

National Legal Presumptions and European Tax Law

Claudia Sanò

 Wolters Kluwer

Table of Contents

Foreword	xiii
Acknowledgments	xv
CHAPTER 1	
Introduction: The Concept of Legal Presumption in the Perspective of EU Tax Law	1
1.1 Scope of the Study	1
1.2 Methodology	3
1.2.1 Delimitation of the Topic: Defining Elements of Legal Presumption and Its Role in the Area of Taxation	3
1.2.2 Tax Law Presumptions in the EU Law Framework	5
1.2.3 Developing Criteria for National Legal Presumptions to Be Compatible with EU Law	7
1.3 Structure of the Book	8
CHAPTER 2	
A Common Understanding of the Concept of Legal Presumption and Its Relevance in the Domain of Taxation	11
2.1 General Theory of Legal Presumption in the Experience of European Countries	11
2.2 Constitutive Elements of Presumption	13
2.2.1 The Basis of Each Presumption: The Known Fact	13
2.2.2 The Outcome of Each Presumption: The Unknown Fact	15
2.2.3 The Essence of Each Presumption: The Inference	15
2.3 The Distinction Between Presumptions of Law and Presumptions Hominis	18
2.4 Effects and Nature of Legal Presumptions	19
2.4.1 General Rule on the Burden of Proof	21

Table of Contents

2.4.1.1	Possible Modifications of the General Rule on the Burden of Proof	22
2.4.2	The Right to Offer Proof to the Contrary	25
2.4.2.1	Content and Limitations of the Proof to the Contrary	27
2.4.3	Distinction Between Irrebuttable Presumptions of Law and <i>Fictio Iuris</i>	28
2.5	Legal Presumptions from the Perspective of National Courts	30
2.6	The Hallmark of Legal Presumptions in the Domain of Taxation	31
2.6.1	Effects of Legal Presumptions on the Distribution of the Burden of Proof	33
2.6.2	The Relevance of Legal Presumptions in Administrative Proceedings	35
2.7	The (Parameters of) Evaluation of Tax Law Presumptions at the National Level	37
2.8	Adopting Tax Law Presumptions at the National Level: From Presumptive Assessments to Anti-abuse Measures	41
2.9	Preliminary Conclusions	44
CHAPTER 3		
	National Tax Law Presumptions and EU Law: Coexistence or Conflict?	47
3.1	Introduction	47
3.2	The Approach to National Presumption Resulting from the CJEU Case Law: Setting the Scene	49
3.2.1	Focus on the Effects of National Presumptions	50
3.2.2	Case Law on the Refunding of Indirect Taxes Levied in Breach of EU Law	51
3.2.2.1	Historical Background	52
3.2.2.2	Legal Background	53
3.2.2.3	Rejection of Legal Presumptions on the Passing on of Indirect Taxes	55
3.2.2.4	More on the Reasoning Behind the Findings of the Court	58
3.2.2.5	Equal Consideration of Statutory Law Provisions and Administrative Practices	60
3.2.2.6	Equal Consideration of Statutory Law Provisions and Judicial Interpretations	61
3.2.2.7	Influence of CJEU Case Law on Reasoning Developed at National Level	66
3.2.3	Common Core Definition Along with an Autonomous Approach	69
3.3	The Evaluation of National Tax Law Presumptions: Legal Framework	70
3.3.1	Relevance of the Principles of Effectiveness and Proportionality	71

3.3.2	Principles of Equivalence and Effectiveness	72
3.3.2.1	Relevance of the Principle of Effectiveness in a Broad Sense	76
3.3.2.2	Role of the Principle of Effectiveness in the Overall Evaluation of Tax Law Presumptions	77
3.3.3	Principle of Proportionality	77
3.3.3.1	Proportionality Test Applied to Tax Law Presumptions	80
3.4	Role of Administrative Cooperation Instruments in the Evaluation of National Presumptive Provisions	82
3.4.1	Evolution of the EU Administrative Cooperation Instruments	83
3.4.2	Link Between Member States' Lack of Information-Sharing and the Adoption of Presumptions	87
3.4.3	CJEU Case Law Dealing with the Division of the Burden of Proof	89
3.4.3.1	The <i>Elisa</i> Case	90
3.4.3.2	The <i>Teleos and Twoh</i> Cases	93
3.4.3.3	The <i>Persche</i> Case	95
3.4.3.4	Perspective in Flux	97
3.5	Preliminary Conclusions	98
CHAPTER 4		
	National Legal Presumptions in Customs Law	101
4.1	The Singularity of the Domain of Customs Law in Relation to National Legal Presumptions	101
4.1.1	Principles Underlying the System of Customs Law: Uniformity, Legal Certainty, Effectiveness	104
4.2	Adopting Presumptions in Customs Law	105
4.2.1	Presumption of Competence	106
4.2.2	Representativeness of Samples	110
4.3	National Tax Law Presumptions and Customs Law	114
4.4	The (In)Compatibility of Irrebuttable Presumptions of Law	115
4.4.1	Some Indications from the <i>Spedition Ulustrans</i> Case	115
4.5	The Preference for Non-binding Measures	119
4.5.1	The <i>Kenny Roland Lyckeskog</i> Case	120
4.6	Open Issue: Are National Rebuttable Presumptions of Law Wholly Incompatible with Customs Law?	123
4.7	Concluding Remarks	124
CHAPTER 5		
	National Legal Presumptions in VAT Law	127
5.1	The EU VAT System and Possible Constraints for National Legal Presumptions	127

Table of Contents

5.2	Evaluation of National Legal Presumptions under an EU Model of Tax	129
5.2.1	General Principles of EU Law Permeating the VAT System	130
5.3	National Legal Presumptions Derogating from the VAT Directive: Conditions and Limitations	132
5.3.1	Liability to Pay VAT	133
5.3.1.1	The <i>FTI</i> Case	134
5.3.1.2	The <i>Vlaamse Oliemaatschappij NV</i> Case	136
5.3.1.3	The Relevance of the Proof to the Contrary	138
5.3.2	The Taxable Amount	139
5.3.2.1	Article 80 of the VAT Directive: Some Reflections on the Conditions of Compatibility for National Implementing Presumptions	142
5.3.3	The Principle of Fiscal Neutrality and the Right of Deduction	144
5.3.3.1	Exclusion of the Right to Deduct Altogether: The <i>Ampafrance and Sanofi</i> Case	148
5.3.3.2	Partial Exclusion of the Right to Deduct: The <i>Sudholz</i> Case	151
5.3.3.3	Relevance of the Justification Underlying Restrictions on the Right to Deduct	153
5.4	Tax Law Presumptions Falling Within National Procedural Autonomy	154
5.4.1	Legal Presumptions Regarding the Conditions for Refundable VAT Credit Retention: The <i>Garage Molenheide</i> Case	156
5.4.2	Relevance of Proof in Rebuttal: The <i>Sosnowska</i> Case	160
5.5	Concluding Remarks	162
CHAPTER 6		
National Legal Presumptions in Harmonized Direct Taxation		165
6.1	National Legal Presumptions and Harmonized Direct Taxation: Interpretative Issue	165
6.2	Anti-abuse Rules in Direct Tax Directives	167
6.3	Implementing Legal Presumptions	169
6.3.1	Non EU-Compatibility of a Total Denial of Direct Tax Directive Benefits	170
6.3.2	The <i>Leur-Bloem</i> Case on the Anti-abuse Rule of the Merger Directive	172
6.3.3	Further Indications for National Compliance Following the <i>Zwijenburg</i> Case	176
6.4	National Legal Presumptions Implementing Anti-abuse Rules: Standards of Conformity with the Direct Tax Directives	178
6.5	Concluding Remarks	181

CHAPTER 7	
National Legal Presumptions in Direct Taxation	185
7.1 National Legal Presumptions in the Area of Direct Taxation	185
7.2 National Tax Law Presumptions Restricting Fundamental Freedoms on the Grounds of the Need for Effective Fiscal Supervision	188
7.2.1 The <i>Vestergaard</i> Case	189
7.2.2 The <i>Talotta</i> Case	192
7.2.3 Rejection of Presumptive Measures Based on Equal Procedural Treatment Grounds	194
7.3 National Legal Presumptions Restricting Fundamental Freedoms on the Grounds of the Need to Combat Tax Avoidance or Evasion	197
7.3.1 Evolution of CJEU Jurisprudence on Standards of Compatibility for Legal Presumptions	199
7.3.1.1 The <i>Cadbury Schweppes</i> Case on CFC Rules	202
7.3.1.2 The <i>Thin Cap GLO</i> Case on Thin Capitalization Rules	207
7.3.1.3 The <i>Lemmers and Van Cleeff</i> Case	211
7.3.1.4 The <i>Itelcar</i> Case	212
7.3.2 Minimum Requirements for EU Law Compatible Legal Presumptions	215
7.4 The Balanced Allocation of Taxing Powers of Member States in Conjunction with the Need to Prevent Tax Avoidance	217
7.4.1 The <i>SGI</i> Case	218
7.5 Principle of Legal Certainty as a Measure of Proportionality	222
7.5.1 The <i>SIAT</i> Case	222
7.5.2 Specificity Test and Impact on the Distribution of the Burden of Proof	225
7.6 Concluding Remarks	227
CHAPTER 8	
Conclusion	231
8.1 Common Core Concept of Legal Presumption from an EU-Wide Perspective	231
8.2 A Perspective Inherent in the Interaction Between Different Legal Orders	232
8.2.1 General Standards Proper of Different Domains of Taxation	233
8.2.2 Focus on the Effects of Legal Presumptions on the Enforcement of EU Law	235
8.3 Testing National Legal Presumptions in the Light of the Criteria Stemming from CJEU Case Law	237
8.3.1 Primacy and Uniform Application of EU Legislation	237
8.3.2 Interpretation Based on the Objective and Principles Governing Secondary EU Legislation	238

Table of Contents

8.3.2.1	Influence over National Presumptions Dealing with the Procedure	240
8.3.3	Implementation of Secondary EU Legislation Without Any Overkill	243
8.3.4	Possible Justifications and Proportionality under Primary EU Law	245
8.3.5	Definition of the Scope of the Legal Presumption	246
8.3.6	Disfavour for Fixed Criteria	249
8.3.7	Divisions of the Burden of Proof	250
8.3.8	Rationale Underlying a National Presumption	252
8.4	Current State and Open Issues	254
	Bibliography	257