Case C-42/22

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:

19 January 2022

Referring court:

Supremo Tribunal Administrativo (Portugal)

Date of the decision to refer:

16 December 2021

Appellant:

Global – Companhia de Seguros, S.A. (now Seguradoras Unidas, S.A.)

Respondent:

Autoridade Tributária e Aduaneira (Tax and Customs Authority)

Subject matter of the main proceedings

'Global – Companhia de Seguros, S.A.', now 'Seguradoras Unidas, S.A.', has brought before the Supremo Tribunal Administrativo (Supreme Administrative Court) an appeal against the judgment of the Tribunal Tributário de Lisboa (Tax Court, Lisbon) of 30 December 2017 dismissing as inadmissible the action for judicial review of the decision of the Tax and Customs Administration relating to certain assessments to VAT, plus corresponding interest, amounting in total to EUR 18 715.86.

Subject matter and legal basis of the request

This request for a preliminary ruling seeks an interpretation of Article 13(B)(a) and (c) of Directive 77/388/EEC and Articles 135(1)(a) and 136(a) of Directive 2006/112/EC, which replaced the former provisions, with a view to determining whether the concept of 'insurance and reinsurance transactions', as the principal activity of an insurance company, also includes related or supplementary

activities, in particular the purchase and sale of parts from written-off vehicles, and whether, to that extent, the latter activity is also exempt from value added tax ('VAT'). The referring court also seeks a determination as to whether that exempt may be inferred from the fact that the insurance company is an entity exempt from that tax where the aforementioned goods have not given rise to a right to deduction of VAT. Lastly, it asks whether it is contrary to the principle of fiscal neutrality for the sale of parts from written-off vehicles not to be exempt from VAT.

Questions referred for a preliminary ruling

The national court has referred the following questions to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

'A. Must Article 13(B)(a) of the Sixth VAT Directive, and, therefore, the current Article 135(1)(a) of the VAT Directive, be interpreted as meaning that the concept of 'insurance and reinsurance transactions' includes, for the purposes of exemption from VAT, related or supplementary activities such as the purchase and sale of parts from written-off vehicles?

B. Must Article 13(B)(c) of the Sixth VAT Directive, and, therefore, the later Article 136(a) of the VAT Directive, be interpreted as meaning that parts from written-off vehicles are regarded as being purchased and sold solely for an exempt entity, where those goods have not given rise to the right to deduction of VAT?

C. Is it contrary to the principle of VAT neutrality for the sale of parts from written-off vehicles by insurance companies not to be exempt from VAT where there was no right to deduction of VAT?'

Provisions of EU law relied on

Council Directive 77/388/EEC of 17 May 1977, the Sixth Directive on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (Sixth VAT Directive): Article 13(B)(a) and (c).

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'): Articles 135(1)(a) and 136(a) [which correspond to Article 13(B)(a) and (c) of the Sixth VAT Directive, cited above].

Provisions of national law relied on

Código do Imposto sobre o Valor Acrescentado (IVA) (Value Added Tax (VAT) Code; 'the VAT Code'), approved by Decree-Law No 394 B/84 of 26 December 1984 and recast by Decree-Law No 102/2008 of 20 June 2008 (Diário da

República No 118/2008, Series I of 20 June 2008), as amended: Article 9(29) (now (28)) and (33).

Decreto-Lei n. 94-B/98, de 17 de abril, que regula as condições de acesso e de exercício da atividade seguradora e resseguradora no território da Comunidade Europeia, incluindo a exercida no âmbito institucional das zonas francas (Decree-Law No 94-B/98 of 17 April 1998 governing the conditions of access to and pursuit of the activity of insurance and reinsurance in the territory of the European Community, including in the institutional field of the free zones) (Diário da República No 90/1998, 2nd Supplement, Series I-A of 17 April 1998): Article 8(1).

Brief presentation of the facts and procedure in the main proceedings

1 This appeal was brought against the judgment declaring inadmissible the action for judicial review brought by Global – Companhia de Seguros, S.A., now Seguradoras Unidas, S.A., against VAT assessments Nos 09172471, relating to the period 07/03T; 09172473, relating to the period 07/06T; 09172475, relating to the period 07/09T, and 09172477, relating to the period 07/12T, and the respective interest assessments No 09172472, relating to the period 07/03T; 09172474, relating to the period 07/06T; 09172476, relating to the period 07/09T, and 09172478, relating to the period 07/12T.

2 The appellant is an insurance company which, in the course of its business, purchases vehicle parts from accidents in which its policyholders have been involved and subsequently sells them.

3 Further to an inspection carried out by officials from the Divisão de Inspeção a Seguradoras e Sociedades Financeiras (Division for the Inspection of Insurers and Financial Institutions), part of the Direção de Serviços de Inspeção Tributária (Tax Inspection Services Directorate) within the then Direção Geral dos Impostos (Directorate-General for Taxation), corrections were made to the value added tax (VAT) due for the 2007 financial year in the amount of EUR 17 213.70 plus interest.

4 Those corrections were made on the basis of an assessment carried out by the Tax Administration in relation to the sale of parts from written-off vehicles, which is reflected in the inspection report as follows:

‘The taxable person did not account for VAT on the transfer of goods (parts from written-off vehicles).

The sale of parts from written-off vehicles is a transaction subject to VAT in accordance with Article 3 of the [VAT Code], inasmuch as it is considered to be a transfer of movable property for consideration, at a rate of 21%, pursuant to Article 18(c) of that Code.’

5 Consequently, the Tax Administration made the assessments to VAT set out in paragraph 1, plus the corresponding interest, in the total amount of EUR 18 715.86.

6 The appellant paid the contested VAT as assessed on 23 November 2009.

Essential arguments of the parties in the main proceedings

The appellant submits that, contrary to what follows from the judgment under appeal, the sale of parts from written-off vehicles should be regarded as exempt from VAT.

In accordance with Article 9(29) of the VAT Code (now Article 9(28) of the VAT Code), which originates from Article 13(B) (‘Other exemptions’) (a) of the Sixth VAT Directive, replaced by the current Article 135(1)(a) of the VAT Directive, ‘insurance and reinsurance transactions, as well as related services performed by insurance brokers and agents’, are exempt from VAT.

The reasons behind that exemption were of a primarily technical nature and have to do with the conceptual difficulty of including insurance activities within the logic of VAT when operated according to the tax credit method, since only a small part of the premiums paid by customers is intended to cover administration costs, and with the fact that insurance companies perform certain financial activities in competition with other banking and financial transactions which are also exempt from tax under that directive.

The provision of EU law that serves as the basis for the exemption provided for in the VAT Code lays down an exemption for insurance and reinsurance without attaching any exception or restriction to its scope.

The reference to related services performed by insurance brokers and agents is included to clarify the scope of the exemption and does not in any way imply that other related services are not covered by that exemption.

According to Article 8(1) of Decree-Law No 94 B/98 of 17 |April 1998, insurance companies ‘are financial institutions the exclusive purpose of which is to carry on the business of direct insurance and reinsurance, and which may also perform activities related or supplementary to those of insurance and reinsurance, in particular in relation to instruments and contracts concerning parts from written-off vehicles […]’. It is therefore clear from the wording of the aforementioned provision that the law regards transactions concerning parts from written-off vehicles, which form part of the business of the undertakings in the sector concerned, as constituting activities related to the principal activity of insurance.

Those transactions cannot be dissociated from the normal activity of negotiating and paying compensation in the event of a claim, given that the amount of such compensation will vary depending on whether the insurance company receives the

written-off vehicle (or parts thereof) in return, and that, in most cases, the transaction does not translate into a gain for the insurance company. In the light of that complementarity, which is reflected even in the sector's own rules, the appellant fails to understand how the sale of parts from written-off vehicles can be excluded from the scope of insurance transactions for the purposes of the application of the exemption provided for in Article 9(29) of the VAT Code.

In addition to the foregoing, the appellant submits that, in the light of Article 9(2) of the VAT Code, it would not make sense for the legislature to have chosen to regard those transactions, traditionally related to the insurance business, as falling outside the scope of the exemption but to have included within it third-party agency and brokerage transactions, which are an activity that can readily be dissociated from collecting premiums and paying compensation, the exemption of which does not appear to be supported by any of the aforementioned technical reasons. In so far as concerns the legislature's intention to exempt insurance activities in general from VAT, it was only in relation to the latter transactions that it felt the need to make express provision for an exemption, with the result that, if the legislature had not made any provision in this regard, such transactions would in any event have been subject to tax. Consequently, the exemption provided for in Article 9(29) would also have to be applied on that basis.

That conclusion is not undermined by the position adopted in certain recent decisions of the administrative and tax courts — contrary to a hitherto relatively settled body of case-law [reference to the case-law of the Supreme Administrative Court]— to the effect that the concept of insurance transactions does not encompass related activities such as the purchase and sale of parts from written-off vehicles.

In the first place, according to the appellant, it is not possible to accept an interpretation according to which Article 9[29] of the VAT Code refers to Article 8 of Decree-Law No 94 B/98 for the purposes of defining the concept of 'insurance and reinsurance transactions', inasmuch as this is an independent concept of EU law which must be interpreted in the light of the Community provision from which it originates.

Moreover, the alleged extension of the exemption to related services performed by insurance brokers and agents does not mean that all related insurance services are excluded under the exemption provision, since, according to the appellant, the term 'including' is used to introduce a clarification which the Community legislature considered necessary to make. Furthermore, on the basis of the foregoing, the appellant takes the view that the transactions must be recognised as being exempt under Article 9(29) of the VAT Code and, for that reason, the judgment under appeal must be set aside and the action for judicial review that was brought must be upheld.

In the event that view does not prevail, and given that this case has raised a question as to the interpretation of EU law which is a matter of some uncertainty

and of relevance to the resolution of the dispute, that question must be referred for consideration by the Court of Justice of the European Union, which alone has jurisdiction to give preliminary rulings on the interpretation of EU law under Article 267 of the Treaty on the Functioning of the European Union (TFEU).

Since there is a need for an interpretation of provisions of EU law — Article 13(B)(a) of the Sixth VAT Directive and Article 135(1)(a) of the VAT Directive — and the question raised is clearly one of some uncertainty, particularly given that, as is well known, legal commentary and the case-law of the administrative and tax courts have not been uniform in this field, despite the fact that the wording of the relevant provisions has not changed, a reference must be made to the Court of Justice.

Even if it were accepted that transactions involving the sale of parts from written-off vehicles are not exempt from VAT on the basis set out above, they should in any event qualify for the exemption provided for in Article 9(33) of the VAT Code, in which case the contested VAT and interest assessments would also be unlawful for that reason.

Consequently, the judgment under appeal is also vitiated by an error of assessment in this regard and must be set aside. According to that part of the aforementioned provision that is relevant to this case, '*supplies of goods used solely exclusively for an exempted activity*' are exempt from VAT, '*where those goods have not given rise to the right to deduction*', as are '*supplies of goods on the acquisition or production of which, by virtue of Article 21(1), value added tax did not become deductible*'. This provision also originates from a provision of EU law, namely Article 13(B)(a) of the Sixth VAT Directive, and, therefore, Article 136(a) of the VAT Directive.

That provision — which is fundamental to the logic of the VAT system — seeks to avoid the cumulative effects of that tax which would inevitably arise if the goods had been purchased in the absence of a right to deduction, either because the purchases in question were made by exempt taxable persons or because they are among the goods listed in Article 21(1) of the VAT Code. It is the first part of that exemption provision which is applied to transactions for the sale of 'parts from written-off vehicles' performed by the then applicant and current appellant in order to achieve the aforementioned neutrality. The goods in question, being 'means of production' which are of interest only to the insurance business, must necessarily be regarded as goods used solely for an exempted activity for the purposes of compliance with the first of the conditions laid down in that provision.

In the second place, even if those vehicles had given rise to a right to deduction in favour of their respective owners, and had thus triggered a VAT assessment on transfer to the appellant, that entity, in its capacity as an exempt taxable person, would never be able to deduct that tax, with the result that the second condition which that provision attaches to recognition of the exemption laid down therein, to

the effect that the goods used for the exempted activity must not have given rise to a right to deduction, is satisfied.

In short, it must therefore be concluded that, even if the view is taken that transactions for the sale of 'parts from written-off vehicles' are not exempt from tax under Article 9(29) of the VAT Code, those transactions should in any event qualify for the exemption provided for in paragraph 33 of that provision, as the Supreme Administrative Court has held [reference to the case-law of the Supreme Administrative Court]. For that reason, the tax assessments at issue are unlawful because they infringe Article 9(33) of the VAT Code and must therefore be annulled.

That conclusion is all the more convincing given that it is the law itself, supported and corroborated by administrative legal commentary — [reference to national administrative legal commentary] —, which establishes the use of the VAT reverse charge mechanism by buyers in the event of the sale of parts from written-off vehicles by insurance companies. The appellant takes the view that that legal provision, supported by current administrative legal commentary, makes clear the legislature's intention that insurance companies should not be taxed, and that that intention must be taken into account in this case, with the result that, on the basis of that same justification, the judgment under appeal must be set aside and the action for judicial review that was brought must be upheld.

The Public Prosecutor's Office attached to this court delivered an opinion in favour of making a reference for a preliminary ruling under Article 267 TFEU on the questions forming the basis of the dispute as to the nature of the transactions at issue in this case in the light of Article 13(B)(a) and (c) of the Sixth VAT Directive, as transposed into national law by [Article 9](29) and (33) of the VAT Code.

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

The main question that must be answered is whether or not the sale of 'parts from written-off vehicles' by undertakings in the insurance business is exempt from VAT in the light of Article 9(29) and (33) of the VAT Code.

According to Article 9(29) and (33) of the VAT Code, in the version in force in 2007, 'insurance and reinsurance transactions, as well as related services performed by insurance brokers and agents', were exempt from tax, as were 'supplies of goods used solely for an exempted activity, where these goods have not given rise to the right to deduction, or of goods on the acquisition or production of which, by virtue of Article 21(1), VAT did not become deductible'.

Those provisions are the result of the transposition of Article 13(B)(a) and (c) of the Sixth Directive, and the interpretation of the latter directive has been controversial: the case-law laid down by the Supreme Administrative Court in the judgment of the full session of that court of 7 November 2012 adopts a position

contrary to that taken by most legal commentators [reference to national legal commentary].

The judgment of the full session of the tax litigation chamber of the Supreme Administrative Court applied to the letter the case-law laid down in the judgment of 19 April 2012, which, in a situation similar to that at issue in the present case, excluded the application of both Article 9(29) and (33) of the VAT Code, concluding, in other words, that the disposal of 'parts from written-off vehicles' by insurance companies was subject to VAT [reference to national legal commentary].

This means that the correct interpretation of Article 9(29) and (33) of the VAT Code, and therefore of Article 13(B)(a) and (c) of the Sixth VAT Directive, the latter provisions having been incorporated into national law by the former s, is clearly a matter of dispute.

In the light of the foregoing, and without prejudice to the content of its case-law, this court considers it appropriate, as proposed by the appellant, to submit a request for a preliminary ruling to the Court of Justice of the European Union under Article 267 TFEU so as to guarantee the uniform application of EU law.

There is no doubt that, in the present case, this court is faced with a dispute as to the interpretation and application of EU law, as described above, which entirely rules out the application of the 'acte clair' doctrine. Consequently, the Supreme Administrative Court, as a court whose decisions are not open to any appeal , must make this request under Article 267 TFEU in order to ensure that national case-law at variance with the spirit of the Sixth Directive does not become established.

The same view has been expressed by the Court of Justice, in particular in the recent [judgment of 4 October 2018 in Case C-416/17], which refers in turn to the [judgment of 15 March 2017 in Case C-3/16 (EU:C:2017:209)], from which this court cites the following findings set out in paragraphs 32 to 34:

'32 The obligation to refer a question to the Court for a preliminary ruling under the third paragraph of Article 267 TFEU is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of EU law in all the Member States, between national courts, in their capacity as courts responsible for the application of EU law, and the Court (see, to that effect, judgment of 9 September 2015, *X and van Dijk*, C-72/14 and C-197/14, EU:C:2015:564, paragraph 54).

33 Moreover, the obligation to make a reference laid down by the third paragraph of Article 267 TFEU is intended in particular to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in any of the Member States (see, to that effect, judgment of 15 September 2015, *Intermodal Transports*, C-495/03, EU:C:2005:552, paragraph 29).

34 As the Court has pointed out on a number of occasions, a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by EU law. Courts adjudicating at last instance have the task of ensuring at national level the uniform interpretation of rules of law (see, to that effect, judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 34, and of 13 June 2006, *Traghetti del Mediterraneo*, C-173/03, EU:C:2006:391, paragraph 31)'.