Case C-420/23

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:

7 July 2023

Referring court:

Supremo Tribunal Administrativo (Portugal)

Date of the decision to refer:

24 May 2023

Applicant:

FAURÉCIA – Assentos de Automóvel, Lda.

Defendant:

Autoridade Tributária e Aduaneira

Subject matter of the main proceedings

The applicant, FAURÉCIA – ASSENTOS DE AUTOMÓVEL, LDA., brought proceedings before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), Tax Section, sitting in plenary session, against the decision of 3 November 2020 of the Centro de Arbitragem Administrativa (Centre for Administrative Arbitration – CAAD, Portugal) ('the contested decision'), claiming that it conflicts with another decision of the CAAD, of 6 October 2020 ('the basic decision'), because the two decisions expressly adopted opposite outcomes.

These proceedings seek to determine whether Article 7(2) of the Código do Imposto do Selo (Stamp Duty Code, 'CIS') – which delimits the geographical scope of Article 7(1)(g) as regards the applicability of the exemption from imposto do selo (stamp duty, 'IS') for financial transactions under a cash pooling agreement – is compatible with EU law, specifically with the principles of non-discrimination and the free movement of capital established in Articles 18 and 63 and Article 65(3) TFEU, which apply in the domestic legal order by virtue of Article 8(4) of the Constitution of the Portuguese Republic.

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

Interpretation of EU law – Article 267 TFEU

Question referred for a preliminary ruling

'Is the provision contained in Article 7(2) of the Código do Imposto do Selo (Stamp Duty Code) according to which short-term cash transactions between two entities resident in Portugal and those in which the borrower is resident in Portuguese territory (and the creditor is resident in the European Union) are exempt from stamp duty, but transactions where the borrower (debtor) is resident in a Member State of the European Union and the lender (creditor) resides in Portugal are not exempt, compatible with the principles of non-discrimination and the free movement of capital established in Articles 18 and 63 and Article 65(3) TFEU?'

Provisions of EU law relied on

Articles 18 and 63 and Article 65(3) TFEU (principles of non-discrimination and the free movement of capital)

Provisions of national law relied on

Lei n.º 150/99, de 11 de setembro, que aprova o Código do Imposto do Selo (Law No 150/99 of 11 September 1999 approving the Stamp Duty Code), in particular Article 7(1)(g) and Article 7(2).

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant is engaged in manufacturing and selling covers, foam, upholstery and metal frames for car seats.

2 At the time of the facts, the applicant was owned by Faurécia Investments, S.A., with registered office in France (99.99%), and Financière Faurécia, S.A., also with registered office in France (0.01%).

3 On 23 February 2000, Financière Faurécia, S.A. and the group entities concluded the 'Convention d'Omnium', a cash pooling arrangement intended to manage the cash flows of the various group entities in various countries.

4 On 8 June 2019, Financière Faurécia, S.A. found it necessary to optimise the cash pooling arrangement in force and accordingly concluded the 'BNP Paribas Cash Centralisation Agreement' with the financial institution BNP Paribas, S.A, for the

provision of a service to centralise group cash management in order to equalise the balances on the various accounts.

5 The applicant became a party to that cash pooling arrangement on 20 July 2010 by means of the 'Bulletin d'Adhésion'.

6 On 30 December 2010, the applicant, Financière Faurécia, S.A. and Faurécia Investments, S.A. concluded a subrogation/assignment of claim agreement under which Faurécia Investments, S.A. and the applicant entered into a new loan agreement with effect from 1 January 2011. In that agreement, the applicant is the lender and Faurécia Investments, S.A. the borrower: the applicant granted a loan to Faurécia Investments, S.A. in the form of a one-year renewable credit with a maximum amount of EUR 65 000 000.00, with interest payable at an average of one month Euribor, rounded up to 1/16 of 1%, plus 0.5% per annum, accruing at the end of each month on the basis of the monthly use of the credit.

7 That agreement was subsequently amended and supplemented a number of times, successively extending its term and changing the maximum amount of the loan, in particular.

8 According to the terms of the agreement, the cash surpluses generated by the various group entities were to be transferred to the account of the applicant which, in turn, was to transfer them to a different undertaking ('B'), engaged in managing the group's corporate holdings and in financial activities, which received those surpluses and used them in France.

9 B's cash surpluses, in turn, were available to meet the financing needs of other group undertakings.

10 Repayment of the funds paid over by the applicant depended on its cash requirements, in accordance with a previously authorised ceiling.

11 In return for the use of those cash surpluses, the applicant charged B monthly interest and issued a monthly invoice for the amount of interest, which it recorded in the loan account.

12 However, since the funds contributed by the applicant under the centralised cash management agreement exceeded those it received from B, that difference constituted a loan granted by the applicant to B, that is to say, it amounted to a grant of financing used by B, for the purpose in particular of subsequently financing other group entities, in order to optimise the group's cash management.

13 Four global inspections of the applicant were carried out for 2014, 2015, 2016 and 2017 and gave rise to supplementary assessments for IS. To avoid future inspections, the applicant performed a number of self assessments for 2018 and, on 19 December 2019, lodged an administrative appeal against the assessments.

14 On 19 March 2020, the administrative appeal was dismissed.

15 The tax authority ('AT') found that, according to Article 7(2) of the CIS, those transactions could not enjoy the exemption under Article 7(1)(g) of that Code because the creditor (the applicant) had its registered office in Portuguese territory.

16 On 29 May 2020, the applicant brought an action before an arbitral tribunal, which gave rise to these proceedings.

17 The facts underlying both the contested decision and the basic decision appear to be identical and it is not apparent that any form of legislative amendment occurred between the contested decision and the basic decision.

18 Nevertheless, in the contested decision, the Tribunal Arbitral em Matéria Tributária (tax arbitral tribunal) held that Article 7(2) of the CIS, according to which the exemption under Article 7(1)(g) of that Code applies only to situations in which the creditor has its registered office in the European Union, does not adversely affect the free movement of capital, since the provisions relating to IS apply indistinguishably to all financial transactions established by law.

19 In the basic decision, in contrast, the tax arbitral tribunal found that by excluding application of the exemption where the borrower (debtor) is resident in the European Union and the lender (creditor) resides in Portugal, Article 7(2) of the CIS gives rise to a restriction on the movement of capital within the meaning of Article 63(1) TFEU.

20 The applicant requests that the contested decision be revoked and replaced by a decision applying the outcome adopted in the basic decision, since the contested decision is vitiated by an error of law because the law has been misinterpreted and wrongly applied.

The essential arguments of the parties in the main proceedings

21 The applicant argues that the assignment of claim agreement is only relevant for the purposes of IS when it gives rise to an (immediate) transfer of funds, but not when it merely reflects an undertaking to transfer funds at an undetermined time in the future. In other words, in credit transactions, the tax obligation (that is to say, the taxable event) only arises when those transactions are performed. Those transactions are performed only when the credit is used, not when the agreement is concluded. The relevant taxable event is therefore the use of the credit (not merely its grant), which is the effective manifestation of taxable capacity.

22 According to the applicant, the taxable event occurs at the time of effective 'use', which is the precise moment at which the other requirements for the tax to apply, such as the territorial connection of the transactions in question, must be satisfied.

23 For those purposes, the 'use of the funds occurs at the place where the user receives the loaned capital, that is to say, at the place where the lender complies with the obligation to transfer the capital to the borrower'.

24 Since the funds must be used in national territory, the applicant understands that the foregoing is true in the present case, in view of the fact that the capital is received on a bank account, or at a different place agreed by the parties, in Portuguese territory so that the taxable event can be found to have occurred in national territory.

25 The applicant therefore finds that the AT followed an incorrect interpretation when it carried out the assessments for the earlier years (2014 and 2015), according to which any credit transaction is subject to IS where one of the parties is established in Portuguese territory, irrespective of whether it is the lender or the borrower.

26 For its part, the AT asserts that when one of the parties does not have its registered office in national territory, the exemptions under Article 7(1)(g) and (h) of the CIS apply only if the creditor has its registered office or effective management in a different Member State of the European Union or in a different State with which Portugal has concluded a convention to prevent double taxation on income and capital (this exception, relating to the registered office of the creditor, only applies if the debtor has its registered office in national territory since there is otherwise no connecting factor that locates the transaction in national territory).

27 In view of the direction of the financial flows between the applicant and B, it must be noted that the creditor is the applicant, the entity that grants the credit, and that its registered office is in national territory, with the effect that, under Article 7(2) of the CIS, the exemptions under Article 7(1)(g) and (h) of the CIS do not apply.

28 The AT nevertheless observes that, although in the first part of Article 7(2) of the CIS it appears that the legislature intended to confine the scope of the exemption under Article 7(1)(g) to financial transactions involving resident companies and firms, by excluding financial transactions in which either party – investor or investee – does not have its registered office or effective management in Portuguese territory, that intention was ultimately not fully realised since, because that solution would discriminate against non-resident companies and firms and could therefore be challenged, under the Treaty on the Functioning of the European Union (TFEU) and under the conventions for the avoidance of double taxation concluded by Portugal, the legislature made it possible for the exemption to remain applicable where the creditor has its registered office or effective management in another Member State of the European Union or in a State with which a convention to prevent double taxation on income and capital has been concluded, unless those transactions are brokered by credit institutions or financial corporations having their registered office abroad or are with subsidiaries or branches abroad of credit institutions or financial corporations having their registered office in national territory.

29 The financial transactions consisting of a transfer of surplus balances from the applicant's bank account to the centralising account therefore cannot enjoy the benefit of the exemption under Article 7(1)(g) of the CIS, whereas transactions taking the form of the use of funds transferred from the centralising account to the applicant's individual bank accounts can benefit from that exemption, provided they satisfy the requirements relating to time limits and purpose contained in that article.

30 Since it is common ground that the agreement in question in any event provides that it will be renewed automatically for one-year periods unless the parties give notice to the contrary, and since its term has been successively extended, this is a credit granted for an undetermined or indeterminable period and therefore, since the legislature established that the prerequisites for the exemption are cumulative, it can be found, at the outset, that the conditions for the exemption under Article 7(1)(h) of the CIS to apply are not satisfied.

31 The AT therefore submits that the assessments at issue are not vitiated by any unlawfulness either as a result of misinterpretation or for any other reason.

32 The applicant argues that the interpretation followed in the basic decision should prevail, according to which the non-application of the exemption under Article 7(1)(g) of the CIS established in Article 7(2) for situations where the debtor (borrower) does not have its registered office or effective management in Portugal but in a Member State of the European Union amounts to an unjustified restriction on the free movement of capital enshrined in Article 63 TFEU and, therefore, in accordance with Article 8(4) of the Constitution of the Portuguese Republic, cannot be applied.

33 The applicant asserts that applying Article 7(2) gives rise to a restriction on the movement of capital since it prevents the residents of a Member State from benefiting from tax exemption, and that the restriction is clearly apparent from the following circumstances:

– Lender in Portugal + borrower in the European Union = non-exempt by virtue of Article 7(2) of the CIS

– Lender in the European Union + borrower in Portugal = exempt by virtue of Article 7(1)(g) and Article 7(2) of the CIS

– Lender in Portugal + borrower in Portugal = exempt by virtue of Article 7(1)(g) of the CIS

34 That is to say, where an entity resident in the European Union takes out a loan (as debtor) with a Portuguese entity it is deprived of the possibility of enjoying an exemption, and has to pay a tax that is not payable by a debtor resident in Portugal that takes out a loan with an entity resident in the European Union or with an entity resident in Portugal, and there is therefore an obvious difference in treatment and a restriction on the movement of capital.

35 This is not a restriction permitted by Article 65 TFEU, since the two situations must be regarded as being comparable and because there are no grounds of general or public interest that justify the discrimination in question.

36 The Deputy Prosecutor General is of the view that the applicant's line of argument must be accepted because, as it argues, Article 7(2) of the CIS is discriminatory and constitutes an unjustified restriction on the free movement of capital guaranteed by Article 63 TFEU.

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

37 The question arises in this case as to whether the provision in Article 7(2) of the CIS according to which short-term cash transactions between two entities resident in Portugal and transactions in which the borrower is resident in Portuguese territory (and the creditor is resident in the European Union) are exempt from IS, but transactions where the borrower (debtor) is resident in a Member State of the European Union and the lender (creditor) resides in Portugal are not exempt is compatible with the principles of non-discrimination and the free movement of capital established in Articles 18 and 63 and Article 65(3) TFEU, which apply in the internal legal order by virtue of Article 8(4) of the Constitution of the Portuguese Republic.

38 Under Article 7(1)(g) of the CIS, in the version in force in 2017, 'financial transactions, including the accrued interest, with a term of less than one year, provided their sole purpose is to make up cash shortfalls …, performed for the benefit of a company with which there is a control or group relationship' were exempt from IS.

39 Article 7(2) of the CIS nevertheless restricts the scope of that exemption by providing that Article 7(1)(g) 'shall not apply where one of the parties does not have its registered office or effective management in national territory'.

40 The legislation nevertheless establishes an exception from non-application of that exemption 'where the creditor has its registered office or effective management in another Member State of the European Union or in a State with which Portugal has concluded a convention to prevent double taxation on income and capital, in which situation the exemption shall apply', and no financial transactions have previously taken place with credit institutions or financial corporations having their registered office abroad or with subsidiaries or branches abroad of credit institutions or financial corporations having their registered office in national territory.

41 As stated in the contradictory decisions handed down in the corresponding proceedings, one of the parties to the cash pooling transaction did not have its registered office or effective management in national territory but in France, with the effect that, according to Article 7(2) of the CIS, prima facie the exemption does not apply to it and the transaction is subject to tax in respect of IS.

42 Furthermore, the requirements for application of the exception to non-application of that exemption are not satisfied, because Article 7(2) provides that entitlement to the exemption remains in place only where the creditor has its registered office or effective management in another Member State of the European Union or in a State with which Portugal has concluded a convention to prevent double taxation on income and capital, which is not the situation prevailing in this case since the applicant has its registered office in Portugal.

43 In the light of those statutory provisions, there is no exemption from IS in cash pooling situations where the creditor has its registered office or effective management in Portugal and the debtor resides in another Member State of the European Union or in a State with which Portugal has concluded a convention to prevent double taxation.

44 At this point the question arises as to whether the internal law is compatible with EU law, as referred to above.

45 In the basic decision it was found that the case-law of the Court enabled a clear answer – to the effect that Article 7(2) of the CIS is incompatible with EU law – to be given to the issues of EU law raised without it being necessary to make a request for a preliminary ruling under Article 267 TFEU. In the contested decision, in turn, it was likewise found unnecessary to make a request for a preliminary ruling, although the outcome adopted was the opposite.

46 The basic decision referred to the Court's judgment of 14 October 1999 in Case C-439/97, *Sandoz GmbH*, summarising the resulting case-law as follows:

– the prohibition in Article 63(1) TFEU (formerly Article 73b(1) and Article 56 TEC) covers all restrictions on movements of capital between Member States and between Member States and non-Member States (paragraph 18);

– legislation that deprives the residents of a Member State of the possibility of benefiting from the absence of taxation which may be associated with loans obtained outside the national territory is a measure likely to deter such residents from obtaining loans from persons established in other Member States (paragraph 19 of that judgment, which cites the judgment of 14 November 1995, *Svensson and Gustavsson*, C-484/93, EU:C:1995:379, paragraph 10);

– it follows that such legislation constitutes an obstacle to the movement of capital within the meaning of Article 63(1) TFEU (formerly Articles 73b and 56 TEC) (paragraph 20).

47 The basic decision held that, in precisely that situation, the exemption under Article 7(1)(g) of the CIS does not apply. In the light of those rules, the residents of a Member State (here, France) are deprived of the possibility of benefiting from the absence of taxation which may be associated with loans obtained outside their national territory. According to the basic decision, the fact that the taxpayer is the creditor (the applicant) and not the debtor does not alter that finding.

48 The fact that the taxpayer is the creditor (the applicant) and not the debtor (whose registered office is in France) was in fact crucial to the opposite outcome being adopted in the contested decision.

49 The contested decision establishes that the IS rules in question do not afford different tax treatment to taxpayers (creditors/lenders) resident in Portugal depending on the nationality or residence of their borrowers. In all circumstances the tax under Item 17.1.4. is levied on the resident creditor, and the borrowers of a creditor or lender who is resident in national territory, as beneficial owners in their capacity as users of the credit granted, are not treated differently depending on their specific nationality or residence. In both situations, by means of the mechanism of *substituição fiscal imprópria* (unauthorised fiscal substitution), proceedings may be brought against the borrowers if the lender taxpayer defaults. Similarly, debtors resident in Portugal who decide to conclude loan agreements with creditors whose registered office is in a different Member State of the European Union do not bear a greater tax charge for IS such as to prevent or deter them from concluding those agreements. In other words, debtors resident in Portugal are not at any time penalised merely for taking out a loan with a non-resident lender rather than a resident lender. It is also recalled in the contested decision that, in cash pooling agreements, IS is levied directly on the creditors and not on the debtors, that those parties are not in objectively comparable situations and that identical rules should not be applied to different situations or different rules to identical situations.

50 In view of the specific features of this case, which have given rise to doubts as to the interpretation of EU law and the adoption of opposing approaches, it is necessary to refer to the Court of Justice of the European Union for a direct ruling on the question referred.