

Case C-23/22**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:**

10 January 2022

Referring court:

Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Portugal)

Date of the decision to refer:

27 December 2021

Applicant:

Caxamar – Comércio e Indústria de Bacalhau, S.A.

Defendant:

Autoridade Tributária e Aduaneira

Subject matter of the main proceedings

This request for a preliminary ruling arises in the course of proceedings between CAXAMAR – Comércio e Indústria de Bacalhau, S.A. ('CAXAMAR'), and the Autoridade Tributária e Aduaneira (Tax and Customs Authority; 'the AT'), in which CAXAMAR is seeking the annulment of the assessments of the imposto sobre o rendimento das pessoas coletivas (corporation tax; 'IRC') and the corresponding interest resulting from the corrections made by the AT to the taxable amount for the 2016 and 2018 tax years, in the sum of EUR 126 302.62.

Subject matter and legal basis of the request

CAXAMAR, a public limited company engaged in the salting, drying and other processing of fishery products, undertook investment projects in connection with cod processing in 2016 and 2018, utilising the tax advantages established in the Regime Fiscal de Apoio ao Investimento (Tax Scheme to Support Investment; 'the RFAI'). The AT considers that the use made of the advantages in question

was illegal in that it did not fall within either the RFAI or the general block exemption regulation (Commission Regulation (EU) No 651/2014 of 16 June 2014; ‘the GBER’) in particular, Article 1 and Article 2(11) thereof, and Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013.

Question referred for a preliminary ruling

According to the correct interpretation of the Guidelines on regional State aid for 2014-2020, in conjunction with the provisions of Commission Regulation (EU) No 651/2014 of 16 June 2014, in particular Article 1 and Article 2(11) thereof, Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013, and Annex I to the Treaty on the Functioning of the European Union, is it possible to conclude that, under Articles 2(2) and 22(1) of the Código Fiscal do Investimento (Tax Code on Investment), approved by Decreto-Lei n.º 162/2014 (Decree-Law No 162/2014) of 31 October 2014, and Articles 1 and 2 of the Portaria n.º 282/2014 (Ministerial Order No 282/2014) of 30 December 2014, the processing of fishery and aquaculture products relating to ‘salted cod’, ‘frozen cod’ and ‘desalted cod’ in Economic Activity Code 10204Rev3 does not constitute the processing of agricultural products for the purposes of granting the relevant tax advantages?

Provisions of EU law relied on

Guidelines on regional State aid for 2014-2020 (Text with EEA relevance) (OJ 2013 C 209, p. 1).

Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ 2014 L 187, p. 1): Article 1 and Article 2(11).

Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000 (OJ 2013 L 354, p. 1).

Treaty on the Functioning of the European Union (OJ 2016 C 202): Annex I.

Provisions of national law relied on

Decreto-Lei n.º 162/2014, de 31 de outubro, que aprova um novo Código Fiscal do Investimento e procede à revisão dos regimes de benefícios fiscais ao investimento produtivo, e respetiva regulamentação (Decree-Law No 162/2014 of 31 October 2014 approving a new Tax Code on Investment and amending the

schemes providing tax advantages for productive investment and the regulation thereof): Articles 2(2) and 22(1).

‘Article 2

Subject matter

[...]

2 – The subject matter of the investment projects referred to in the previous paragraph must, inter alia, fall within the following economic activities and must also fall within the sectoral scope established by the Guidelines on regional State aid for 2014-2020, published in the *Official Journal of the European Union* No C 209 of 23 July 2013 (‘the Guidelines’), and by the GBER:

- (a) extractive industry and processing industry;
- (b) tourism, including activities of tourist interest;
- (c) computing activities and services and related activities and services;
- (d) agricultural, aquaculture, fishing, farming and forestry activities;
- (e) research and development and high technology intensity activities;
- (f) information and audiovisual and multimedia production technologies;
- (g) defence, environment, energy and telecommunications;
- (h) shared service centre activities.

[...]

Article 22

Scope and definitions

1 – The RFAI applies to persons liable for IRC who carry on an activity within the sectors expressly listed in Article 2(2), having regard to the activity codes defined in the ministerial order referred to in Article 2(3), other than activities that are excluded from the sectoral scope of the Guidelines and the GBER.

[...]

Portaria n.º 282/2014, de 30 de dezembro, que define os códigos de atividade económica (CAE) correspondentes a várias atividades [Ministerial Order No 282/2014 of 30 December 2014 defining the economic activity codes (CAE) for various activities]: Articles 1 and 2.

‘Article 1

European Union framework

Under the Guidelines on regional State aid for 2014-2020, published in the *Official Journal of the European Union* No C 209 of [23] July 2013, and Regulation (EU) No 651/2014 of [17] June 2014, published in the *Official Journal of the European Union* No [L] 187 of 26 June 2014 (the general block exemption regulation), investment projects relating to economic activities in the steel, coal, fishery and aquaculture and primary agricultural production sectors, those involving the processing and marketing of the agricultural products listed in Annex I to the Treaty on the Functioning of the European Union, and those in the forestry, shipbuilding, synthetic fibres, transport and related infrastructure, and energy generation, distribution and infrastructure sectors may not obtain tax advantages.

Article 2

Sectoral scope

Without prejudice to the restrictions established in the previous article, the economic activities listed in Article 2(2) of Decree-Law No 162/2014 of 31 October 2014 correspond to the following codes in the Portuguese Classification of Economic Activities, Revision 3 (CAE-Rev.3), approved by Decree-Law No 381/2007 of 14 November 2007:

- (a) extractive industries – divisions 05 to 09;
- (b) processing industries – divisions 10 to 33;
- (c) accommodation – division 55;
- (d) food and beverage services and similar – division 56;
- (e) publishing activities – division 58;
- (f) motion picture, video and television programme production activities – group 591;
- (g) computer consultancy, programming and related activities – division 62;
- (h) data processing, hosting and related activities and web portals – group 631;
- (i) scientific research and development activities – division 72;
- (j) activities of tourist interest – subclasses 77210, 90040, 91041, 91042, 93110, 93210, 93292, 93293 and 96040;
- (k) administrative services and business support activities – classes 82110 and 82910.

Succinct presentation of the facts and procedure in the main proceedings

- 1 CAXAMAR is a public limited company engaged primarily in the salting, drying and other processing of fishery and aquaculture products (code 10204 CAE-Rev3) and, secondarily, in the freezing of fishery and aquaculture products (code 10202 CAE-Rev3) and the wholesaling of other food products (code 46382 CAE-Rev3); it is subject to the general IRC scheme and the normal monthly VAT scheme.
- 2 The company was the subject of a tax inspection carried out by the Santarém Finance Directorate, which examined the application of the tax advantages granted under the RFAI. In that context, the inspection services made a series of corrections which consisted in disapplying the reductions made to the taxable amount for IRC purposes for the 2016 and 2018 tax years in connection with the advantages offered by the RFAI, since the activity carried on by the company did not come within the scope of that scheme. That scope is defined by the provisions in Article 2(2) and (3) and Article 22(1) and (2) of the Código Fiscal do Investimento (Tax Code on Investment; ‘the CFI’), and in Articles 1 and 2 of Ministerial Order No 282/2014 of 30 December 2014. Nor does the activity come within the sectoral scope of the [Guidelines] and the GBER, as read with Annex I to the TFEU.
- 3 The costs in question are inherent in the investments, as regards the ‘RFAI’ tax benefit for the 2016 and 2018 tax years, made in connection with CAE 10204-R3, which applies to the ‘SALTING, DRYING AND OTHER PROCESSING ACTIVITIES OF FISHERY AND AQUACULTURE PRODUCTS’.
- 4 The AT concluded that the aim of the investment project in question is to increase the capacity of an existing establishment and that it was undertaken to improve and extend processes for ‘salting, desalting and freezing cod’. It considered that the output from the processing activities carried on by CAXAMAR, which fall within CAE 10204 (‘salted cod’, ‘frozen cod’, ‘desalted cod’) and within the chapters of the Brussels nomenclature referred to in Annex I to the Treaty, comes within the concept of ‘processing of agricultural goods’, since the end product is still an agricultural product listed in Annex I to the Treaty.
- 5 CAXAMAR had no outstanding debts to the AT or to Social Security in 2016 or 2018. It paid the tax assessed as due for the 2016 tax year, amounting to EUR 82 547.33, on 13 February 2021, and the tax assessed as due for the 2018 tax year, amounting to EUR 43 755.29, also on 13 February 2021.

The essential arguments of the parties in the main proceedings

- 6 CAXAMAR argues that the AT erred in its assessment of the facts and its interpretation of the legislation. It understands that its activity falls within the sectoral scope of the GBER and the Guidelines, and that consequently the CFI is applicable to it and it may, therefore, take advantage of the RFAI: the industry

concerned is cod processing, which is not the processing of an agricultural product.

- 7 Moreover, it has no outstanding debts to the AT or to Social Security.
- 8 For its part, the AT considers that CAXAMAR has unlawfully taken advantage of that tax benefit (RFAI), since its activity does not satisfy the eligibility requirements for the benefit. The AT therefore carried out a series of supplementary tax assessments. In its view, CAXAMAR cannot take advantage of the RFAI because the company's activities do not fall within its sectoral scope. Those activities, which consist in processing cod into salted, frozen and desalted cod, fall within the processing and marketing of the fishery products sector and are excluded from the scope of the Guidelines and the GBER, with which the RFAI must comply. Not only are fishery and aquaculture products expressly excluded from the scope of the Guidelines, the GBER and the RFAI; both the Guidelines and the ministerial order also exclude the 'agricultural products' referred to in Annex I to the TFEU; in accordance with Article 38 TFEU and the list in Annex I to the Treaty, that term also includes fisheries, that is, fish, molluscs and crustaceans listed in Chapter 3 of the combined nomenclature. The AT contends that, even if the economic activities in question were not excluded, the RFAI benefit obtained in the 2016 and 2018 tax years exceeded the maximum intensity (35%) approved by the European Commission for regional State aid. Lastly, the AT maintains that the company has not demonstrated that, during the tax years in which it benefited from the advantage in question, it did not have any outstanding debts to the tax authorities or to Social Security, as required under the CFI.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 9 In essence, the point at issue is whether the AT acted correctly when it amended the taxable amount for IRC purposes and the corresponding interest on the grounds that the activity carried on by CAXAMAR did not fall within the scope of the RFAI and therefore the investment did not satisfy the necessary requirements in order to benefit from the credits and deductions available under that tax advantage.
- 10 In other words, the relevant issue is to determine whether the activity carried on by CAXAMAR, namely the processing of cod into salted, frozen and desalted cod, can be considered an 'activity of the processing industry' falling within Article 2(b) of Ministerial Order 282/2014 of 30 December 2014 ('(b) Processing industries – divisions 10 to 33'), inasmuch as, under the applicable EU legislation, in particular the Guidelines, the GBER, and the rules to which these refer, the activity involves the processing of an agricultural product.
- 11 In the present case, the taxable amount for IRC purposes has been reduced by EUR 72 775.36 and EUR 41 607.67 for the 2016 and 2018 tax years respectively

in respect of the tax advantages provided for in the RFAI for the investments made in those periods.

- 12 More specifically, the question is whether or not the investment projects undertaken by CAXAMAR in 2016 and 2018 in connection with cod processing fall within the scope of the RFAI.
- 13 In so far as EU State aid legislation is concerned, the CFI, the regulation of the RFAI contained therein, and Ministerial Order No 282/2014 of 30 December 2014 must be seen as measures to implement and give effect to the principles and rules in Articles 107 to 109 TFEU, in the GBER and in the Guidelines and, in that context, the ministerial order can only be seen as a measure implementing provisions of EU law. Consequently, the AT understands that there is no reason for the rule in Article 1 of the ministerial order to prevail over Article 1(3)(c) of the GBER so as to exclude the granting of the tax benefit established in the RFAI.
- 14 The [Centro de Arbitragem Administrativa (Centre for Administrative Arbitration)] has already stated that it must be borne in mind that the list of activities provided in Article 2 of the CFI is not exhaustive, since it merely provides a purely indicative list of the economic activities to which the investment projects apply.
- 15 But it is also clear from that article that, in order to be eligible for the benefit, an economic activity must also fall within the sectoral scope of the Guidelines for 2014-2020 and the GBER. Moreover, project eligibility is also subject, in particular, to specification of the economic activity codes (CAE) – which the legislature left to be addressed in a regulatory instrument – which must have regard to the restrictions in Article 1 of Ministerial Order No 282/2014; under those restrictions, investment projects for economic activities connected with primary agricultural production and the processing and marketing of agricultural products listed in Annex I to the TFEU are ineligible for the benefit.