Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

8 July 2021 (*)

(Reference for a preliminary ruling – Directive 2006/112/EC – Value added tax (VAT) – Exemptions – Article 135(1)(a) – Definition of ‘insurance’ transactions and of ‘related services performed by insurance brokers and insurance agents’ – Article 174(2) – Right to deduction – Proportional deduction – Extended warranties on household electrical appliances and other computer and telecommunications equipment – Definition of ‘financial transactions’)

In Case C?695/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration – CAAD), Portugal), made by decision of 10 September 2019, received at the Court on 20 September 2019, in the proceedings

Rádio Popular – Electrodomésticos SA

v

Autoridade Tributária e Aduaneira,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby, S. Rodin (Rapporteur) and K. Jürimäe, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Rádio Popular – Electrodomésticos SA, by A.M. Rosa da Silva Garcia, advogada,

– the Portuguese Government, by L. Inez Fernandes, R. Campos Laires, A. Homem and P. Barros da Costa, acting as Agents,

– the Greek Government, by M. Tassopoulou, I. Kotsoni and by K. Georgiadis, acting as Agents,

– the European Commission, by M. Afonso 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 174(2)(b) and (c) of 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 Rádio Popular – Electrodomésticos SA ('Rádio Popular') and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal; 'AT') concerning the deduction by Rádio Popular of input value added tax (VAT) paid on the sale of warranty extensions.

Legal context

EU law

3 Pursuant to the second subparagraph of Article 1(2) of the VAT directive:

'On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.'

4 Article 135(1) of that directive, in Chapter 3, 'Exemptions for other activities', of Title IX of that directive provides:

'Member States shall exempt the following transactions:

(a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents;

(b) the granting and the negotiation of credit and the management of credit by the person granting it;

(c) the negotiation of or any dealings in credit guarantees or any other security for money and the management of credit guarantees by the person who is granting the credit;

(d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;

(e) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items, that is to say, gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest;

(f) transactions, including negotiation but not management or safekeeping, in shares, interests in companies or associations, debentures and other securities, but excluding documents establishing title to goods, and the rights or securities referred to in Article 15(2);

(g) the management of special investment funds as defined by Member States;

…'

5 Article 173 of that directive states:

'1. In the case of goods or services used by a taxable person both for transactions in respect of which VAT is deductible pursuant to Articles 168, 169 and 170, and for transactions in respect of

which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions shall be deductible.

The deductible proportion shall be determined, in accordance with Articles 174 and 175, for all the transactions carried out by the taxable person.

2. Member States may take the following measures:

(a) authorise the taxable person to determine a proportion for each sector of his business, provided that separate accounts are kept for each sector;

(b) require the taxable person to determine a proportion for each sector of his business and to keep separate accounts for each sector;

(c) authorise or require the taxable person to make the deduction on the basis of the use made of all or part of the goods and services;

…'

6 Article 174(1) and (2) of that directive provides:

'1. The deductible proportion shall be made up of a fraction comprising the following amounts:

(a) as numerator, the total amount, exclusive of VAT, of turnover per year attributable to transactions in respect of which VAT is deductible pursuant to Articles 168 and 169;

(b) as denominator, the total amount, exclusive of VAT, of turnover per year attributable to transactions included in the numerator and to transactions in respect of which VAT is not deductible.

…

2. By way of derogation from paragraph 1, the following amounts shall be excluded from the calculation of the deductible proportion:

(a) the amount of turnover attributable to supplies of capital goods used by the taxable person for the purposes of his business;

(b) the amount of turnover attributable to incidental real estate and financial transactions;

(c) the amount of turnover attributable to the transactions specified in points (b) to (g) of Article 135(1) in so far as those transactions are incidental.'

Portuguese law

7 Articles 9 and 23 of the Código do Imposto sobre o Valor Acrescentado (Value Added Tax Code; 'the VAT Code'), in the version applicable to the dispute in the main proceedings, transpose into Portuguese law the provisions of the VAT Directive mentioned in paragraphs 3 to 6 above.

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

8 Rádio Popular is a limited company whose main activity is the sale of household electrical appliances and other computer and telecommunications equipment.

9 In addition, it offers purchasers of its goods a number of ancilliary services such as, in

particular, the extension of the warranty on purchased items. That extension is the result of an insurance contract by which the insurance undertaking guarantees to the purchaser, in the event of a claim, the repair of the article purchased or, possibly, its replacement, for a period beyond the period covered by the warranty provided by the manufacturer. That insurance contract is concluded between an insurance undertaking and the purchasers of the articles sold by Rádio Popular.

10 Acting as an intermediary in the sale of insurance products, Rádio Popular charges the customer, in return for the extension of the warranty taken out, an extra amount in addition to the price of the article purchased. The sales of warranty extensions thus takes place at the time of the sale of articles and is performed using, in principle, the same material and personnel resources as those allocated to the sale of those articles.

11 Taking the view that the sales of warranty extensions constitute insurance transactions exempt from VAT, Rádio Popular did not pay VAT relating to those sales but nevertheless deducted in full the input VAT paid for all its activity during the financial years 2014 to 2017.

12 Following audits carried out by the AT in respect of Rádio Popular relating to those financial years, that authority concluded that that company had wrongly deducted all the VAT paid in those tax years, on the ground that the sales of warranty extensions made by Rádio Popular were exempt from VAT and therefore did not give rise to the right to deduct VAT. Taking the view that the tax paid on the acquisition of mixed-use goods and services is deductible only in proportion to the annual amount of the transactions giving rise to the right to deduct, that authority issued, in respect of Rádio Popular, four assessments concerning VAT and compensatory interest totalling EUR 356 433.05.

13 After Rádio Popular requested the establishment of an arbitration tribunal, seeking a declaration that those assessments were unlawful, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration – CAAD), Portugal), declared itself established on 11 April 2019.

14 According to that tribunal, it is common ground between the parties to the main proceedings that the activity of Rádio Popular consisting in the sale of warranty extensions qualifies for the exemption for insurance transactions provided for in Article 135(1)(a) of the VAT Directive, which was transposed by the VAT Code. Since that part of the transactions performed by Rádio Popular does not therefore give rise to a right to deduct, the referring tribunal states that it is necessary, in principle, to apply the proportional deduction provided for in Articles 173 and 174 of that directive for mixed-use goods and services.

15 Rádio Popular submits, however, that the sales of warranty extensions constitute ‘financial transactions’ which are incidental to the main activity of selling household electrical appliances and other computer and telecommunications equipment and, accordingly, pursuant to the exception laid down in both Article 23(5) of the VAT Code and Article 174(2)(b) and (c) of the VAT Directive, the amount relating to those transactions must be disregarded for the purpose of calculating the deductible proportion. The concept of ‘financial transactions’, within the meaning of those provisions, must be interpreted broadly to avoid infringing the fundamental principle of neutrality governing that directive and the principle of non-distortion of competition.

16 In contrast, the AT contends that those operations cannot be classified as either ‘financial transactions’ or as ‘incidental transactions’ within the meaning of those provisions. In that regard, it states, first, that insurance transactions, such as those at issue in the main proceedings, cannot be treated as ‘financial transactions’, since the VAT Directive clearly distinguishes between those two concepts. Secondly, in the light of the judgment of 29 April 2004, *EDM* (C?77/01, EU:C:2004:243),

sales of warranty extensions do not constitute ‘incidental transactions’.

17 In that regard, the AT observes, inter alia, that Rádio Popular sells warranty extensions on a regular basis and that Rádio Popular receives a profit of approximately 35% of the amount paid by each purchaser of a warranty extension, with that profit being necessary for its economic viability.

18 The referring tribunal considers that the AT’s assessment that those sales are not incidental to sales of household electrical appliances and other computer and telecommunications equipment is vitiated by errors of fact and of law. It also states that it has not been proved that the economic viability of Rádio Popular depends on the sale of warranty extensions. With reference to the settled case-law of the Court on ancillary services, the referring tribunal notes, in particular, that only a small percentage, estimated at 0.62% of the total value of the goods or services acquired by Rádio Popular for the pursuit of its activity is attributable to the sale of warranty extensions.

19 In any event, the question arises as to whether those transactions may be classified as ‘financial transactions’ within the meaning of Article 174(2)(b) and (c) of the VAT Directive, read in conjunction with Article 135(1)(b) and (c) of that directive. The referring tribunal considers that a combined reading of those provisions shows that amounts relating to insurance transactions are not excluded from the calculation of the deductible proportion.

20 In those circumstances, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration – CAAD)) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do transactions involving intermediation in the sale of extended warranties on household electrical appliances, which are carried out by a taxable person under VAT law whose principal activity consists in the sale of household electrical appliances to consumers, constitute financial transactions, or are they to be treated as such pursuant to the principles of neutrality and non-distortion of competition, for the purposes of exclusion of the amount represented by them from the calculation of the deductible proportion, in accordance with Article 135(1)(b) and/or (c) of [the VAT Directive]?’

Consideration of the question referred

21 As a preliminary point, it should be noted that, apart from Article 135(1)(b) and (c) of the VAT Directive, to which the referring tribunal makes direct reference in its question, Article 174 of that directive, which concerns the method of calculating the deductible proportion, must also be taken into account in answering that question.

22 In particular, paragraph 2 of the latter article provides, for certain transactions, in particular for incidental transactions, for a derogation from the method of calculating the deductible proportion, as provided for in paragraph 1 of that article, under which the amount of turnover attributable to those transactions must be excluded from the denominator of the fraction used to calculate the deductible proportion referred to in paragraph 1.

23 In those circumstances, the question referred must be understood as seeking to ascertain whether Article 174(2)(b) and (c) of the VAT Directive, read in conjunction with Article 135(1) of that directive, must be interpreted as meaning that it applies to transactions involving intermediation in the sale of warranty extensions that are performed by a taxable person in the course of its main activity, consisting in the sale to consumers of household electrical appliances and other computer and telecommunications equipment, and whether, therefore, the amount of turnover relating to those transactions must be excluded from the denominator of the fraction used

to calculate the deductible proportion referred to in Article 174(1) of the VAT Directive.

24 In order to answer that question, it must be noted, first of all, that the parties to the main proceedings agree that transactions involving intermediation in the sale of warranty extensions, such as those at issue in the main proceedings, fall within the scope of Article 135(1)(a) of that directive and are, accordingly, exempt from VAT.

25 However, it should be noted that the transactions covered by the derogation provided for in Article 174(2) of the VAT Directive do not include the transactions referred to in Article 135(1)(a) of that directive.

26 Therefore, it is necessary to determine, first, whether transactions such as those at issue in the main proceedings do indeed fall within the scope of Article 135(1)(a) of the VAT Directive. If that proves to be the case, it will then be necessary to determine whether such transactions may nevertheless fall within the scope of Article 174(2)(b) or (c) of that directive, such that the amount of turnover attributable to those transactions must be excluded from the denominator of the fraction used to calculate the deductible proportion referred to in paragraph 1 of that article.

27 In that regard, it must be borne in mind that the terms used to specify the exemptions covered by Article 135(1) of that directive are to be interpreted strictly, given that they constitute exceptions to the general principle that VAT is levied on all services supplied for consideration by a taxable person acting as such (judgment of 8 October 2020, *United Biscuits (Pensions Trustees) and United Biscuits Pension Investments*, C?235/19, EU:C:2020:801, paragraph 29).

28 Pursuant to Article 135(1)(a) of the VAT Directive, Member States are to exempt ‘insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents’.

29 According to the Court’s case-law, insurance transactions are generally understood to be characterised by the fact that the insurer undertakes, in return for prior payment of a premium, to provide the insured party, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded. Such transactions necessarily imply the existence of a contractual relationship between the provider of the insurance service and the person whose risks are covered by the insurance, that is to say, the insured party (judgments of 17 March 2016, *Aspiro* , C?40/15, EU:C:2016:172, paragraphs 22 and 23, and of 25 March 2021, *Q-GmbH (Special risk insurance)*, C?907/19, EU:C:2021:237, paragraph 32).

30 In the present case, it is apparent from the information provided by the referring tribunal that Rádio Popular is not itself bound by the insurance contract providing the warranty extension to purchasers of household electrical appliances and other computer and telecommunications equipment as the insured parties, but acts only as an intermediary between them and an insurer with which that contract is concluded and which, moreover, takes responsibility for covering the risk insured against.

31 It is nevertheless necessary to examine whether transactions such as those at issue in the main proceedings constitute ‘related services performed by insurance brokers and insurance agents’ within the meaning of Article 135(1)(a) of the VAT Directive.

32 In that regard, as is apparent from the wording of that provision, the exemption of those services is subject to two cumulative conditions: first, those services must be ‘related’ to insurance transactions and, secondly, they must be ‘performed by insurance brokers and insurance agents’ (judgment of 25 March 2021, *Q-GmbH (Special risk insurance)*, C?907/19, EU:C:2021:237, paragraph 34).

33 As regards the first of those conditions, it should be noted that the Court has previously held that the term ‘related’ is sufficiently broad to cover different services connected with the performance of insurance transactions and, in particular, the settlement of claims, which constitute one of the essential parts of those transactions (judgment of 17 March 2016, *Aspiro*, C?40/15, EU:C:2016:172, paragraph 33).

34 Since it is apparent from the description of the facts provided by the referring tribunal that the supply at issue in the main proceedings consists, in essence, in the sale of warranty extensions relating to purchased items, which take the form of an insurance contract as described in paragraph 30 above, such a supply must be regarded as relating to an insurance transaction, within the meaning of Article 135(1)(a) of the VAT Directive.

35 As to the second of those conditions, in order to determine whether the services in respect of which the exemption under Article 135(1)(a) of the VAT Directive is sought are supplied by an insurance broker or agent, it is not necessary to take as a basis the formal status of the supplier, but rather the actual content of those services (see, to that effect, judgment of 25 March 2021, *Q-GmbH (Special risk insurance)*, C?907/19, EU:C:2021:237, paragraph 36 and the case-law cited).

36 In the context of that examination, it is necessary to ascertain whether two criteria are fulfilled. In the first place, the supplier of services must be related to the insurer and the insured party, since that relationship may be indirect only if the supplier of services is a subcontractor of the broker or agent. In the second place, its activities must cover the essential aspects of the work of an insurance agent, such as the finding of prospective clients and their introduction to the insurer, with a view to concluding insurance contracts (judgment of 25 March 2021, *Q-GmbH (Special risk insurance)*, C?907/19, EU:C:2021:237, paragraph 37 and the case-law cited).

37 In the present case, those criteria are prima facie met by a service provider such as Rádio Popular in so far as, as is apparent from the information provided by the referring tribunal, that service provider is in direct contact with both the insurer, whose insurance products, including warranty extensions, it sells, and the insured party, with a view to selling those products when selling household electrical appliances and other computer and telecommunications equipment, and that in so doing it carries out activities which are essentially related to the function of an insurance agent, such as the finding of prospective clients and their introduction to the insurer with a view to the conclusion of insurance contracts.

38 It follows that, subject to the checks which are ultimately for the referring tribunal to carry out, transactions involving intermediation in the sale of warranty extensions, such as those at issue in the main proceedings, which are performed by a taxable person in the course of its main activity, consisting in the sale to consumers of household electrical appliances and other computer and telecommunications equipment, constitute services related to insurance transactions performed by insurance brokers and insurance agents within the meaning of Article 135(1)(a) of the VAT Directive.

39 As noted in paragraph 25 above, such transactions are not covered by the derogation from the method of calculating the deductible proportion laid down in Article 174(2) of that directive in so

far as that provision does not refer to Article 135(1)(a) of that directive.

40 Thus, although transactions such as those at issue in the main proceedings constitute services related to insurance transactions performed by an insurance agent, within the meaning of Article 135(1)(a) of the VAT Directive, it is necessary to examine whether such services may nevertheless be classified, in particular in the light of the principle of fiscal neutrality, as ‘incidental financial transactions’ within the meaning of Article 174(2)(b) and (c) of that directive.

41 In so far as Article 174(2)(c) of the VAT Directive refers to the transactions referred to in Article 135(1)(b) to (g) of that directive, it should be noted, first, that Article 135(1) of that directive draws a clear distinction between the insurance transactions referred to in point (a) of that provision and the transactions referred to in points (b) to (g) thereof, in particular financial transactions.

42 It is clear from the wording of Article 135(1)(a) of the VAT Directive and Article 135(1)(b) to (g) thereof that those provisions relate to separate transactions and that insurance transactions cannot be treated in the same way as financial transactions, in particular for the purposes of applying the derogation provided for in Article 174(2) of that directive (see, by analogy, judgment of 17 March 2016, *Aspiro*, C?40/15, EU:C:2016:172, paragraph 29).

43 Furthermore, that finding cannot be called into question by the principle of fiscal neutrality. Although it is indeed settled case-law that that principle precludes treating similar goods or services, which are thus in competition with each other, differently for VAT purposes (judgment of 17 January 2013, *BG? Leasing,* C?224/11, EU:C:2013:15, paragraph 65 and the case-law cited), there is nothing in the documents before the Court to suggest that insurance transactions and financial transactions constitute ‘similar’ transactions within the meaning of that case-law.

44 In any event, as the Court has previously held, that principle cannot extend the scope of an exemption in the absence of clear wording to that effect. That principle is not a rule of primary law which can determine the validity of an exemption, but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions (judgment of 17 March 2016, *Aspiro*, C?40/15, EU:C:2016:172, paragraph 31 and the case-law cited).

45 Lastly, *mutatis mutandis*, an interpretation that the concept of ‘insurance transactions’ contained in Article 135(1)(a) of the VAT Directive and that of ‘financial transactions’ contained in Article 174(2)(b) of that directive are synonymous cannot be accepted.

46 The sound functioning and uniform interpretation of the common system of VAT require, in principle, that similar transactions covered by the VAT Directive not be defined by different concepts depending on whether they are covered by one or the other of the provisions of that directive (see, by analogy, judgment of 22 October 2009, *Swiss Re Germany Holding*, C?242/08, EU:C:2009:647 paragraph 31).

47 It follows that a transaction classified as an ‘insurance transaction’ within the meaning of Article 135(1)(a) of the VAT Directive cannot constitute a transaction of a financial and incidental nature within the meaning of Article 174(2)(b) and (c) of that directive, read in conjunction with Article 135(1)(b) to (g) of that directive, irrespective of whether or not it is ‘incidental’ within the meaning of those latter provisions.

48 It follows from all the foregoing considerations that the answer to the question referred is that Article 174(2)(b) and (c) of the VAT Directive, read in conjunction with Article 135(1) of that directive, must be interpreted as meaning that it does not apply to transactions involving intermediation in the sale of warranty extensions that are performed by a taxable person in the

course of its main activity consisting in the sale to consumers of household electrical appliances and other computer and telecommunications equipment, with the consequence that the amount of turnover relating to those transactions must not be excluded from the denominator of the fraction used to calculate the deductible proportion referred to in Article 174(1) of that directive.

Costs

49 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. The costs incurred in submitting observations to the Court, other than those of the parties to the main proceedings, are not recoverable.

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

Article 174(2)(b) and (c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Article 135(1) of that directive, must be interpreted as meaning that it does not apply to transactions involving intermediation in the sale of warranty extensions that are performed by a taxable person in the course of its main activity consisting in the sale to consumers of household electrical appliances and other computer and telecommunications equipment, with the consequence that the amount of turnover relating to those transactions must not be excluded from the denominator of the fraction used to calculate the deductible proportion referred to in Article 174(1) of that directive.

[Signatures]

* Language of the case: Portuguese.