

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

28 February 2019 (*)

(Reference for a preliminary ruling — Value added tax (VAT) — Sixth Directive 77/388/EEC — Exemption — Article 13B(b) — Leasing or letting of immovable property — Meaning — Contract for the transfer of the use of land comprising vineyards for agricultural purposes)

In Case C-278/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 14 March 2018, received at the Court on 24 April 2018, in the proceedings

Manuel Jorge Sequeira Mesquita

v

Fazenda Pública,

THE COURT (Eighth Chamber),

composed of F. Biltgen (Rapporteur), President of the Chamber, C.G. Fernlund and L.S. Rossi, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and R. Campos Laires, acting as Agents,
- the Austrian Government, by G. Hesse, acting as Agent,
- the European Commission, by P. Costa de Oliveira and L. Lozano Palacios, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

1 This request for a preliminary ruling relates to the interpretation of Article 13B(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation 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) ('the Sixth Directive').

2 The request has been made in proceedings between Mr Manuel Jorge Sequeira Mesquita and Fazenda Pública (State Treasury, Portugal) with regard to value added tax (VAT) assessments for the year 2002 and relating to a contract for the transfer of the use of land comprising vineyards for agricultural purposes concluded with Sociedade Agrícola e Comercial dos Vinhos Vale da Corça Lda.

Legal context

EU law

3 Article 2 of the Sixth Directive, which was part of Title II thereof, headed 'Scope', provided:

'The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

...'

4 Under Article 5(8) of the Sixth Directive:

'In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor. Where appropriate, Member States may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortion of competition.'

5 Article 13 of that directive, headed 'Exemptions within the territory of the country', provides in point B thereof, headed 'Other exemptions':

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemption and of preventing any possible evasion, avoidance or abuse:

...

b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. the hire of safes;

Member States may apply further exclusions to the scope of this exemption;

...'

6 The Sixth Directive was repealed and replaced, with effect from 1 January 2007, by Council

Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1). The content of Article 13B(b) of the Sixth Directive was repeated, virtually unchanged, in Article 135(1)(l) and (2) of Directive 2006/112.

Portuguese law

7 Article 9 of the Código do Imposto sobre o Valor Acrescentado (Value Added Tax Code, 'CIVA'), provided, in the version applicable at the material time:

'The following shall be exempt from tax:

...

(30) the letting of immovable property. This exemption shall not extend to:

- a) the provision of accommodation in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;
- b) the letting of areas for the garaging or collective parking of vehicles;
- c) the letting of permanently installed equipment and machinery, as well as the letting of any other immoveable property derived from the transfer for consideration of the use of a commercial or industrial establishment;
- d) the hire of safes;
- e) the letting of spaces for exhibitions or publicity;

...'

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

8 The applicant in the main proceedings is the administrator of the estate of Mr Adelino Gonçalves Mesquita. The latter had concluded a contract with Sociedade Agrícola e Comercial dos Vinhos Vale da Corça, a company engaged in viticulture. By that contract, Mr Gonçalves Mesquita had transferred, in return for amounts paid by way of an advance, the use of rural properties — of which he was the owner — for agricultural purposes comprising vineyards. That contract had been concluded for a period of one year, automatically renewable for a period of the same length, until such time as it was terminated by one or other of the parties.

9 According to the report on a tax inspection for the year 2002, that transfer was subject to VAT. The total amount of tax assessments notified in that regard was set at EUR 107 527.10, plus compensatory interest.

10 The applicant in the main proceedings brought an action against those tax assessments before the Tribunal Administrativo e Fiscal de Mirandela (Administrative and Tax Court, Mirandela, Portugal) invoking the VAT exemption provided for in Article 9(30) of the CIVA. Since that action was dismissed, the applicant in the main proceedings brought an appeal before the Tribunal Central Administrativo Norte (Northern Central Administrative Court, Portugal), which made an order declaring that it lacked jurisdiction and forwarded the case-file to the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal).

11 That court observes that it is apparent from the case-law of the Court of Justice, in

particular, the judgment of 4 October 2001, '*Goed Wonen*' (C-326/99, EU:C:2001:506), that, first, the exemption from VAT on leasing or letting of immovable property provided for in Article 13B(b) of the Sixth Directive, which corresponds to Article 135(1)(l) of Directive 2006/112, covers transactions by which the owner of immovable property gives the tenant, for an agreed period and for consideration, the right to occupy that property as if he were the owner thereof and to exclude any other person from enjoyment of such a right. Secondly, since the letting of immovable property is generally a relatively passive activity, transactions involving a more active use of that property are excluded from the scope of the exemption.

12 In the light of that case-law, the referring court has doubts as to whether a contract for the transfer of the use of vineyards for a period of one year, renewable automatically, constitutes leasing or letting of immovable property within the meaning of those provisions.

13 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:

'Must Article 135(1)(l) of Directive 2006/112 of 28 November 2006 relating to the exemption from VAT of transactions involving the leasing of immovable property be interpreted as meaning that such an exemption is applicable to a contract for the transfer of the use of land comprising vineyards for agricultural purposes to a company whose corporate purpose is an agricultural activity, entered into for a period of one year, automatically renewable for further periods of the same length and under which rent is paid at the end of each year [?]'

Consideration of the question referred

14 As a preliminary point, it is important to note that Article 135(1)(l) of Directive 2006/112, the interpretation of which constitutes the subject matter of the question referred, was not yet in force at the material time. In those circumstances, in order to give a useful answer to the referring court, it is necessary to examine that question in the light of the corresponding provision of the Sixth Directive.

15 Therefore, it must be noted that, by its question, the referring court asks, in essence, whether Article 13B(b) of the Sixth Directive must be interpreted as meaning that the exemption from VAT of the leasing or letting of immovable property provided for in that provision is applicable to a contract for the transfer of the use of land comprising vineyards for agricultural purposes to a company engaged in viticulture, entered into for a period of one year, automatically renewable and under which rent is paid at the end of each year.

16 According to settled case-law, the exemptions provided for in Article 13 of the Sixth Directive constitute independent concepts of EU law (judgments of 4 October 2001, '*Goed Wonen*', C-326/99, EU:C:2001:506, paragraph 47, and of 15 November 2012, '*Leichenich*', C-532/11, EU:C:2012:720, paragraph 17).

17 Moreover, although those exemptions are derogations from the general principle stated in Article 2 of the Sixth Directive, according to which VAT is to be levied on each supply of services made for consideration by a taxable person, and therefore must be interpreted strictly, the concept of leasing or letting in Article 13B(b) of that directive is broader than that existing in the various national laws (judgment of 4 October 2001, '*Goed Wonen*', C-326/99, EU:C:2001:506, paragraphs 46 and 49 and the case-law cited).

18 In a number of cases, the Court has defined the concept of the letting of immovable property, within the meaning of that provision, as the conferring by a landlord on a tenant, for an

agreed period and in return for rent, of the right to occupy that property as if that person were the owner and to exclude any other person from enjoyment of such a right (see, to that effect, judgment of 4 October 2001, *Goed Wonen*, C?326/99, EU:C:2001:506, paragraph 55, and of 6 December 2007, *Walderdorff*, C?451/06, EU:C:2007:761, paragraph 17 and the case-law cited).

19 The Court has also clarified that the exemption provided for in Article 13B(b) of the Sixth Directive is due to the fact that the leasing of immovable property, whilst being an economic activity, is normally a relatively passive activity, not generating any significant added value. Such an activity is thus to be distinguished from other activities which are either industrial and commercial in nature, such as those giving rise to the exceptions referred to in Article 13B(b)(1) to (4) of that directive, or have as their subject matter something which is best understood as the provision of a service rather than simply the making available of property, such as the right to use a golf course, the right to use a bridge in consideration of payment of a toll or the right to install cigarette machines in commercial premises (see, to that effect, judgment of 4 October 2001, *Goed Wonen*, C?326/99, EU:C:2001:506, paragraphs 52 and 53, and of 18 November 2004, *Temco Europe*, C?284/03, EU:C:2004:730, paragraph 20).

20 It follows that the passive nature of the leasing or letting of immovable property, which justifies the exemption from VAT of such transactions under Article 13B(b) of the Sixth Directive, is due to the nature of the transaction itself and not to the way in which the tenant uses the property concerned.

21 Thus, as the Court has already held, an activity is excluded from that exemption where it entails not only the passive activity of making immovable property available but also a certain number of commercial activities, such as supervision, management and continuing maintenance by the owner, as well as the provision of other facilities, so that, in the absence of quite exceptional circumstances, letting out that property cannot therefore constitute the main service supplied (see, to that effect, judgment of 18 January 2001, *Stockholm Lindöpark*, C?150/99, EU:C:2001:34, paragraph 26).

22 By contrast, the mere fact that the tenant of immovable property uses that property for commercial purposes, in accordance with the terms of the letting contract, is not, of itself, such as to preclude the owner of that property being exempt from VAT under Article 13B(b) of the Sixth Directive (see, to that effect, judgment of 15 November 2012, *Leichenich*, C?532/11, EU:C:2012:720, paragraph 29).

23 As regards the case in the main proceedings, it must be noted that it does not appear to be contested that the agricultural land comprising vineyards — the agricultural use of which forms part of the transfer contract at issue in the main proceedings — constitutes immovable property, within the meaning of Article 13B(b) of the Sixth Directive. In that regard, it should be recalled, as regards, more specifically, the vines planted on such land, that the concept of ‘immovable property’ does not imply that the objects in question must be indissociably incorporated into the ground. It is sufficient that they are not mobile, nor easily movable (see, to that effect, judgments of 16 January 2003, *Maierhofer*, C?315/00, EU:C:2003:23, paragraphs 32 and 33, and of 15 November 2012, *Leichenich*, C?532/11, EU:C:2012:720, paragraph 23). That appears to be the case for those vines; it is, however, a matter for the referring court to determine.

24 It must also be held that a contract for the transfer of agricultural use, such as that at issue in the main proceedings, constitutes leasing or letting of immovable property within the meaning of that provision, as interpreted in paragraphs 18 to 20 of this judgment. First, this involves the transfer, by the owner, of the agricultural land in question to the transferee for an agreed period of one year, renewable automatically, in return for rent. Secondly, there is nothing in the order for reference to indicate that, in addition to that leasing of the property, the owner supplied other

services classifiable as commercial activities to the transferee.

25 As regards, more specifically, the question posed by the referring court in relation to the duration of the contract for transfer at issue in the main proceedings and to the renewal conditions for that contract, it should be noted that the actual period of the letting is not, of itself, the decisive factor in determining whether a contract is one for the letting of immovable property, within the meaning of Article 13B(b) of the Sixth Directive, except so far as concerns short-term leases (see, to that effect, judgment of 18 November 2004, *Temco Europe*, C-284/03, EU:C:2004:730, paragraph 21 and the case-law cited). In any event, that duration and those renewal conditions cannot be regarded as being incompatible with leasing or letting within the meaning of that provision.

26 The considerations in paragraph 24 of the present judgment are not invalidated by the arguments put forward by the Portuguese Government in its written observations.

27 First, the fact that the transferee of the immovable property at issue in the main proceedings does not have the same rights as an owner — particularly in so far as he is not authorised to replace the vines with another crop but rather must continue to use them in accordance with the terms of the transfer contract — does not preclude that transfer contract from falling within the scope of the exempt transactions referred to in Article 13B(b) of the Sixth Directive. Indeed, as follows from the case-law cited in paragraph 18 of this judgment, those transactions confer on the tenant or transferee a right to occupy the immovable property in question as if he were the owner, in particular by excluding any other person from the enjoyment of such a right. They do not pass all of the rights of the owner of that property on to the tenant.

28 Secondly, the Court cannot accept the argument that the aim of the transfer contract at issue in the main proceedings had a wider scope than simply those transactions, in so far as it consisted in a transfer of the totality of the assets and rights of the agricultural activity concerned, since that activity was tantamount to an undertaking. In that context, the Portuguese Government claims that that contract also resulted in the transfer of assets and intangible rights, such as legal permits to plant vines intended for wine production, the capacity of that agricultural activity to generate profits, together with the name or designation of an undertaking's establishment.

29 In that connection, it should be noted that, first, since the immovable property that was transferred under that contract was merely the subject of a lease, not a transfer of property rights, it did not constitute a transfer of a totality of assets, within the meaning of Article 5(8) of the Sixth Directive (see, to that effect, judgment of 19 December 2018, *Mailat*, C-17/18, EU:C:2018:1038, paragraphs 22 and 23).

30 Secondly, the Court has held that a supply must be regarded as a single supply where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (judgment of 19 December 2018, *Mailat*, C-17/18, EU:C:2018:1038, paragraph 33 and the case-law cited).

31 In so far as, as the Portuguese Government claims, the contract for transfer at issue in the main proceedings covered not only the immovable property in question, but also resulted in the transfer of certain assets and intangible rights, the latter cannot be decoupled from the transfer of that immovable property, but is an integral part thereof, so that that transfer contract constitutes a single supply in which the making available of the immovable property is the principal supply. In those circumstances, that contract constitutes a transaction which comes within the scope of Article 13B(b) of the Sixth Directive (see, by analogy, judgment of 19 December 2018, *Mailat*, C-17/18, EU:C:2018:1038, paragraphs 39 to 41).

32 Furthermore, even if the question referred does not specifically mention the exclusions from the VAT exemptions provided for in Article 13B(b) of the Sixth Directive, which are listed in that provision and which correspond, moreover, to the exclusions referred to in Article 135(2) of Directive 2006/112, it must be stated, in order to provide a useful answer to the referring court, that the transaction at issue in the main proceedings would appear not to fall within any of those exclusions.

33 In particular, the exclusion of lettings of permanently installed equipment and machinery listed in point 3 of the first subparagraph of Article 13B(b) of the Sixth Directive, which is mentioned by the referring court in the grounds of its order for reference and by the Austrian Government in its written observations, is not applicable to the facts at issue in the main proceedings. First, vineyards cannot be classified as equipment or machinery. Secondly, it is not apparent from the documents before the Court that the agricultural land — the use of which forms part of the contract for transfer at issue in the main proceedings — was leased together with tools, machinery or other commercial or industrial goods. In that regard, the referring court indicates that it is not established that the transferee company, apart from being engaged in the viticulture sector, is engaged in wine-production.

34 Furthermore, although the Portuguese Government invokes the second subparagraph of Article 13B(b) of the Sixth Directive, under which Member States may apply further exclusions to the scope of the exemption provided in Article 13B(b), that government has not put forward any provision of Portuguese law providing for such an exclusion which could apply to the transaction at issue in the main proceedings.

35 In the light of the foregoing considerations, the answer to the question referred is that Article 13B(b) of the Sixth Directive must be interpreted as meaning that the exemption from VAT on the leasing or letting of immovable property, provided for in that provision, is applicable to a contract for the transfer of the use of land comprising vineyards for agricultural purposes to a company engaged in viticulture, entered into for a period of one year, automatically renewable and under which rent is paid at the end of each year.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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:

Article 13B(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment must be interpreted as meaning that the exemption from value added tax on the leasing or letting of immovable property provided for in that provision is applicable to a contract for transfer of the use of land comprising vineyards for agricultural purposes to a company engaged in viticulture, entered into for a period of one year, automatically renewable and under which rent is paid at the end of each year.

[Signatures]

* Language of the case: Portuguese.