

Case C-218/21**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:**

1 April 2021

Referring court:

Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal)

Date of the decision to refer:

17 February 2021

Appellant:

Autoridade Tributária e Aduaneira (Tax and Customs Authority)

Respondent:

DSR. – Montagem e Manutenção de Ascensores e Escadas Rolantes, S. A.

Subject matter of the main proceedings

Taxation; VAT; applicability of reduced rates of VAT to labour charges in respect of the provision of lift repair and maintenance services.

The main proceedings concern an appeal lodged by the Autoridade Tributária e Aduaneira (Tax and Customs Authority), seeking to have set aside the judgment of 16 October 2017 of the Tribunal Administrativo e Fiscal do Porto (Administrative and Tax Court, Oporto, Portugal), which upheld the contentious administrative appeal brought by DSR. – Montagem e Manutenção de Ascensores e Escadas Rolantes, SA against the VAT assessments relating to the months of January to December 2007, in addition to the relevant interest, in the amounts of EUR 123 442.31 and EUR 21 226.57 respectively.

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

Interpretation of EU law; Article 267 TFEU.

Questions referred for a preliminary ruling

I. Is it compatible with European Union law, in particular Annex IV to the [Sixth] VAT Directive, for point 2.27 of List I annexed to the VAT Code to be applied in such a way that it is taken to mean that it includes the repair and maintenance of lifts carried out by the undertaking to which the facts summarised above relate and that it results in the application of the reduced rate of VAT?

II. Is it compatible with European Union law, in particular Annex IV to the [Sixth] VAT Directive, for that provision of the VAT Code to be applied in such a way that it also takes into account other provisions of national law, namely Article 1207, Article 204(1)(e) and (3), and Article 1421(2)(b) of the Civil Code (provisions governing the concepts of works contract and immovable property and the presumption that a lift is a common part of a building in co-ownership)?

Provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (more specifically, point 2 of Annex IV to that directive, headed ‘List of the services referred to in Article 106’).

Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 1999/85/EC of 22 October 1999.

Provisions of national law relied on

Value Added Tax Code (‘VAT Code’), approved by Decree-Law No 394- B/84 of 26 December 1984 (*Diário da República*, Series I, No 297, Supplement 1, of 26 December 1984), as currently in force, in particular point 2.27 of List I (Goods and services subject to the reduced rate), which forms part of Chapter VII (Final provisions).

Civil Code, approved by Legislative Decree 47344/66 of 25 November 1966 (*Diário do Governo* No 274/1966, Series I of 25 November 1966), as currently in force, in particular Article 204(1)(e), Article 1207 and 1421.

Law No 3-B/2000 of 4 April 2000 (General State Budgets for the year 2000), which added point 2.24 (now 2.27) to List I annexed to the VAT Code.

Law No 32-B/2002 of 30 December 2002 (General State Budgets for the year 2003).

Law No 55-B/2004 of 30 December 2004 (General State Budgets for the year 2005).

Notice No 30025 of 7 August 2000 and Notice No 30036 of 4 April 2001, both from the VAT Services Directorate.

Summary of the facts and procedure in the main proceedings

- 1 DSR. – Montagem e Manutenção de Ascensores e Escadas Rolantes, SA is an undertaking which manufactures lifts, hoists and conveyor belts and also provides lift repair and maintenance services.
- 2 Between 11 October 2011 and 14 November 2011, it underwent a tax inspection, during which it exercised its right to be heard.
- 3 On completion of the inspection, on 30 December 2011 a tax inspection report was drawn up, in which the tax authority concluded that *‘the taxable person’s tax position was unlawful because it was applying the reduced rate to the lift remodelling and repair services it provided which, in the tax authority’s view, cannot be treated in that way and should therefore be subject to the standard rate. In this case, the taxable person charges VAT at the standard rate on all materials included and applies the reduced rate to labour only. It has also been established that, as regards the other instructions contained in the Notices referred to, the taxable person’s position was not contrary to those Notices. Accordingly, it has been established that the reduced rate was incorrectly applied to the value of labour charged for in respect of the lift repair and maintenance services, which should have been subject to the standard rate.’*
- 4 After it had been notified of the VAT assessments in the amounts indicated above, the taxable person lodged a contentious administrative appeal which was upheld on the grounds that the labour services provided in relation to the repair and maintenance of lifts are subject to the VAT rate of 5%, in accordance with point 2.27 (formerly point 2.24) of List I annexed to the VAT Code, confirming the view that ‘the lifts are an integral part of the buildings’ and that ‘that reduced rate is not precluded in respect of the repair and maintenance of lifts, provided that those services are carried out under a works contract, as stipulated by the provision in question, and that that rate is applied only to the labour’.
- 5 The Administração Tributária e Aduaneira appealed to the referring court against that decision, claiming that the judgment under appeal is vitiated by an error of law.
- 6 The doubts as to interpretation in the light of EU law were raised by the Public Prosecutor’s Office and are shared by the referring court, which therefore decided to stay the proceedings and to refer two questions to the Court of Justice for a preliminary ruling.

Essential arguments of the parties to the main proceedings

- 7 The appellant in the main proceedings submits that the Court of Justice of the European Union (CJEU) has already ruled on the question whether the application of reduced VAT rates is lawful and that, in accordance with that case-law, it is important to clarify the possibility that Member States may apply a reduced rate to all or only part of a category in Annex H [to the Sixth Directive], which means, as the Court of Justice indicated in its judgment of 8 May 2003, that it is possible to restrict the application of a reduced rate to concrete and specific aspects of a supply of goods or services, since that is consistent with the principle that exemptions or derogations must be interpreted restrictively for reasons of legal certainty.
- 8 In that context, the appellant contends that, in the present case, the respondent charges for all materials included at the standard rate, making only labour charges subject to the reduced rate, and therefore the exclusion of services supplied in relation to lifts has a basis in EU law, in particular the Proposal for a Council Directive amending Directive 77/388/EEC as regards reduced rates of value added tax (in particular, point 44).
- 9 The appellant tax authority also disputes the respondent's assertion that the law is clear with regard to the derogations it lays down. The tax authority contends that the systematic, historical and, in particular, purposive approaches should be used in order to reach a conclusion concerning the correct interpretation of the provision in question; in its view, that interpretation should be carried out strictly, in the light of the arguments put forward, the background to that provision and the entire philosophy underlying the creation and development of the VAT system in the European Union.
- 10 In support of its argument, the tax authority relies on the positions adopted in the European Commission's communications on this subject, in particular the report COM (2003) 309 final of 2 June 2003, which states, at point 3.3.1., that most of the countries which applied this measure limited its scope by reference to the age of the buildings or the nature of the services, and which summarises the main reasons leading to the creation of the right to apply a reduced rate to services of that kind.
- 11 In summary, the reduced rate was incorrectly applied to the value of the labour charged for in respect of lift repair and maintenance services when the standard rate should have been applied, which resulted in the failure to account for VAT in the amounts indicated above.
- 12 On the other hand, the respondent maintains the line of argument already set out in paragraph 4.

Summary of the reasoning in the request for a preliminary ruling

- 13 In line with the question raised by the Office of Counsel for the State, the referring court considers that it is ‘highly doubtful’ that, in the light of current EU law, it is permissible to charge for labour in respect of lift repair and maintenance services in accordance with Annex IV to the VAT Directive, which provides for a reduced rate in respect of ‘renovation and repairing of private dwellings, excluding materials which account for a significant part of the value of the service supplied’.
- 14 According to the referring court, and contrary to the argument put forward by the appellant – which claims that the legislation in question must be interpreted strictly, thereby excluding lift repair services from its scope – the case-law of the CJEU has not specifically ruled on the question of the conformity of the provision in point 2.27 of List I annexed to the VAT Code, on which the reasoning in the judgment under appeal was based.
- 15 If the taxable person’s line of argument, which was confirmed in the judgment under appeal, were adopted, the application of the reduced rate in the present case would flow from an interpretation of the term ‘works contract for buildings for residential use’ in the sense that it includes lift repair services.
- 16 The first question referred for a preliminary ruling is aimed specifically at clarifying whether, in the light of Annex IV to the VAT Directive, the national provision in point 2.27 must be interpreted as meaning that it includes or excludes such services.
- 17 The second question referred for a preliminary ruling seeks to determine whether, given that, for the purposes of civil law, lifts are considered to be common parts of a building, the view must be taken that that classification can be extrapolated in full to the field of taxation (the respondent undertaking’s position) or whether, on the other hand, a strict definition must be adopted for tax purposes, as the appellant tax authority contends.
- 18 Ultimately, both questions have the same objective, which is to obtain from the Court of Justice clarification concerning which of the two opposing positions – the tax authority’s strict view or the broader point of view of the respondent undertaking – should be adopted in the light of EU law, in particular Annex IV to the VAT Directive, as regards the applicability of the reduced rate to the services concerned.