

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

11 January 2024 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Annex IV – Point 2 – Temporary provisions for particular labour-intensive services – Reduced rate of VAT applicable to the renovation and repairing of private dwellings – Definition of ‘private dwellings’)

In Case C-433/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 8 June 2022, received at the Court on 30 June 2022, in the proceedings

Autoridade Tributária e Aduaneira

v

HPA – Construções SA,

THE COURT (Eighth Chamber),

composed of K. Jürimäe, President of the Third Chamber, acting as President of the Eighth Chamber (Rapporteur), M. Safjan and M. Gavalec, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Portuguese Government, by P. Barros da Costa, C. Bento and A. Rodrigues, acting as Agents,

– the European Commission, by M. Björkland and I. Melo Sampaio, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of point 2 of Annex IV to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’).

2 The request has been made in proceedings between the Autoridade Tributária e Aduaneira

(Tax and Customs Authority, Portugal) ('the tax authority') and HPA – Construções SA ('HPA') concerning the rate of value added tax (VAT) applicable to the building restoration services supplied by that company.

Legal context

European Union law

3 The VAT Directive includes Title VIII, entitled 'Rates', which contains Chapter 2, entitled 'Structure and levels of rates', comprising, inter alia, Articles 96 and 98.

4 Article 96 of that directive provides:

'Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services.'

5 Article 98(1) and (2) of that directive reads as follows:

'1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.'

6 Title VIII of that directive contains Chapter 3, headed 'Temporary provisions for particular labour-intensive services', which comprises, inter alia, Articles 106 and 107 of the VAT Directive. Subsequent to the facts of the dispute in the main proceedings, Chapter 3 of Title VIII of the VAT Directive and Annex IV thereto were repealed by Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112 as regards reduced rates of value added tax (OJ 2009 L 116, p. 18).

7 Article 106 of the VAT Directive provides:

'The Council [of the European Union] may, acting unanimously on a proposal from the [European] Commission, allow Member States to apply until 31 December 2010 at the latest the reduced rates provided for in Article 98 to services listed in Annex IV.

The reduced rates may be applied to services from no more than two of the categories set out in Annex IV.

In exceptional cases a Member State may be allowed to apply the reduced rates to services from three of those categories.'

8 Article 107 of that directive provides:

'The services referred to in Article 106 must meet the following conditions:

- (a) they must be labour-intensive;
- (b) they must be largely provided to final consumers;

...'

9 Annex IV to the VAT Directive contains a list of the services referred to in Article 106 of that directive. Point 2 of that annex is worded as follows:

‘renovation and repairing of private dwellings, excluding materials which account for a significant part of the value of the service supplied’.

Portuguese law

10 Article 18(1) of the Código do Imposto sobre o Valor Acrescentado (Value Added Tax Code), in the version applicable to the dispute in the main proceedings (‘the VAT Code’), provides:

‘The rates of tax shall be as follows:

(a) for the imports, supplies of goods and supplies of services mentioned in List I annexed to this Code, the rate shall be 5%;

...

(c) for other imports, supplies of goods and supplies of services, the rate shall be 21%.’

11 Point 2.24 of List I annexed to the VAT Code provides:

‘Works contracts for the improvement, refurbishment, renovation, restoration, repair or conservation of immovable properties and independent parts of immovable properties used for residential purposes, with the exception of cleaning services, grounds maintenance services and works on buildings which cover all or part of the constituent elements of swimming pools, saunas, tennis courts, golf courses or minigolf courses or similar facilities.

The reduced rate shall not apply to the materials incorporated unless their value exceeds 20% of the total value of the service supplied.’

12 For the purposes of interpreting the phrase ‘immovable properties and independent parts of immovable properties used for residential purposes’ employed in that point of List I annexed to the VAT Code, the tax authority adopted guidelines by way, in particular, of Circular No 30025 of 7 August 2000. According to that circular, a property is to be regarded as being used for residential purposes where it ‘is in actual use as a private dwelling when the works start and continues to be in actual use as such once those works are completed’.

The dispute in the main proceedings and the question referred for a preliminary ruling

13 HPA is a commercial company, the purpose of which is, in particular, the supply of services for civil construction and works contracts. In 2007, that company entered into five contracts for works relating to the renovation of urban buildings with three commercial companies that were the proprietors of the immovable property on which the works covered by those contracts were to be carried out.

14 On the invoices for the renovation and repair services supplied under the terms of those contracts, HPA applied a reduced rate of VAT of 5%, pursuant to point 2.24 of List I annexed to the VAT Code.

15 On 19 January 2011, HPA was subject to a tax inspection relating to the 2007 tax year by the Direção de Finanças de Lisboa (Directorate of Finances, Lisbon, Portugal). That inspection sought to determine whether the conditions laid down in respect of the application of that reduced rate had been satisfied, in particular that relating to the requirement that the services be supplied in respect of immovable property used for residential purposes.

16 Following that inspection, considering that HPA could not benefit from that reduced rate of VAT, the Serviço de Finanças de Sintra-1 (Sintra-1 Tax Office, Portugal) issued to that company, on 10 May 2011, a VAT adjustment notice for a total additional amount of VAT to be paid in the sum of EUR 374 750.77.

17 HPA challenged that adjustment notice before the Tribunal Administrativo e Fiscal de Sintra (Administrative and Tax Court, Sintra, Portugal). By decision of 26 June 2020, that court upheld the action brought by HPA and annulled that adjustment notice. The tax authority brought an appeal against that decision before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), the referring court.

18 Before that court, the tax authority argues that point 2.24 of List I annexed to the VAT Code, as interpreted by Circular No 30025 of 7 August 2000, applies solely services supplied for the renovation of immovable property that is actually used for residential purposes, both before and after those services have been supplied. The reduced rate of VAT provided for in point 2.24 of List I annexed to the VAT Code is there not applicable, it is argued, to renovation services relating to immovable property which, like that which was the subject of the five works contracts referred to in paragraph 13 of the present judgment, is solely ‘intended’ for use for residential purposes, in the sense that it has been approved for such use but is not actually occupied as such at the time when those services are supplied.

19 Since point 2.24 of List I annexed to the VAT Code transposed point 2 of Annex IV to the VAT Directive into Portuguese law, the referring court deems it necessary to ask the Court to interpret the latter provision. According the referring court, it is necessary, in particular, to clarify the circumstances under which a supply of renovation services may benefit from the reduced rate of VAT applicable to the activities of ‘renovation and repairing of private dwellings’ referred to in that provision of the VAT Directive.

20 In that connection, the referring court observes that the Court of Justice held, in its judgment of 5 May 2022, *DSR – Montagem e Manutenção de Ascensores e Escadas Rolantes* (C-218/21, EU:C:2022:355), that point 2 of Annex IV to the VAT Directive, first, covered two distinct activities – namely renovation and repair – and, second, applied to private dwellings, that is to say, immovable property serving as a private residence and not used for commercial purposes, as staff accommodation or for temporary occupation, such as hotels. The Court did not, however, rule on the interpretation of the concept of ‘private dwellings’.

21 In those circumstances, the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does point 2 of Annex IV to the VAT Directive preclude a provision of national law under which the reduced rate of VAT may be applied only to works contracts for the repair and renovation of buildings in private dwellings which are inhabited at the time when those works are carried out?’

Consideration of the question referred

22 By its question, the referring court asks, in essence, whether point 2 of Annex IV to the VAT Directive must be interpreted as precluding national legislation which provides for the application of a reduced rate of VAT to services relating to the renovation and repair of private dwellings on condition that these actually be used for residential purposes at the time when those works are carried out.

23 Until its repeal by Directive 2009/47, point 2 of Annex IV to the VAT Directive, read in conjunction with Article 106 of that directive, authorised Member States to apply a reduced rate of VAT to services relating to the ‘renovation and repairing of private dwellings, excluding materials which account for a significant part of the value of the service supplied’.

24 In the absence of any reference to the law of the Member States or of a relevant definition in the VAT Directive, the words used in point 2 of Annex IV to that directive must be interpreted uniformly, irrespective of how they may be characterised in the Member States, and in accordance with their usual meaning in everyday language, while taking into account the context in which they occur and the purposes of the rules of which they are part (judgment of 5 May 2022, *DSR – Montagem e Manutenção de Ascensores e Escadas Rolantes*, C-218/21, EU:C:2022:355, paragraph 29 and the case-law cited).

25 Thus, as regards, in the first place, the usual meaning of the words used in that provision and, in particular, of the phrase ‘private dwellings’, it should be noted that the word ‘dwelling’ generally refers to immovable or even movable property, or a part thereof, intended for residential use and which therefore serves as a residence for one or more persons. Furthermore, the adjective ‘private’ makes it possible to draw a distinction with non-private dwellings, such as staff accommodation or hotels (judgment of 5 May 2022, *DSR – Montagem e Manutenção de Ascensores e Escadas Rolantes*, C-218/21, EU:C:2022:355, paragraph 34).

26 It follows that the renovation and repairing services referred to in point 2 of Annex IV to the VAT Directive must relate to property used for private residential purposes, whereas services relating to property used for other purposes, such as commercial purposes, are not covered by that provision (judgment of 5 May 2022, *DSR – Montagem e Manutenção de Ascensores e Escadas Rolantes*, C-218/21, EU:C:2022:355, paragraph 35).

27 In so far as, in accordance with the case-law recalled in paragraphs 25 and 26 of the present judgment, the services referred to in point 2 of Annex IV to the VAT Directive concern properties that serve as a residence for one or more persons and are used for private residential purposes, it is apparent from the wording of that provision that it refers to the actual use of such properties for residential purposes. Both the concept of residence and the requirement of use of a property refer to actual use of that property.

28 It should therefore be held, in the light of the wording of point 2 of Annex IV to the VAT Directive, that, first, immovable property which, whilst benefiting from an authorisation for residential purposes, is not actually used to that end at the time when the renovation or repair services at issue are rendered, does not fall within the scope of that provision. Second, renovation or repair services which concern property that, at the time when those services are rendered, is used by the proprietor thereof for commercial or investment purposes are excluded from the scope of that provision.

29 In the second place, the context into which point 2 of Annex IV to the VAT Directive fits supports the interpretation whereby the reduced rate of VAT applies solely to renovation and repair services in respect of properties that are actually used for residential purposes.

30 First, that provision, inasmuch as it allows a reduced rate of VAT to be applied, constitutes an exception to the principle of the application of the standard rate and must therefore be interpreted strictly (see, to that effect, judgments of 19 December 2019, *Segler-Vereinigung Cuxhaven*, C-715/18, EU:C:2019:1138, paragraph 25, and of 5 May 2022, *DSR – Montagem e Manutenção de Ascensores e Escadas Rolantes*, C-218/21, EU:C:2022:355, paragraph 40).

31 Second, it is apparent from a combined reading of Articles 106 and 107 of the VAT Directive that, in order to be able to benefit from a reduced rate of VAT, the services set out in point 2 of Annex IV to that directive had largely to be provided direct to final consumers. However, renovation or repair services supplied to a company or to a natural person who owns a dwelling intended to be used for residential purposes without that dwelling actually being used for those purposes, cannot be regarded as having been provided to a final consumer, any more than renovation services supplied to a company or to a natural person who, in the course of his or her professional activity, uses a property for commercial, and not residential, purposes.

32 In the third place, as is clear from points 31 to 33 of the Advocate General's Opinion, interpreting point 2 of Annex IV to the VAT Directive as meaning that only renovation and repair services in respect of properties that are actually occupied at the time when the works are carried out fall within the scope of that provision is in conformity with the purposes pursued by the adoption of a reduced rate, which is intended to benefit the consumer.

33 For a trader entitled to deduct input VAT, it is irrelevant whether or not the renovation or repair services are taxed at the standard or at the reduced rate, since that trader will, in any event, be relieved of that burden of VAT relating to those services through the exercise of his or her right to deduct VAT. By contrast, the application of a reduced rate to those services benefits the final consumer who actually resides in the immovable property on which the works are to be carried out and who is not entitled to deduct input VAT.

34 Through the application of that reduced rate, that consumer may thus benefit from services relating to the renovation and repair of the dwelling which he or she actually uses for residential purposes at a cost lower than that which he or she would have to bear if those services were taxed at the standard rate. The decisive factor in assessing whether the consumer may be given an advantage by the application of the reduced rate of VAT lies in the fact that, at the time when the cost is generated, that property is actually used by that consumer for residential purposes.

35 Lastly, in the fourth place, it should be stated that, in order for it to be considered that immovable property is actually used for residential purposes, it is not necessary that it be occupied while the works are carried out by those persons who stay there, be it permanently or otherwise. First, actual use for residential purposes is not affected by the fact that the property is used only at certain points in the year. Second, the fact that a private dwelling is unoccupied for a certain period of time does not alter its nature as a private dwelling.

36 In the light of all of the foregoing, the answer to the question referred for a preliminary ruling is that point 2 of Annex IV to the VAT Directive must be interpreted as not precluding national legislation which provides for the application of a reduced rate of VAT to services relating to the renovation and repair of private dwellings on condition that the dwellings concerned are actually used for residential purposes at the time when those works are carried out.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Point 2 of Annex IV to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

must be interpreted as not precluding national legislation which provides for the application of a reduced rate of VAT to services relating to the renovation and repair of private dwellings on condition that the dwellings concerned are actually used for residential purposes at the time when those works are carried out.

[Signatures]

* Language of the case: Portuguese.