from creating new taxes and, secondly, it would also be impossible to levy it using one of the existing taxes or levies, given their current configuration. Similarly, it would also be impossible to convert it into a rate, given that the taxable event under no circumstances entails any compensation whatsoever from the local authorities.

Having ruled out the possibility of local councils currently being able to levy a sales tax similar to the municipal tax established in Estonia, one option would be to include the possibility of its levying in a future reform of the local financing system encompassing the introduction of new tax types, with the goal of improving the revenue stream for local authorities. In such a scenario, it would not be unthinkable to consider the establishment of a municipal sales tax on local traders, which might even end up replacing the current IAE, whose levying, following the reforms of 2004, is now tremendously unfair. Now that a large number of IAE taxpayers have been declared exempt from the tax, nowadays, only those legal persons with a turnover of more than one million euros have a duty to pay the tax.

For Aragonés Beltrán [17], IAE regulations following the reforms introduce clear and unjustified discrimination between groups or categories finding themselves in a homogenous situation. There is discrimination between companies and undertakings without a legal personality, on the one hand, and natural persons, on the other, since the latter are always exempt from paying the tax. If the IAE is levied on the mere carrying out of a business, professional or artistic activity, the legal form of carrying on said activity is of no matter. There is therefore no general interest purpose that may justify the exemption established, which represents a violation of the equal treatment principle [17].

Therefore, the levying of a sales tax on all those carrying out commercial activities and providing services within the municipal limits would permit a far more equitable distribution of the tax burden, in addition to the fact that the amount of the taxable base—the sales price—is far more representative of the taxpayer's economic capacity than the scales currently employed to establish IAE payments. The statement by Checha González [18] in this regard is compelling that a tax is only just if, in each specific case of its application, it is levied on an actual, rather than fictitious or presumed, economic capacity: an injustice committed against one taxpayer is not excused nor made good by the averaged justice of cases in genera.

However, the fact that municipal councils may not currently establish a sales tax similar to that existing in Estonia does not prevent Spain's Autonomous Communities from considering their possible levying at Autonomous Community level, since they do have the legislative capacity to establish their own taxes. More specifically, the establishment by Autonomous Communities of their own taxes has its legal basis in Article 133 CE, pursuant to which, although the originating power to establish taxes belongs to the Spanish State, Autonomous Communities have the competences to establish and levy their own taxes, pursuant to the CE and the law. Additionally, Article 157.1.b) CE defines the Autonomous Communities' resources, specifying, amongst others, "their own taxes, rates and special levies", with Article 157.3 clarifying that said competences must be attributed by means of an Organic Law. In this regard, Organic Law 8/1980, of 22 September, on the financing of the Autonomous Communities (LOFCA), is that which implements the aforementioned constitutional precepts, specifying and limiting the creation of Autonomous Communities' own taxes, such that it would be this law that would permit the creation of a tax like that under review.

Nevertheless, the Autonomous Communities are faced with limits when it comes to establishing their so-called "own" taxes since, although the Spanish Constitution endorses said possibility as the purest expression of their financial autonomy, both the CE and the LOFCA (Arts. 6 and 9) set limitations on their creation and establishment, such as not being able to impose tax burdens on assets located outside of their respective territories, nor being able to adopt tax measures that entail an obstacle to the free movement of goods and services. Furthermore, the Autonomous Communities must respect the principles of territoriality, neutrality, and market unity, and the so-called "prohibition of equivalence", which in practice means that:

a) The Autonomous Communities cannot establish taxes for taxable events already taxed by the Spanish State.

b) The Autonomous Communities cannot establish taxes for taxable events already subject to local taxes.

So, this dual limitation upon the Autonomous Communities prevents them from establishing a tax whose taxable event is already subject to Spanish State or local tax levies. However, taking into account the difference between the concepts of the object of taxation and a taxable *event* (with the latter being much more restrictive), the same object of taxation can be taxed simultaneously by means of the regulation of different taxable *events* by not only the Spanish State, but also the Autonomous Communities and local authorities. With regard to this difference, TC Judgement 37/1987, of 26 March (Legal Basis 14), notes that "object of taxation" can be defined as all sources of wealth, income or any other element of economic activities that the legislator decides to subject to taxation, a reality that belongs to the sphere of fact, whilst a "taxable event" is a strictly legal concept which, on the basis of certain circumstances, the Law defines in any given case to configure each tax and whose occurrence gives rise to a tax liability. Nevertheless, in response to the possible creation of an Autonomous Community tax on an object of taxation already subject to a local tax, Article 6.3 LOFCA states that, in all cases, "the proper compensation or coordination measures must be established in favour of local authorities, such that their revenue is neither diminished nor reduced with regard to the potential for future growth".

With regard to the possibility of creating Autonomous Community taxes compatible with local ones, of relevance is TC Judgement 122/2012, of 5 June, with regard to the tax on large retail establishments (*Impuesto sobre grandes establecimientos comerciales*, IGEC), approved by Parliament of Catalonia Law 16/2000, of 29 December, and its possible incompatibility with the IAE local tax. Its Legal Basis 3 once again clarifies the limitation of not being able to levy Autonomous Community taxes on taxable events already taxed by the Spanish State or local authorities. In this regard, the Court notes that what is forbidden is the taxing of the same taxable events, but not the same objects or sources of taxation. However, it does warn that the aim is not simply to avoid grammatical uniformity in the wording of their respective tax regulations, but that the specific circumstances and elements making up each of the definitions of the two taxes must be analysed. Therefore, to deem whether an Autonomous Community tax is levied on a taxable event already taxed by the Spanish State or a local authority, it does

not suffice to apply the criterion of literal uniformity of the precepts of the two regulations, but consideration also needs to be given to other elements configuring the two taxes defined by their respective legislators, such as the taxpayers, manifestations of economic capacity, tax rate scales, etc. In this case, after analysing the two taxes, it ruled that the Catalan tax was constitutional, holding that it did not entail a case of double taxation with the IAE, given that they were not levied on the same taxable event.

With regard to this potential duplication, Ruiz and Zornoza [19] anticipated the Court's findings by pointing out that, although both taxes were imposed upon the same manifestation of economic capacity—the presumed benefit for someone carrying out an economic activity in premises—the IGEC seeks a regulatory goal finding specific form in the levying of a tax on an additional or ancillary economic capacity arising from two circumstances: carrying out said activity in a large retail outlet and not internalising certain costs such as environmental impact or overuse of public highways. This potential non-fiscal purpose of the IGEC means that it is not equivalent to the IAE [19].

Also, worth noting is recent TC Judgement 4/2019, of 17 January, with regard to the tax on empty housing (*Impuesto sobre viviendas vacías*, IVV), approved by Parliament of Catalonia Law 14/2015, of 21 July, and its possible incompatibility with the local IBI tax. In its Legal Basis 3, the Court once again rules that it is necessary to take account of the essential elements of the taxes under review, so as to determine the “way” in which the relevant source of economic capacity is subject to levying within the structure of each tax. To this end, there is a need to analyse, in addition to the taxable event in the strict sense of the words, other aspects such as the cases of non-subjection and exemption, the taxpayers and quantification factors. Additionally, it also acknowledges that the elements to be examined include the possible existence of non-fiscal goals in the tax as a whole or in some of its core elements, noting that the non-fiscal goal is not incompatible with that of revenue collection. After comparing and analysing the content of the two taxes in dispute, the Court concluded that, here again, there was no double taxation with the two taxes, in that they are levied on two different taxable events and declared that the Catalan Autonomous Community tax was constitutional.

With regard to the possible duplication between the IVV and the IBI, Orón Moratal [20] already noted that the lack of any formal existence of a taxable event on the surcharge on the IBI could be sufficient grounds for not appraising any coincidence between the taxable events of the two taxes, and therefore argue that the IVV is actually levied on a matter reserved for local authorities—the holding of property assets, such that it would be possible for an Autonomous Community to also tax it, provided that it established compensatory measures as the Catalan tax does. Additionally, with regard to its non-fiscal purpose, he stated that the non-fiscal nature of the new tax is obvious, such that the doubts as to its constitutionality with regard to the limits stipulated in Art. 6 LOFCA could be resolved in favour of the Autonomous Community tax on the basis of criteria previously established by the TC [20].

Despite these favourable rulings and the Autonomous Communities' legislative capacity to establish their own

taxes, the truth is their leeway is so small, if not practically non-existent. In addition to the aforementioned constitutional and legal limitations, to which Autonomous Communities are subject to establish their own taxes, there is another obvious reality: the lack of actual objects that remain untaxed and that are sufficiently important to have a significant impact upon the generation of Autonomous Communities' revenue. If we bear in mind the fact that economic realities, in their different manifestations, are practically entirely covered by state and local taxes, the Autonomous Communities' potential for establishing their own new taxes is, in practice, severely limited.

For Pérez Royo [21], the Autonomous Communities' powers for establishing their own taxes are extremely scant since the majority of taxable events are already taxed by the Spanish State [21]. Along the same lines, Ramos Prieto et al. [22] state that, in general, the tax revenue collection capacity of Autonomous Communities' own taxes is very limited. Given the coverage of the most noteworthy manifestations of wealth (such as income, ownership of assets and the movement of goods and services) by State and local taxes, the Autonomous Communities have been forced to explore non-fiscal options, such as taxes designed primarily to further social and economic policy goals rather than a strictly revenue-generating purpose. Therefore, a great number of current Autonomous Community taxes are non-fiscal taxes, and it is precisely for this reason that many of them have a rather meagre revenue-generating capacity. With regard to this, illustrative is the statement by Cuenca García [23] that, although the Autonomous Communities have both their own and assigned taxes, the former generate revenue that barely contributes 1% of their resources.

In light of all the above, a sales tax could represent an important source of revenue for Autonomous Communities' coffers, provided that the conditions set forth by the CJEU in the Judgement analysed above are met, as are the limitations imposed by the CE and LOFCA, pursuant to the TC rulings in this regard.

IV. CONCLUSION

Firstly, and pursuant to the CJEU Judgement analysed above, local authorities may establish a sales tax on those carrying out economic activities as retailers, caterers and service provider and located within their municipal limits, as this tax is compatible with VAT.

More specifically, the two taxes are compatible because, unlike VAT, the municipal sales tax is not charged at each stage of the production and distribution process and it does not give rise to a deduction of the tax paid at an earlier stage of the process. There are therefore enough differences for the two taxes not to be regarded as the same.

In Spain, it is impossible for local authorities to create this tax directly, in that it is a competence of the Spanish State exercised by virtue of the ‘no taxation without representation’ principle. Furthermore, the current nature and configuration of local taxes do not allow for the introduction of this tax through changes to the tax bylaws that govern them.

Nevertheless, although Spanish municipalities are forbidden from directly creating this tax, this same is not the case for the country's Autonomous Communities, in that they

possess the legislative capacity to create their own taxes. Admittedly, this capacity is subject to certain limitations that significantly curtail it, in that they cannot tax taxable events already covered by Spanish State or local taxes.

Whatever the case, the CJEU Judgement under review would permit the creation of a new kind of tax, be this directly by the Autonomous Communities or, in some future reform of the local financing system, by the Spanish State, by adding a new municipal tax to the sources of revenue for local authority coffers.

REFERENCES

- [1] M. Lamensch, "Consumption taxes and VAT", *European Value Added Tax in the Digital Era*. Amsterdam: IBFD, 2016.
- [2] R. M. Bird and P. Gendron, "Is VAT the Best Way to Impose a General Consumption Tax in Developing Countries?", *Working Paper, No. 18*, International Studies Program of Andrew Young School of Policy Studies, 2006.
- [3] L. Ebrill, et al., *The Modern VAT*. Washington DC: International Monetary Fund, 2001.
- [4] M. Lamensch, "Consumption taxes and VAT", *European Value Added Tax in the Digital Era*. Amsterdam: IBFD, 2016.
- [5] I. Lejeune, "The EU VAT Experience: What Are the Lessons?", *The VAT Reader: Tax Analysts*, 2011.
- [6] I. Lejeune and S. Dale, "Snapshot of the current global landscape", *Shifting the balance from direct to indirect taxes: bringing new challenges*. PWC, 2013.
- [7] F. Gerard and J. Naritomi, *Value Added Tax in developing countries: Lessons from recent research*. IGC Growth Brief Series 015, London: International Growth Centre, 2018.
- [8] J. Martínez-Vázquez, et al., "Overview and Comparison of the Value Added Tax and The Retail Sales Tax", *PolicyBrief No. 156*, Fiscal Research Center, 2007.
- [9] B. Westberg, "European Union - Taxation of the Digital Economy - An EU Perspective". *European Taxation*, Vol. 54, No. 12, 2014.
- [10] G. Casado Ollero, "La financiación de las corporaciones locales: principio de autonomía y suficiencia financiera", *Globalización y principio de autonomía local, Manuales de Formación Continuada*, vol. 44. Madrid: Consejo General del Poder Judicial, 2007.
- [11] E. Simón Acosta, "El principio de suficiencia en la Hacienda Local", *Autonomía y financiación de las Haciendas Locales*. Madrid: Instituto de Estudios Financieros, 1982.
- [12] L. Morell Ocaña, *El régimen local español*. Madrid: Civitas, 1988.
- [13] B. Westberg, "European Union - Taxation of the Digital Economy - An EU Perspective". *European Taxation*, Vol. 54, No. 12, 2014.
- [14] E. Aragonés Beltrán, "Ordenanzas reguladoras de los tributos locales (tasas, contribuciones especiales e impuestos)", *Cuadernos de derecho local*, No. 20. Madrid: Fundación Democracia y Gobierno Local, 2009.
- [15] J. I. Rubio de Urquía, *Ley Reguladora de Haciendas Locales*. Madrid: Abella, 1989.
- [16] About Spanish local taxes, also see J. Martín Fernández, *Tasas y Precios en la Hacienda Local: La Experiencia Española*. Madrid: Marcial Pons, 2013. And M. Ruiz Garijo, "Las tasas locales", *Los tributos locales y el régimen fiscal de los Ayuntamientos* (Dir. Chico de la Cámara, P.). Madrid: Thomson-Reuters Lex Nova, 2014.
- [17] E. Aragonés Beltrán, "Problemas destacados del IAE", *Claves del Gobierno Local*, No. 4. Madrid: Fundación Democracia y Gobierno Local, 2005.
- [18] C. Checa González, "El impuesto sobre actividades económicas: presente y futuro", *Nueva Fiscalidad*, No. 3., 2002.
- [19] V. Ruiz Almendral and J. Zornoza Pérez, "El impuesto sobre grandes establecimientos comerciales. Análisis constitucional", *Nueva Fiscalidad*, No. 10, 2004.
- [20] G. Orón Moratal, "Las viviendas desocupadas como objeto de medidas constrictivas", *Anuario de Derecho Municipal*, No. 9., 2015.
- [21] F. Pérez Royo, *Derecho financiero y tributario*. Madrid: Civitas, 2014.
- [22] J. Ramos Prieto, "A propósito de la reforma del sistema de financiación de las Comunidades Autónomas de régimen general: problemas y propuestas", *Documentos de trabajo*, No. 2. Madrid: Instituto de Estudios Fiscales, 2019.
- [23] A. Cuenca García, "El sistema de financiación autonómica: convergencia de los recursos por habitante", *XXIV Encuentro de Economía Pública*. Toledo: Universidad de Castilla-La Mancha, 2017.



Benjamí Anglès Juanpere (Reus, Spain, 1971). Ph.D. Cum Laude in Tax Law, University Rovira i Virgili (Tarragona, Spain), in 2013. Master in Public Law, University Rovira i Virgili (Tarragona, Spain), in 2012. Master in Tax Law, University a Distancia de Madrid (Madrid, Spain), in 2011. And Degree in Law, University Oberta de Catalunya (Barcelona, Spain), in 2009. Currently, he is a Tax Law Professor at the University Oberta de Catalunya (Barcelona, Spain), since 2015. Previously, he was Legal Adviser of a county council and Tax Inspector of

a large municipality. Remarkable publications are: 1) "Medidas fiscales locales para ayudar a la economía y el empleo, también en tiempos de COVID-19," *Crónica Tributaria*, no. 177, 2021; 2) "The Resolution of Tax Disputes and International Tax Arbitration," *European Journal of Business and Management Research*, vol. 5 no. 1, 2020, and 3) "La fiscalidad de Bitcoin en España," *Crónica Tributaria*, no. 173, 2019. The current fields of research are tax and technology, tax procedures and local and regional taxes. Dr. Anglès is member of the Spanish Financial and Tax Law Professors Network and member of the Eurasia Business and Economic Society (EBES).