Case C-695/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

20 September 2019

Referring court:

Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Taxation Arbitration Tribunal (Centre for Administrative Arbitration — CAAD)) (Portugal)

Date of the decision to refer:

10 September 2019

Applicant:

Rádio Popular — Electrodomésticos, S.A.

Defendant:

Autoridade Tributária e Aduaneira (Tax and Customs Authority)

Subject matter of the main proceedings

The main proceedings relate to the assessment of VAT and corresponding interest by the Autoridade Tributária e Aduaneira (Tax and Customs Authority) ('the AT') for the years 2014, 2015, 2016 and 2017 in respect of the activity carried on by the applicant, Rádio Popular, S.A., in the field of extended warranty transactions.

Subject matter and legal basis of the request for a preliminary ruling

The request for a preliminary ruling, which has been made in accordance with Article 267 TFEU, seeks to ascertain whether the situation of the applicant, Rádio Popular, S.A., so far as concerns the activity carried on in the field of extended warranties, is caught by Article 23(5) of the Código do Imposto sobre o Valor Acrescentado (Value Added Tax Code; 'the CIVA') for the purposes of exclusion from the calculation of the deductible proportion.

Question referred

Do transactions involving intermediation in the sale of extended warranties on household electrical appliances, which are carried out by a taxable person under VAT law whose principal activity consists in the sale of household electrical appliances to consumers, constitute financial transactions, or are they to be treated as such pursuant to the principles of neutrality and non-distortion of competition, for the purposes of exclusion of the amount represented by them from the calculation of the deductible proportion, in accordance with Article 135(1)(b) and/or (c) of Council Directive 2006/112/EC of 28 November 2006?

Provisions of EU law relied on

Articles 135, 173 and 174 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive').

Provisions of national law relied on

Article 23 of the CIVA.

Brief presentation of the facts and main proceedings

1 Rádio Popular — Electrodomésticos, S.A. ('the applicant'), established in Maia, is an undertaking whose business consists in the sale of household electrical appliances and computer and telecommunications equipment. When selling household electrical appliances, the applicant, at the customer's request, also sells extended warranties prolonging the customer's original warranty, which it does on behalf of the brand supplier, thus acting as an intermediary between the insurance company and the end customer.

2 The applicant does not charge VAT on the activity of selling extended warranties but it deducts in full the input VAT paid on the goods and services purchased in order to pursue its business as a whole.

3 The applicant underwent a VAT inspection by the AT in relation to financial years 2014 and 2015 which was later extended to financial years 2016 and 2017.

4 In the inspection report, the AT concluded that, inasmuch as the extended warranty transactions carried out by Rádio Popular are not regarded as financial transactions, Article 23(5) of the CIVA is not applicable, and those transactions are not therefore excluded from the calculation of the deductible proportion referred to in paragraph 1(b) of that article. It also stated that that provision is not applicable in any event given the routine nature of the extended warranty transactions carried out by the applicant, which completely rules out the possibility of those transactions being regarded as incidental to the taxable person's activity. Consequently, in accordance with Article 23(1)(b) of the CIVA,

input tax paid on the purchase of goods and services for mixed use is deductible only at the percentage (in the proportion) represented by the annual amount of transactions giving rise to a deduction.

5 As a result of the inspections, assessments of VAT and corresponding interest totalling EUR 356 433.05 (EUR 328 107.08 by way of VAT and EUR 28 325.97 by way of interest) were issued.

6 On 24 January 2019, the applicant asked the referring court to annul the assessments of VAT and corresponding interest in respect of the years 2014, 2015, 2016 and 2017 and order the AT to pay the interest accrued.

7 In response, the AT contended that the application for arbitration proceedings should be dismissed and the proceedings suspended pending a ruling from the Court of Justice of the European Union on the key legal issues raised.

Main arguments of the parties to the main proceedings

8 The applicant submits that the intermediation activity is merely a residual part of its overall business, having represented in the financial years 2014, 2015, 2016 and 2017 a marginal total annual turnover of 4%, 4%, 5% and 4% respectively, and is allocated only a very small percentage of its human resources, the percentage accounted for by the material resources it attracts being practically non-existent.

9 The concept of a financial transaction for the purposes of Article 23(5) of the CIVA must be interpreted extensively as including insurance and reinsurance transactions, in accordance with the principle of VAT neutrality; insurance transactions are classified as financial transactions, in particular under the Classification of Portuguese Economic Activities (CAE), and insurers are regarded as financial institutions in a broad sense, given the traditional threefold configuration of the Portuguese financial system: banking, stock exchange and insurance.

10 The exemption of financial transactions, including insurance and reinsurance, is currently contained in Article 135(1) of the VAT Directive.

11 The right to deduct VAT is a fundamental right which can be limited only in the cases expressly permitted by the rules of EU law or by the general principles of law recognised in this field, such as the principle of abuse of rights.

12 For the right to deduct to be capable of being exercised, the intermediation activity which the applicant carries out on an incidental basis must be classified as an incidental financial transaction which is not taken into account in the calculation of the deductible proportion, to which end the concept of financial transaction must be interpreted broadly, failure to do so amounting to a breach of the fundamental principle of VAT neutrality.

13 For its part, the AT contends that the case-law established by the Court of Justice in the judgment in *EDM* (C-77/01, EU:C:2004:243), concerning the concept of an incidental activity, must be applied, and understands that the contested activity carried on by the applicant cannot be classified as incidental, since, 'although the sale of extended warranties represents only 4% or 5% of turnover, the profit which that activity yields (some 35%) was greater than the profit made by the business as a whole in the financial years 2014 and 2015'. According to the AT, the applicant's very viability depends on the sale of extended warranties.

14 On the other hand, it is contended that there is no parallel between sales of extended warranties and financial transactions. Article 135 of the VAT Directive clearly differentiates insurance transactions from financial transactions, referring to insurance transactions in point (a) [of that article] and financial transactions in points (b) to (g). The distinction between 'insurance transactions' and 'financial transactions' is thus clearly apparent from the exclusion of insurance transactions from Article 174(2)(c) of the VAT Directive, which defines the formula for calculating the deductible proportion and which has been reflected in Article 23 of the CIVA.

15 The VAT Directive provides that the calculation of the deductible proportion must not take into account the amount of turnover attributable the transactions referred to in Article 135(1)(b) to (g) (that is to say, financial transactions), provided that these are incidental transactions, thus excluding the transactions provided for in point (a) (that is to say, insurance transactions).

16 On the other hand, the sale of extended warranties, it is contended, does not fall within the scope of the concept of 'financial transaction', as Article 23(5) of the CIVA requires. According to the AT, the applicant's interpretation is also contrary to the Portuguese Constitution, in so far as it amounts to an infringement of the principles of fiscal justice and equality, if the applicant is compared with insurance intermediaries, who cannot deduct VAT even if they incur financing costs.

17 According to the AT, the stance taken by the applicant also gives rise to unfair competition with insurance intermediaries which may lead to distortions in the taxation of taxable persons.

Brief presentation of the grounds of the request for a preliminary ruling

18 The referring court must assess and decide whether the extended warranty activity carried on by the applicant can be included within the scope of Article 23(5) of the CIVA.

19 The applicant is engaged in the sale of household electrical appliances, an activity on which it charges VAT. Further to its sales of household electrical appliances, the applicant, at the customer's request, also sells extended warranties prolonging the customer's original warranty, which it does on behalf of the brand supplier,

thus acting as an intermediary between the insurance company and the end customer.

20 The applicant does not charge VAT on the activity of selling extended warranties but it deducts in full the input VAT paid on the goods and services purchased in order to pursue its business as a whole.

21 It is common ground between the parties that the extended warranty activity qualifies for the exemption provided for in Article 9(28) of the CIVA, applicable to '*insurance and reinsurance transactions, as well as the provision of related services by insurance brokers and agents*'.

22 Since the activity of providing extended warranties is exempt, it does not confer a right to deduct, in the light of the wording of Article 20(1) of the CIVA.

23 This, then, is a situation which is capable of being included within the scope of Article 23(1)(b) of the CIVA, inasmuch as the applicant uses goods and services to perform transactions arising from the pursuit of an economic activity provided for in Article 2(1)(a) some of which do not give rise to a right to deduct, and in which '*tax shall be deducted at the percentage represented by the annual amount of transactions giving rise to a deduction*'.

24 Article 23(4) of the CIVA provides that '*the percentage of deduction referred to in paragraph 1(b) shall be made up of a fraction comprising, as numerator, the annual amount, exclusive of VAT, of transactions that give rise to a right to deduct in accordance with Article 20(1) and, as denominator, the annual amount, exclusive of VAT, of all transactions performed by the taxable person in pursuit of an economic activity as provided for in Article 2(1)(a), together with any non-taxed subsidies that are not to be used to purchase capital goods*'.

25 However, Article 23(5) provides for exceptions to that rule, also excluding from that calculation '*financial transactions which are incidental to the activity carried on by the taxable person*', meaning that, in those situations, all VAT paid on the purchase of goods or services used to perform both types of transaction is deductible.

26 The dispute between the parties concerns that classification of transactions, inasmuch as the applicant claims that its situation falls within the scope of the aforementioned paragraph 5, to the extent that transactions involving the sale of extended warranties must be classified as '*financial transactions*' and are incidental to the principal activity of selling household electrical appliances, while the AT understands that those transactions cannot be classified as 'financial' and are not incidental.

27 Since this case concerns the interpretation of provisions of EU law, the parties ask whether it is necessary to submit a request for a preliminary ruling to the Court of Justice of the European Union.

28 Where a question as to the interpretation and application of EU law arises before them, national courts are obliged to refer that question to the Court of Justice by way of a request for a preliminary ruling. Where, however, EU law is clear and there is already a precedent in the case-law of the Court of Justice, there will be no need for such a reference.

29 As is apparent from the inspection report, the AT's position that underlies the contested assessments is based on two grounds, inasmuch as it considers that the impossibility of excluding from the calculation of the deductible proportion the amount of turnover achieved through sales of extended warranties follows not only from the fact that such transactions do not constitute financial transactions but also from the fact that they do not constitute an incidental activity, in accordance with the provisions contained in Article 23(5) of the CIVA and Article 174(2)(b) and (c) of the VAT Directive.

30 It is thus appropriate to evaluate the lawfulness of the two grounds relied on by the AT in issuing the contested assessments. On the other hand, in order to decide whether it is necessary to submit a request for a preliminary ruling to the Court of Justice, it must be considered (i) whether the application of EU law is essential to the resolution of this case and (ii) whether there is a clear solution or one which has been examined in the case-law of the Court of Justice, in either of which [latter] cases there will be no need to make a reference to the Court, in accordance with the ruling given in the judgment of 6 October 1982, *CILFIT* (283/81, EU:C:1982:335).

31 Now, the case-law of the Court of Justice is uniform in stating that 'a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied' (judgment of 25 February 1999, *Card Protection Plan Ltd (CPP)*, C-349/96, EU:C:1999:93, paragraph 30).

32 The Court of Justice has also held that an economic activity cannot be classified as 'incidental' within the meaning of Article 19(2) of the Sixth Directive if it constitutes the direct, permanent and necessary extension of the taxable activity of the undertaking (judgment of 11 July 1996, *Régie dauphinoise*, C-306/94, EU:C:1996:290, paragraph 22) or if it entails a significant use of goods or services subject to VAT (judgments of 29 April 2004, *EDM*, C-77/01, EU:C:2004:243, paragraph 76, and of 29 October 2009, *NCC Construction Danmark*, C-174/08, EU:C:2009:669).

33 In the present case, the applicant's principal activity consists in the supply of household electrical appliances. The supplementary activities (such as services relating to credit purchases, transport and at-home installation/assembly and demonstration, as well as the sale of extended warranties) do not constitute for customers an aim in itself, but are means whereby the customer can better enjoy the principal service provided, that is to say the supply of household electrical appliances under the original warranty.

34 As the judgment in *EDM*, cited above, states, 'although the scale of the income generated by financial transactions within the scope of the Sixth Directive may be an indication that those transactions should not be regarded as incidental within the meaning of that provision, the fact that income greater than that produced by the activity stated by the undertaking concerned to be its main activity is generated by such transactions does not suffice to preclude their classification as "incidental transactions"' (paragraph 78).

35 It follows from that case-law that the proposition put forward by the AT to the effect that the 'routine nature of those transactions … completely rules out the possibility of their being regarded as incidental to the activity of the taxable person', and that those transactions cannot be classified as incidental because they are 'performed routinely and even represent an essential component of the results achieved without which the undertaking's viability might be at risk', is without foundation under EU law.

36 In this case, the allocation to the activity of selling extended warranties of mixed-use resources representing approximately 0.62% of the total value of the goods and services used by the applicant on which VAT has been charged is manifestly very small, and there is therefore good reason to regard the activity of selling extended warranties as incidental to the principal activity of selling household electrical appliances.

37 That being the case, the AT's position with respect to the non-incidental nature of the activity of selling extended warranties is based on erroneous assumptions of fact, inasmuch as it understands that, without the activity of selling extended warranties, 'the viability of the undertaking might be at risk', a view which is not consistent with the actual situation. This led the referring court, in its decision on the facts, to find that 'it has not been shown that the applicant's viability depends on the sale of extended warranties, or that the applicant's business model cannot be executed without the sale of extended warranties'.

38 None the less, that finding is not sufficient to support the conclusion that the assessments must be annulled, since the AT also bases those assessments on the fact that sales of extended warranties cannot be classified as 'financial transactions' for the purposes of Article 23(5) of the CIVA and Article 174(2) of the VAT Directive.

39 Consequently, it having been established that the sale of extended warranties is incidental to the applicant's activity of selling household electrical appliances, it falls to be determined whether these are 'financial transactions', since Article 23(5) of the CIVA confines exclusion from the calculation of the deductible proportion to transactions of that kind.

40 Although the immediate subject matter of the dispute is an issue concerning the interpretation of a provision of national law, it is in effect an issue concerning the

interpretation of EU law, since Article 23(5) transposes into national law Article 174(2)(b) of the VAT Directive.

41 This court is unaware of any previous case-law of the Court of Justice on whether or not extended warranty transactions are financial, and neither does there appear to be a clear solution to that issue.

42 The applicant's arguments to the effect that insurance intermediation transactions fall within the scope of the concept of 'financial transactions', or are at least to be treated as 'financial transactions' pursuant to the principles of VAT neutrality and non-distortion of competition, do appear to carry some weight.

43 However, the fact, pleaded by the AT, that Article 174(2)(c) of the VAT Directive refers to 'transactions specified in points (b) to (g) of Article 135(1)' and not to point (a), which provides for the exemption of 'insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents', may be interpreted as the manifestation of a legislative intention not to exclude turnover attributable to insurance transactions from the calculation of the deductible proportion.

44 Account being taken of the foregoing considerations, it is necessary to submit a request for a preliminary ruling to the Court of Justice. The referring court has taken into account, when formulating the question to be referred, the decision it has already taken with respect to the incidental nature of the activity of selling extended warranties.