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OPINION OF ADVOCATE GENERAL

SZPUNAR

delivered on 7 March 2019 (1)

Case C?145/18

Regards Photographiques SARL

v

Ministre de l’Action et des Comptes publics

(Request for a preliminary ruling from the Conseil d’État (France))

(Reference for a preliminary ruling — Common system of value added tax — Special arrangements — Works of art — Reduced rate of VAT — Photographs taken by the artist, printed by him or under his supervision, signed and numbered and limited to 30 copies)

Introduction

1.

It is hard to define photography. Its nature as a ‘reflection of reality’, its apparent ease of execution and its increasing democratisation (these days almost everyone owns a camera, even if only in their telephones) raise doubts as to its artistic character. The debate as to whether photography is art and, if so, under what conditions is as old as photography itself. (2) Such debate is naturally legitimate between philosophers or art theorists. However, taxation of business transactions must be founded on clear and objective criteria based on legislation, even where such transactions relate to objects classified as ‘works of art’. This debate cannot be settled by tax authorities, national courts or even the Court of Justice. In this Opinion I shall explain why any attempt to do so, like that made in French administrative practice, not only is incapable of achieving its aim, namely to make it possible to distinguish what is art from what is not, but necessarily leads to an infringement of legal certainty, fiscal neutrality and competition.

Legal context

EU law

2.

Under Article 103 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: (3)

‘1. Member States may provide that the reduced rate, or one of the reduced rates, which they apply in accordance with Articles 98 and 99 is also to apply to the importation of works of art, collectors’ items and antiques, as defined in points (2), (3) and (4) of Article 311(1).

2. If Member States avail themselves of the option under paragraph 1, they may also apply the

reduced rate to the following transactions:

(a)

the supply of works of art, by their creator or his successors in title;

…’

3.

Article 311 of that directive provides:

‘1. For the purposes of this Chapter, and without prejudice to other Community provisions, the following definitions shall apply:

…

(2) “works of art” means the objects listed in Annex IX, Part A;

….

2. Member States need not regard as works of art the objects listed in points (5), (6) or (7) of Annex IX, Part A.’

4.

Point 7 of Part A of Annex IX (‘Works of art’) to the directive reads as follows:

‘photographs taken by the artist, printed by him or under his supervision, signed and numbered and limited to 30 copies, all sizes and mounts included.’

French law

5.

Article 278f of the Code général des impôts (General Tax Code, CGI), in its version applicable up to 31 December 2011, provided:

‘Value added tax shall be levied at the rate of 5.5%: [(4)]

…

(2) on the supply of works of art, by their creator or his successors in title;

…’

6.

Under point 7 of Article 98 A of Annex II to the CGI, the following are to be regarded as works of art: ‘photographs taken by the artist, printed by him or under his supervision, signed and numbered and limited to 30 copies, all sizes and mounts included …’.

7.

The Ministerial Directive of 25 June 2003, as applicable at the material time (‘the Ministerial Directive of 25 June 2003’), provided the following clarification as regards the conditions for the

application of the reduced rate of VAT in respect of art photographs:

‘…

I.

Criteria for art photographs:

1.

Only photographs demonstrating clear creative intent on the part of their creator may be regarded as works of art eligible for the reduced rate of VAT.

That is the case where, through subject choice, setting, features of the shot or any other distinctive characteristic of the photographer’s work, such as framing quality, composition, exposure, lighting, contrast, colours and relief, play of light and volume, lens and film selection or the specific conditions in which the negative is processed, he produces a work which goes beyond the simple mechanical fixation of the memory of an event, trip or people and which is thus of interest to any audience.

II.

Conditions for application

1.

In the light of the above, identity photographs, school photographs and group photographs are not eligible for the reduced rate.

2.

Photographs where interest depends primarily on the status of the individual or the nature of the object shown are not, in general, regarded as art photographs. That is the case, for example, with photographs depicting family or religious events (weddings, communions etc.).

3.

That being said, for photographs of any kind other than those mentioned in II?1, the creative intent of the creator as evidenced by the criteria already set out and the interest to any audience may be reinforced by the following indicators:

(a)

The photographer proves that his works have been exhibited in cultural institutions (regional, national or international), museological institutions (museums, temporary or permanent exhibitions) or commercial institutions (trade fairs, shows, galleries etc.) or that they have been presented in specialist publications.

…

(b)

The use of specific equipment for both taking and developing the photograph.

…’

Facts, procedure and questions referred for a preliminary ruling

8.

The business activity of Regards Photographiques SARL is the creation and sale of photographs.

9.

Following an audit of accounts, the tax authority (France) called into question the reduced rate of VAT that the company had applied to the supply of certain photographs, namely portraits and wedding photographs. Because it considered that these photographs should be subject to the standard rate of VAT, the tax authority imposed on Regards Photographiques additional assessments of VAT for the period from 1 February 2009 to 31 January 2012.

10.

The action brought by Regards Photographiques against those additional assessments of VAT was dismissed by the tribunal administratif d’Orléans (Administrative Court, Orléans, France) and by the cour administrative d’appel de Nantes (Administrative Court of Appeal, Nantes, France). Regards Photographiques has appealed on a point of law against that judgment to the referring court.

11.

In those circumstances, the Conseil d’État (Council of State, France) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1)

Must the provisions of Articles 103 and 311 of Directive [2006/112] and point 7 of Part A in Annex IX thereto, be interpreted as meaning that they require only that the photographs are taken by their photographer, printed by him or under his supervision, signed and numbered up to a maximum of 30 copies, all sizes and mounts included, in order to be able to benefit from the reduced rate of VAT?

(2)

If the answer to the first question is yes, are Member States nevertheless permitted to exclude from the benefit of the reduced rate of VAT photographs that are not, in addition, artistic in character?

(3)

If the answer to the first question is no, what other conditions must the photographs satisfy in order to benefit from the reduced rate of VAT? In particular, must they show an artistic character?

(4)

Must those conditions be interpreted uniformly within the European Union, or do they refer to the law of each Member State, in particular in the field of intellectual property?’

12.

The request for a preliminary ruling was received at the Court on 23 February 2018. Written observations were submitted by Regards Photographiques, the French Government and the European Commission. The same parties were represented at the hearing held on 21 November 2018.

Analysis

13.

The referring court asks the Court four questions. Of those questions, the first has fundamental significance, while the other three are somewhat ancillary in nature. I shall therefore begin by analysing the first question.

The first question

14.

The first question concerns the interpretation of point 7 of Part A of Annex IX to Directive 2006/112. It should be recalled that this provision sets out the conditions which must be satisfied by photographs in order for them to be classifiable as ‘works of art’ and, in particular, to be eligible for the reduced rate of VAT under Article 103(2)(a) of the directive. Those conditions are that the photographs must have been taken by the artist, printed by him or under his supervision, signed and numbered and limited to 30 copies.

15.

The main point of contention in this case seems to relate to the term ‘artist’. The practice of the French tax authorities, as codified in the abovementioned provisions of the Ministerial Directive of 25 June 2003, infers from that term a justification for establishing additional requirements in respect of the ‘artistic’ character of photographs eligible for the reduced rate of VAT. This position is summarised perfectly by the French Government, which states in its observations that, for a photograph to be classified as a ‘work of art’ within the meaning of point 7 of Part A of Annex IX to Directive 2006/112, it is not only necessary that ‘the substantive conditions laid down [in that provision] [are] met’ but also that ‘the photograph [is] an artistic creation of the creator which reflects his personality and which may be of interest to any audience’. According to the French Government, this second condition follows from the fact that, under point 7 of Part A of Annex IX to Directive 2006/112, a photograph should be ‘taken by an artist’.

16.

I must confess at the outset that I have an entirely different reading of the abovementioned provision which stems from a literal, holistic and teleological interpretation of that provision.

17.

In my view, the interpretation advocated by the French Government does not withstand a simple grammatical analysis of the provision at issue. According to the French Government, that provision requires that the photograph is taken ‘by an artist’, whereas its precise wording refers to a photograph taken ‘by the artist’. The French Government’s analysis is thus based on a modified formulation of the provision in question, thereby making it say something that it does not say.

18.

The use of the definite article ‘the’ in the provision in question is not insignificant and reflects the meaning desired by the EU legislature. To replace it with the indefinite article ‘an’ alters that meaning, thus distorting the will of the EU legislature. Furthermore, it should be noted that the definite article is also used in other language versions of point 7 of Part A of Annex IX to Directive 2006/112, drafted in languages which have the grammatical category of articles. (5) The French Government’s argument could be more readily accepted on the basis solely of language versions which, like Polish, do not have definite and indefinite articles. In those languages, the use of the term ‘artist’ on its own may, from a purely grammatical point of view, cause confusion. However, the requirement, in interpreting a provision of EU law, relating to consideration of its substance in several language versions allows any possible confusion to be dispelled.

19.

The term ‘artist’, preceded by a definite article in the languages which have that grammatical form, appears in each point of Part A of Annex IX to Directive 2006/112. Thus, aside from photographs, pictures etc. ‘executed entirely by hand by the artist,’, engravings, etc. of plates ‘executed entirely by hand by the artist’, sculptures, etc. ‘executed entirely by the artist’, tapestries and wall textiles ‘made by hand from original designs provided by artists’, individual pieces of ceramics ‘executed entirely by the artist’ and enamels on copper ‘bearing the signature of the artist or the studio’ are considered to be works of art.

20.

These provisions set out the stages in the execution of the object which must be completed by the person who is considered to be its creator. As the objects in question are classified as ‘works of art’ for the purposes of the application of the VAT system, their creators are classified, according to the wording used, as ‘artists’. It is therefore being the creator of an object in one of the categories specified in Part A of Annex IX to Directive 2006/112 that confers status as an ‘artist’ within the meaning of that Annex, and not vice versa. The sole purpose of specifying that the object must be personally executed is to exclude items of industrial mass production and simple copies or reproductions not executed personally by the creator from the application of the various derogation arrangements under the VAT system. (6)

21.

However, contrary to the inferences following from the interpretation advocated by the French Government, it is not the aim of these provisions to draw a distinction between, on the one hand, paintings, sculptures, engravings etc. executed by persons who, in the view of the tax authority, have the status of artist and, on the other, those executed by persons not having that status. Moreover, the French Government asserted at the hearing, in response to a question asked by the Court, that in French administrative practice this additional ‘artistic character’ requirement applies to just one category of works of art, namely photographs.

22.

I cannot see any reason to justify treating this category any differently from the others.

23.

Point 7 of Part A of Annex IX to Directive 2006/112 sets out the requirements to be met by a photograph in order to be classified as a ‘work of art’ within the meaning of that provision. Those

requirements focus primarily on two key stages in the execution of a photograph: shooting and printing on paper or other physical media. Shooting, which includes choice of the subject of the photograph, camera settings and production of the image on a photosensitive surface (usually silver-halide film or an electronic sensor), must be done by the creator of the photograph. The next stage is printing, a term which means, in analogue technology, developing the film and printing in the strict sense, that is, producing a print on paper or, in digital technology, digital retouching and printing out on paper or other media. This stage must be performed by the creator of the photograph himself or under his supervision. It is common practice in author photography to give the task of printing to a specialist, although the photographer retains full control over the final effect, that is to say, the image produced on paper or other physical media. The photograph must then be signed by the creator, the number of copies (prints on paper or other media) being limited to 30.

24.

These requirements make it possible to distinguish photographs that can be classified as ‘works of art’ from photographic mass production where, if there is printing on paper or other media, (7) in most cases it is entrusted, wholly or partly, to specialist laboratories and the photographer does not have control over the final effect.

25.

However, no requirements can be inferred from point 7 of Part A of Annex IX to Directive 2006/112, whether as regards the necessary or excluded subject of the photograph, its artistic standard or the status of its creator. Any photograph produced in the conditions set out in that provision and sold in circumstances where VAT is levied (8) is considered to constitute a ‘work of art’ under that provision. Similarly, any person who has executed such a photograph is classified as an ‘artist’ within the meaning of that provision.

26.

The term ‘artist’ in Part A of Annex IX to Directive 2006/112 fulfils an additional role in connection with the application of the reduced rate to the supply of works of art. Under Article 103(2)(a) of Directive 2006/112, that rate is applicable only to supplies made by the creators of those works of art or their successors in title. Directive 2006/112 does not define the notion of ‘creator’ of a work of art, but it seems very clear that this can only be the ‘artist’ mentioned in Part A of Annex IX to Directive 2006/112. Thus, the argument put forward by the French Government in its written observations that the notion of ‘creator’ in Article 103(2)(a) of Directive 2006/112 and the notion of ‘artist’ used in Part A of Annex IX to that directive are distinct is entirely unfounded in my view, as the logic of the rules on the reduced rate applicable to works of art is based precisely on the identity of the person making the supply, namely the creator within the meaning of Article 103(2)(a) and the person who produced the work of art in question (the artist within the meaning of Part A of Annex IX).

27.

Therefore, the use of the term ‘artist’ in point 7 of Part A of Annex IX to Directive 2006/112 does not, contrary to the claim made by the French Government in support of its administrative practice, justify a refusal to grant certain photographs the status of ‘work of art’ within the meaning of that provision by reason of their subject, their artistic standard or the status of their creator.

28.

I therefore propose that the first question be answered to the effect that Article 103(2)(a) of Directive 2006/112, read in conjunction with point 7 of Part A of Annex IX to that directive, must be interpreted as meaning that it requires only that the photographs are taken by their creator, printed by him or under his supervision, signed and numbered up to a maximum of 30 copies, all sizes and mounts included, in order to be able to benefit from the reduced rate of VAT.

The second question

29.

By its second question, the referring court asks, in essence, whether, even though point 7 of Part A of Annex IX to Directive 2006/112 does not lay down any such requirement, Member States are free to make the application of the reduced rate of VAT to photographs subject to the condition that the photographs are artistic in character, such classification being defined by the Member States' legislation or administrative practice. In other words, the question asks whether point 7 of Part A of Annex IX to Directive 2006/112 precludes a practice of a Member State such as that codified by the Ministerial Directive of 25 June 2003.

30.

In this regard, the Commission rightly points out that the Court has repeatedly held that the Member States may apply a reduced rate of VAT to concrete and specific aspects of a category of supplies for which they have the option to apply such a rate (selective application), provided they comply with the principle of fiscal neutrality. (9) The Court has thus accepted the charging of a different rate of tax for energy supply under a standing charge and for energy supply without a standing charge, (10) for services of laying of a water mains connection and for other water supply services, (11) for services of transporting a body and for other services provided by undertakers (12) and, subject to subsequent verification by the national courts, for taxi transport services and for minicab transport services, (13) for books on paper and for books on other media (14) or for fresh pastry goods and cakes depending on their use-by date. (15)

31.

I concur with the Commission's view that this case-law could be transposed to the application of the reduced rate pursuant to Article 103(2)(a) of Directive 2006/112.

32.

However, it would seem that the aim of French administrative practice with regard to the application of the reduced rate to photographs, as codified by the Ministerial Directive of 25 June 2003, is not the selective application of that rate within the meaning of the case-law referred to in this Opinion, but the establishment of additional criteria for distinguishing photographs which are artistic in character from those which are not. This is confirmed both by the wording of the second question and by the observations submitted by the French Government.

33.

Thus, Part I of the Ministerial Directive of 25 June 2003, entitled 'Criteria for art photographs', seeks to establish an abstract definition of art photographs, based inter alia on the criteria of the clear creative intent of the creator and interest to any audience. It must be stated, however, that these criteria are highly ambiguous and subjective. They ensure neither compliance with legal certainty, as they allow the tax authority almost unlimited discretion, nor compliance with fiscal neutrality, as two objectively identical photographs could be taxed differently depending on

whether or not, in the tax authority’s view, they demonstrate clear creative intent and interest to any audience.

34.

Part II of the Ministerial Directive of 25 June 2003 seems to lessen this ambiguity by providing clarification as to the classification of different kinds of photographs. The result is nevertheless even less convincing.

35.

First, point II-1 of the Ministerial Directive of 25 June 2003 excludes identity photographs, school photographs and group photographs. While the category of identity photographs is fairly easy to define, the same does not hold for the other two categories. (16) In addition, it is not clear how this exclusion is linked with the criteria set out in Part I of the Ministerial Directive. In particular, the group portrait has, since the dawn of time, been an artistic subject par excellence (17) and a group photograph could therefore perfectly well demonstrate clear creative intent on the part of its creator and be of interest to any audience.

36.

Second, point II-2 of the Ministerial Directive of 25 June 2003 excludes, but only ‘in general’, photographs where interest depends primarily on the status of the subject photographed. Mention is made, albeit only by way of example, of photographs depicting family events, such as weddings and communions. Determination of the interest represented by a photograph is thus, once again, left to the discretion of the tax authority.

37.

However, according to point II-3 of the Ministerial Directive of 25 June 2003, the artistic character of a photograph can be reinforced (but not, it seems, definitively demonstrated) by the fact that the photographer has exhibited his works in cultural, museological or commercial institutions or published them, and by the use of specific equipment.

38.

As regards the criterion of exhibition or publication of the photographer’s works, in my view it is contrary to the principle of fiscal neutrality as, under that criterion, the rate of taxation of the supply of goods (the photograph) depends on qualities of the taxable person making that supply. These are not relevant from the point of view of the levying of VAT. Thus, a single supply to a single customer could be subject to a standard rate or a reduced rate depending on whether the vendor proves the exhibition or publication of his works which, if I understand it properly, do not necessarily have to be the same as the object of the supply.

39.

The criterion of equipment used poses serious risks of distortion of competition as it favours certain technologies (analogue technology, more specifically silver-halide), certain formats and certain techniques (printing on photo paper) and disregards others, especially digital technology. These technical differences do not affect the artistic character of the photograph produced or have any relevance in terms of the rate of taxation.

40.

The Ministerial Directive of 25 June 2003 thus attempts to capture in administrative terms something that is elusive, namely the artistic character of a work. By making the tax authority an art critic, such an attempt necessarily infringes legal certainty, the principle of fiscal neutrality and competition. It is therefore far from the objective and unambiguous criteria that the Court accepted in the case-law cited in point 30 of this Opinion for Member States to be permitted to limit the scope of the reduced rate of VAT to certain categories of goods and services for which such a rate may be applied. French administrative practice, as codified in the Ministerial Directive of 25 June 2003, is therefore contrary to the general principles governing the common system of VAT.

41.

This finding is not called into question by the French Government's argument that the limitation of the application of the reduced rate solely to photographs which are artistic in character stems from the objective of Article 103 of Directive 2006/112, namely promoting the development of the market in works of art.

42.

It is true that the recitals of Directive 2006/112 do not explain the reasons which led the EU legislature to permit Member States to apply the reduced rate to the objects specified in Annex IX to that directive. It should be stated, however, that this option is consistent with the favourable tax treatment under the directive of goods and services designed to meet a wide range of cultural and entertainment needs of consumers. Thus, Article 132(1)(n) of Directive 2006/112 introduces a mandatory exemption for the supply of certain cultural services and the supply of goods closely linked thereto. As regards the reduced rate, Article 98 of Directive 2006/112, read in conjunction with Annex III to the directive, permits the application of such a rate, inter alia, to the supply of books, newspapers and periodicals, to admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities, to reception of radio and television broadcasting services and to supply of services by writers, composers and performing artists, or of the royalties due to them.

43.

None of these provisions mentions any requirement relating to the artistic character or standard of the goods or services in the abovementioned categories. On the contrary, the very broad formulation of those categories tends to suggest that the EU legislature wished to include all kinds of cultural and entertainment activities in them, without passing judgement on their artistic or intellectual standard. The objective underlying favourable tax treatment of these activities is therefore plainly not limited to the promotion of art in the noble sense of the term.

44.

I cannot therefore see why the purported objective of Article 103 of Directive 2006/112 would require that article to be applied only to objects having artistic character. If the EU legislature introduced the option for Member States to apply the reduced rate of VAT to certain objects (works of art, collectors' items and antiques) and provided a legal definition of those objects (in Annex IX of Directive 2006/112), it is not appropriate to call into question that definition by attempting to elaborate upon it by means of vague and ambiguous notions on the ground that it does not serve the objective that the EU legislature wished to achieve in introducing that option.

45.

This is all the more so since the French administrative practice in question, as codified by the Ministerial Directive of 25 June 2003 and outlined in the request for a preliminary ruling and in the observations submitted by the French Government, lacks consistency in two respects.

46.

First, the French Government asserted at the hearing that the artistic character requirement is applied only to photographs and not to the other categories of works of art specified in Part A of Annex IX to Directive 2006/112 (not to mention collectors' items or antiques which are referred to in Parts B and C of that Annex). However, works of lesser artistic quality or of interest only to specific individuals also exist in other fields of art. How would a drawing made by a 'street artist' at a tourist site or a commemorative work of art be better than a family photograph produced by a professional studio?

47.

Second, to the best of my knowledge, Article 279(g) of the CGI provides for the application of the reduced rate (currently 10%) to the transfer of copyright, including for photographs, without any requirement relating to the artistic character of the works to which that copyright relates.

48.

I am well aware that photography is, aside from a means of artistic expression, a technical process for reproducing an image of reality for purposes entirely other than meeting cultural or entertainment needs, which would justify their exclusion from the benefit of the reduced rate. That is the case, for example, with identity photographs, photographs to document the scene of an accident or damage for insurance purposes, photographs of land and buildings for the purposes of their sale or rental, medical photographs and so on. However, such photographs are not normally supplied in the conditions mentioned in point 7 of Part A of Annex IX to Directive 2006/112. The only notable exception may be identity photographs, it would seem. Nevertheless, this category of photographs is sufficiently identifiable with the aid of objective criteria that it can be easily excluded from the application of the reduced rate of VAT without infringing legal certainty and fiscal neutrality.

49.

I therefore propose that the second question be answered to the effect that Article 103(2) of Directive 2006/112 must be interpreted as meaning that Member States are entitled, subject to compliance with legal certainty and fiscal neutrality, to apply the reduced rate only to certain categories — defined objectively and unambiguously — of objects specified in Part A of Annex IX to that directive. However, Member States are not authorised to apply to those objects additional requirements, based on vague criteria or granting the authorities responsible for the application of the tax provisions broad discretion, such as the artistic character of an object.

The third question

50.

The answer to the third question follows from my proposed answers to the first two questions and does not therefore require separate analysis.

The fourth question

51.

By its fourth question, the referring court asks, in essence, whether Member States may have recourse to criteria applied in other areas of national law, in particular copyright, in order to delimit the notion of ‘work of art’ in respect of photographs. A negative answer to this question follows from my proposed answers to the first two questions. I would nevertheless like to make the following remarks on this point.

52.

Copyright has long recognised that photographs have the character of intellectual works. (18) However, the notion of ‘work’ for the purposes of copyright does not imply any assessment of the artistic character or standard of the object in question. Although, for protection to be granted, copyright requires the work to be original, that is, to be the intellectual creation of its creator, this condition is interpreted very broadly so that it is an easy step to take. This also applies to photographs as, contrary to certain received ideas, a photograph is rarely a perfect representation of reality: (19) if only by framing, the photographer excludes part of that reality, thereby making a creative choice. The notion of ‘work’ used in copyright would not therefore be of any use in delimiting the notion of ‘work of art’ within the meaning of point 7 of Part A of Annex IX to Directive 2006/112.

53.

Furthermore, copyright is to a large degree harmonised within the European Union, through Directive 2001/29/EC in particular. (20) That harmonisation includes the notion of ‘work’, which is an autonomous concept of EU law. (21) As far as photographs are concerned, the Court has recognised simple portrait (22) and landscape photographs (23) as works. I assume that a wedding photograph could also be classified as a ‘work’ for the purposes of copyright.

Conclusion

54.

In the light of all the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Conseil d’État (Council of State, France) as follows:

1.

Article 103(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with point 7 of Part A of Annex IX to that directive, must be interpreted as meaning that it requires only that the photographs are taken by their creator, printed by him or under his supervision, signed and numbered up to a maximum of 30 copies, all sizes and mounts included, in order to be able to benefit from the reduced rate of VAT.

2.

Article 103(2) of Directive 2006/112 must be interpreted as meaning that Member States are entitled, subject to compliance with legal certainty and fiscal neutrality, to apply the reduced rate only to certain categories — defined objectively and unambiguously — of objects specified in Part A of Annex IX to that directive. However, Member States are not authorised to apply to those objects additional requirements, based on vague criteria or granting the authorities responsible for the application of the tax provisions broad discretion, such as the artistic character of an object.

(1) Original language: French.

(2) Charles Baudelaire wrote in 1859, regarding the invention of the daguerreotype, that '… this industry, by invading the territories of art, has become art's most mortal enemy …' (Baudelaire, Ch., 'Salon de 1859', Revue française, vol. XVII, 1859, p. 262).

(3) OJ 2006 L 347, p. 1.

(4) As from 1 January 2012, the rate was increased to 7%.

(5) Such as the English ('photographs taken by the artist'), German ('vom Künstler aufgenommene Photographien'), Spanish ('fotografías tomadas por el artista') and other versions.

(6) Annex IX to Directive 2006/112 is applicable not only in the context of the reduced rate but also in the context of the special taxation arrangements laid down in Title XII, Chapter 4 of that directive.

(7) These days the vast majority of photographs remain as digital files without a print being made on physical media. These photographs can also be marketed digitally. In terms of the rules on VAT, this constitutes a supply of services and the question of their classification as works of art does not therefore arise (see point 3 of Annex II to Directive 2006/112).

(8) That is to say, as a supply of goods made in the context of the economic activity of its vendor, who has the status of a taxable person for VAT purposes (see Article 2(1)(a) and Article 9(1) of Directive 2006/112). In particular, the occasional sale of a photograph outside the scope of an economic activity does not result in VAT being levied and the question of the classification of that photograph as a work of art within the meaning of point 7 of Part A of Annex IX to Directive 2006/112 does not therefore arise.

(9) See, in particular, judgment of 27 February 2014, Pro Med Logistik and Pongratz (C?454/12 and C?455/12, EU:C:2014:111, paragraphs 43 to 45 and the case-law cited).

(10) Judgment of 8 May 2003, Commission v France (C?384/01, EU:C:2003:264, paragraph 29).

(11) Judgment of 3 April 2008, Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien (C?442/05, EU:C:2008:184, second sentence of paragraph 2 of the operative part).

(12) Judgment of 6 May 2010, Commission v France (C?94/09, EU:C:2010:253, paragraph 46).

(13) Judgment of 27 February 2014, Pro Med Logistik and Pongratz (C?454/12 and C?455/12, EU:C:2014:111, paragraph 1 of the operative part).

(14) Judgment of 11 September 2014, K (C?219/13, EU:C:2014:2207, operative part).

(15) Judgment of 9 November 2017, AZ (C?499/16, EU:C:2017:846, operative part).

(16) The category of school photographs in particular seem mysterious to me: are they photographs showing pupils and/or teachers, photographs produced by pupils as part of their studies or other kinds of photographs?

(17) To name only the Laocoön Group or The Last Supper by Leonardo da Vinci.

(18) One of the first judicial decisions extending copyright protection to photography was the

judgment of the Supreme Court of the United States of 17 March 1884, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (see Markiewicz, R., Ilustrowane prawo autorskie, Warsaw, 2018, p. 106). The Berne Convention for the Protection of Literary and Artistic Works, signed at Berne on 9 September 1886, has required photographs to be protected since the Berlin Act of 1908. Lastly, Article 9 of the World Intellectual Property Organisation (WIPO) Copyright Treaty, adopted in Geneva on 20 December 1996, aligned the duration of copyright protection for photographs with other categories of works.

(19) Or, to be more precise, our image of reality.

(20) Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

(21) See, to that effect, judgment of 16 July 2009, Infopaq International (C?5/08, EU:C:2009:465, paragraphs 31 to 37).

(22) Judgment of 1 December 2011, Painer (C?145/10, EU:C:2011:798, paragraph 94).

(23) Judgment of 7 August 2018, Renckhoff (C?161/17, EU:C:2018:634, paragraph 14).