

Case C-505/22

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:

25 July 2022

Referring court:

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

Date of the decision to refer:

22 July 2022

Applicant:

Deco Proteste – Editores, Lda.

Defendant:

Autoridade Tributária e Aduaneira (Tax and Customs Administration)

Subject matter of the main proceedings

Supplies of goods – Concept of ‘supply of goods made free of charge’ – Concept of ‘gift of small value’ – Gifts with a value below EUR 50 and exceeding a ceiling of 0.5% of the turnover of the taxable person in the preceding year

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

Interpretation of EU law, specifically the second paragraph of Article 16 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) – Article 267 TFEU

Questions referred

1) Where new subscribers are given a gift (a ‘gadget’) when they subscribe to periodicals, must the making of that gift be considered, for the purposes of Article 16 of the VAT Directive, to be:

(a) a supply of goods made free of charge, separate from the transaction consisting of subscribing to the periodicals,

or

(b) part of a single transaction for consideration,

or

(c) part of a commercial package, comprising a principal transaction (the subscription to the magazine) and an ancillary transaction (making the gift), in which the ancillary transaction is considered to be a supply for consideration instrumental to the subscription to the magazine?

2) If the answer to the first question is that the making of the gift is a supply of goods made free of charge, is the setting of an annual ceiling on the overall value of gifts of 0.5% of the turnover of the taxable person in the preceding year (in addition to the limit on the unitary value) compatible with the concept of ‘the application of goods ... as gifts of small value’ referred to in the second paragraph of Article 16 of the VAT Directive?

3) If the preceding question is answered in the affirmative, must that proportion of 0.5% of the turnover of the taxable person in the preceding year be considered to be so low that it renders the second paragraph of Article 16 of the VAT Directive ineffective?

4) Having regard also to the purposes for which it was established, does that ceiling of 0.5% of the turnover of the taxable person in the preceding year infringe the principles of neutrality, of equal treatment or non-discrimination and of proportionality?

Provisions of European Union law relied upon

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (‘VAT Directive’), in particular the second paragraph of Article 16

Provisions of national law relied upon

Article 3(3)(f), second part, and Article 3(7) of the Código do Imposto sobre o Valor Acrescentado (Portuguese VAT Code; ‘CIVA’)

Succinct presentation of the facts and procedure in the main proceedings

- 1 Deco Proteste – Editores, Lda. ('the applicant') is a commercial company, the corporate purpose of which is the publication of magazines and other consumer information documents, and which, through its publishing department, produces periodicals intended to inform and protect consumers, which it sells on subscription.
- 2 The applicant forms part of the international group EUROCONSUMERS which brings together various organisations promoting and protecting consumer interests. It is linked to the Portuguese consumer protection body DECO – Associação Portuguesa de Defesa do Consumidor.
- 3 In order to ensure that its business is economically viable, the applicant needs a large number of subscribers to its magazines. To promote its sales and attract new subscribers, the applicant uses various marketing techniques including direct marketing such as paper mailing, in the form of sending physical letters to potential subscribers; e-marketing, using emails sent to those potential customers; and telemarketing.
- 4 In that context, the applicant runs promotional campaigns, in which it gives customers who sign up to a subscription plan, in addition to the magazines subscribed to, entitlement to a gift in the form of an electronic device, a 'gadget', (specifically, a tablet) the unitary value of which is always below EUR 50, and makes intra-community acquisitions in order to supply that gift, to which it applies the reverse charge and on which it assesses and deducts VAT. The customer receives the item as an introductory gift and may cancel the subscription at any time.
- 5 The applicant does not impose a loyalty period and customers may therefore keep the gift without incurring any penalty.
- 6 In 2014, 2015, 2016 and 2017, the overall value of the gifts made to new subscribers exceeded 0.5% of the applicant's turnover, and adjustments were subsequently made for the years 2015 to 2018.
- 7 The invoices issued by the applicant in respect of the monthly payments for the magazine subscriptions which gave entitlement to gifts refer to the subscription to the magazines, applying the 6% reduced rate (under Article 18(1)(a) of the CIVA) to the corresponding amount, but make no reference to the supply of gifts.
- 8 In 2019, the applicant underwent an inspection in relation to the Imposto sobre o Rendimento das Pessoas Coletivas (Portuguese corporation tax) and VAT for 2015, 2016, 2017 and 2018.
- 9 As a result of that inspection, it was proposed that the applicant make VAT adjustments, since it had exceeded the ceiling of 0.5% of turnover which the Portuguese legislation has established to define 'gifts of small value'.

- 10 The applicant voluntarily submitted replacement declarations for the December of each year from 2015 to 2018 and then self-assessed the corresponding amounts of VAT payable, including default and compensatory interest.
- 11 The applicant disagreed with those VAT self-assessments calculated in accordance with the defendant's interpretation contained in the tax inspection report, and lodged an administrative appeal seeking annulment of those self-assessments and of the assessments of default and compensatory interest for which it was liable.
- 12 By decision of 11 May 2021, the deputy director of the Direção de Finanças de Lisboa (Lisbon Department of Finance, Portugal) dismissed the administrative appeal. That decision held that a supply of goods separate from those invoiced to the customer constitutes a gift, on which tax will or will not be payable depending on its unitary value. Since the applicant exercised its right to deduct VAT on the acquisition of those gifts, the annual value of the gifts is subject to the system governing supplies of goods made free of charge, on which VAT must be assessed (pursuant to Article 3 of the CIVA).
- 13 On 6 August 2021, since it disagreed with the dismissal of the administrative appeal, the applicant applied to the referring court, the Tribunal Arbitral Tributário (Tax Arbitration Court) for leave to bring the arbitration proceedings now being heard by it. The defendant is the Autoridade Tributária e Aduaneira (Tax and Customs Authority; 'the defendant').
- 14 The applicant has applied for a finding of unlawfulness and the consequent annulment of the decision dismissing the administrative appeal, of the contested VAT self-assessments for 2015, 2016, 2017 and 2018, totalling EUR 2 562 500.65, and of the assessments of default and compensatory interest, in the amount of EUR 270 936.70, arising from the voluntary adjustments made as a result of the inspection relating to those years.
- 15 The applicant has also applied for the defendant to be ordered to repay the tax and interest that it considers to have been unduly paid, plus compensatory interest on that amount until the date on which it is repaid in full.

The essential arguments of the parties in the main proceedings

The applicant's position

- 16 The applicant claims that there is an error of law. It asserts, in the first place, that giving gadgets to new subscribers when they subscribe to its periodicals does not constitute gifting, since there is no *animus donandi*, and, in the second place, that this is a commercial package for promotional, advertising and commercial purposes. That package consists of a supply of services (the subscription) linked to a supply of goods (the gadget) with monetary consideration included in the amount of the magazine subscription, that is to say, the final price is not only the

price of the magazines subscribed to, but rather the discounted price of the magazines plus the gadget.

- 17 Since it does not constitute gifting, that provision of gadgets does not fall within the scope of Article 3(3)(f) of the CIVA, which originates in Article 16 of the VAT Directive. What the applicant chooses to call the item it provides cannot affect the tax framework governing the goods it markets in respect of VAT. That notwithstanding, even if that were found to be a matter of a gift of goods, its unitary value is below EUR 50 and it is therefore in any event covered by the concept of small value under Article 3(7) of the CIVA.
- 18 The applicant notes that the fact that, overall, the gadgets given out exceed 0.5% of its turnover for the preceding year has no bearing on the small value of the goods supplied or on the fact that the concept of ‘gift of small value’ is specifically defined in the legislation.
- 19 It argues, therefore, that the defendant’s interpretation is contrary to Article 3(3)(f) and 3(7) of the CIVA and is incompatible with the second paragraph of Article 16 of the VAT Directive.
- 20 The applicant also claims that taking into account the ceiling of 0.5% of turnover infringes the principles of proportionality, of neutrality and of equal treatment or non-discrimination, in so far as it requires traders to behave in a particular way, thereby limiting their economic freedom and neutrality; it is excessively restrictive and therefore renders Article 16 of the VAT Directive ineffective; it discriminates against Portuguese traders compared with the traders in other Member States which do not impose such a ceiling; it discriminates against the applicant compared with traders established in Portuguese territory whose business depends on fewer customers and/or different sales margins; and it goes beyond what is necessary to achieve the objective of effectively protecting the rights of the Treasury, since there is no risk of taxable persons making gifts of unjustified value when they are genuinely acting for commercial purposes.

The defendant’s position

- 21 In so far as concerns the question whether the ceiling, laid down in Article 3(7) of the CIVA, of 0.5% of the preceding year’s turnover is compatible with EU law, the defendant states that the Member States have a degree of discretion as regards how they interpret the concept of a gift of small value, provided that they observe the purpose of Article 16 of the VAT Directive and the position it occupies in the scheme of that directive.
- 22 The defendant contends that the Member States can set limits on the basis of various economic circumstances and establish exceptions to prevent abuse, and that the ceiling of 0.5% of turnover is in line with that objective, since it prevents, inter alia, a situation in which two items are supplied together where one is declared to be for consideration, subject to a reduced rate, and the other, although

formally declared to be a free gift, constitutes a supply of goods at the normal rate of tax because it is, in essence, for consideration.

Common position of the parties

- 23 It is common ground that the making of gifts by the applicant is a legitimate practice, in line with customary business practices, the purpose of which is to attract and retain new customers.

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

- 24 The questions raised in this case concern the provisions under which the applicant makes gifts to new subscribers to its periodicals in the context of promotional campaigns to attract customers.
- 25 The purpose of those questions is to clarify, in the first place, whether the making of those gifts is a genuine supply of goods made free of charge or whether this is a global commercial package for monetary consideration, in which the magazine subscription is linked to the supply of the gift and the amount received is the transaction price of the bundle being marketed, which includes the magazines and the gift. In the latter scenario, nothing would have been gifted and Article 3(3)(f) of the CIVA would not apply.
- 26 In the second place, if it is found that the making of the gift is a supply of goods made free of charge, where the unitary value of the goods is always below EUR 50, it will be necessary to determine whether the fact that, alongside the quantitative unitary limit of EUR 50, Article 3(7) of the CIVA establishes an overall quantitative limit on gifts made of 0.5% of the turnover of the taxable person (reported in the preceding year) is in conformity with the second paragraph of Article 16 of the VAT Directive and is an appropriate criterion for defining the concept of ‘gift of small value’ contained in that paragraph. If the answer is in the affirmative, it will be necessary also to determine whether the ceiling of 0.5% of turnover infringes the principles of proportionality, neutrality and of equal treatment or non-discrimination.
- 27 With regard to the national legal framework, Article 3 of the CIVA defines the concept of a supply of goods and, in Article 3(3)(f) the supply of goods made free of charge is regarded as a supply of goods where the tax on those goods or their constituent elements has been wholly or partly deducted. Article 3(7) of the CIVA, for its part, excludes gifts from the provisions laid down in Article 3(3)(f) where their unitary value is EUR 50 or less and their global annual value does not exceed 0.5% of the turnover of the taxable person in the preceding calendar year, in accordance with customary business practices.
- 28 As regards EU law, Article 2(1)(a) of the VAT Directive provides that supplies of goods ‘for consideration’ are to be subject to VAT. In Article 16, the VAT Directive also governs situations where supplies of goods made free of charge are

treated as transactions for consideration, and taxed accordingly. However, they are not treated thus in the case of ‘gifts of small value’.

- 29 The two questions which it is necessary to answer relate to the application of the concepts ‘supply of goods made free of charge’ and ‘the application of goods ... as gifts of small value’, which calls for a – necessarily uniform – interpretation of Article 16 of the VAT Directive.
- 30 The referring court has doubts as to how it should interpret those two concepts.

The concept of ‘supply of goods made free of charge’

- 31 The main doubt in relation to this concept concerns whether the applicant’s promotional campaign should be categorised as: (a) two separate transactions, one, for consideration, relating to the subscription to magazines and another relating to the supply of gifts made free of charge for the purposes of Article 16 of the VAT Directive; or (b) a transaction for consideration in which the price is the consideration for the bundle, which may consist of a commercial package corresponding to a single transaction or of a commercial package comprising a main transaction (subscription to the magazine) and an ancillary transaction (the making of a gift), in which the gift is considered to be supplied for consideration and instrumental to the subscription to the magazine.
- 32 The referring court cites the judgment of the Court of Justice of 27 April 1999, *Kuwait Petroleum* (C-48/97, EU:C:1999:203, paragraph 26), which stated that goods are supplied for consideration only ‘if there is a legal relationship between the supplier and the purchaser entailing reciprocal performance, the price received by the supplier constituting the value actually given in return for the goods supplied’. It is necessary to determine whether, in the present case, the gift can be found to have been made in return for value, even though that value is not identified or specified individually.

The concept of ‘gift of small value’

- 33 The referring court notes in respect of this concept that, although the Court of Justice has already held that the setting of a monetary ceiling to embody the concept of a gift of small value may be consistent with the VAT Directive (see the judgment of 30 September 2010, *EMI Group*, C-581/08, EU:C:2010:559), it is necessary to determine whether the national legislation is consistent with Article 16 of the VAT Directive and with the objectives pursued by the EU legislature where, in addition to a unitary limit of EUR 50 or less, it sets a ceiling unconnected with the unitary value of the goods offered.
- 34 If the making of the gift is found to constitute a supply of goods made free of charge, it will be necessary to determine, first, whether the concept of ‘the application of goods ... as gifts of small value’ referred to in the second paragraph of Article 16 of the VAT Directive can be defined not only by reference to the

unitary value but also, at the same time, in relation to the overall value of the gifts made by the taxable person as a proportion of its turnover in the preceding year and, if the answer is in the affirmative, whether a ceiling of 0.5% of turnover is so low as to render that article ineffective. Second, it will be necessary to determine whether that ceiling discriminates in favour of traders whose activity depends on fewer customers or different sales margins and of traders in other Member States where no such ceiling is set, contrary to the principles of neutrality and equal treatment or non-discrimination. Third, it will be necessary to determine whether that ceiling also infringes the principle of proportionality, by going beyond what is necessary to ensure that there are no transactions free of charge that can be abused by taxable persons.

- 35 Accordingly, in accordance with Article 267 TFEU, the referring court stays the proceedings and refers the questions set out above to the Court of Justice for a preliminary ruling.