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OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 1 February 2017 (1)

Case C?26/16

Santogal M-Comércio e Reparação de Automóveis Lda

v

Autoridade Tributária e Aduaneira

(Request for a preliminary ruling

from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal))

?Reference for a preliminary ruling — Value added tax (VAT) — Exemptions — Intra-Community transactions — Supply of new means of transport — Conditions for the grant of the exemption to the vendor — Residence of the purchaser in the Member State of destination — Temporary registration in the Member State of destination — Risk of tax evasion — Good faith — Obligation of diligence on the part of the vendor’

I – Introduction

1.

The request for a preliminary ruling before the Court concerns the interpretation of Article 138(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (‘the VAT Directive’). (2)

2.

In essence, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) seeks to ascertain whether, in the context of an intra-Community supply of a new vehicle, a Member State is allowed, first, to make the exemption from value added tax (VAT), provided for in Article 138(2)(a) of the VAT Directive, subject to the condition that the purchaser is established or domiciled in the Member State of destination of that vehicle, secondly, to refuse the exemption from VAT where the vehicle has been granted only temporary, tourist registration in the Member State of destination; and, thirdly, to request payment of the VAT by the vendor of the vehicle in circumstances which might indicate that the purchaser could have committed VAT fraud, without it however being established that the vendor cooperated with the purchaser to avoid paying VAT.

3.

Those questions were raised in the context of a dispute between the company Santogal M-Comércio e Reparação de Automóveis Lda (‘Santogal’), established in Portugal, and the

Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal) concerning that authority's refusal to grant Santogal the benefit of the exemption from VAT, provided for in the Portuguese law transposing Article 138(2)(a) of the VAT Directive, in respect of Santogal's supply of a new motor vehicle which was transported to Spain by its purchaser.

4.

More specifically, according to the request for a preliminary ruling, Santogal sold to an Angolan national, under an invoice dated 26 January 2010, a new vehicle for the sum of EUR 447665, which it had previously acquired from Mercedes-Benz Portugal and the entry of which into Portuguese territory had been recorded in a vehicle customs declaration of 25 June 2009 ('the customs declaration'). (3)

5.

In the course of the sale, the purchaser informed Santogal that he intended that vehicle to be for his personal use in Spain, where he was already established, and that he planned to take personal responsibility for transporting it to Spain, where he would arrange for it to undergo technical inspection and have it registered. He provided Santogal with his foreign national's identification number (NIE) in Spain, a document issued on 2 May 2008 by the Ministério del Interior, Dirección General de la Policia y de la Guardia Civil — Comunidad Tui-Valencia (Ministry of the Interior, Directorate-General of Police and of the Civil Guard — Municipality of Tui-Valencia, Spain) confirming his entry in the central register of foreign nationals under that NIE, and with a copy of his Angolan passport. The address given by the purchaser in the course of the sale did not, however, match that stated on the document issued on 2 May 2008.

6.

In the light of those documents, Santogal took the view that the sale of the vehicle was exempt from VAT under Article 14(b) of the Regime do IVA nas Transações Intracomunitárias (RITI) (VAT Rules on Intra-Community Transactions), which is intended to transpose Article 138(2)(a) of the VAT Directive into Portuguese law.

7.

The vehicle was transported to Spain in a totally enclosed trailer.

8.

Following the technical inspection of the vehicle in Spain, the purchaser sent to Santogal, at the latter's request, two documents to complete the sale. Those documents were a technical inspection certificate, issued on 11 February 2010, and a Spanish registration document, issued on 18 February 2010. That registration document, which provided an address for the purchaser which matched neither the address given by the purchaser at the time of the sale nor that stated on the document of 2 May 2008, related to a temporary, 'tourist' registration, due to expire on 17 February 2011.

9.

According to the information provided by the referring court, the assignment of a tourist registration number is governed in Spain by Real Decreto 1571/1993 por el que se adapta la Reglamentación de la matrícula turística a las consecuencias de la armonización fiscal del mercado interior (Royal Decree 1571/1993 adapting in Spain the legislation on tourist registration to the consequences of the tax harmonisation resulting from EU rules) of 10 September 1993 (4), and by Real Decreto

2822/1998 por el que se aprueba el Reglamento General de Vehículos (Royal Decree 2822/1998 approving the General Vehicle Regulations) of 23 December 1998. (5) Tourist registration is provisional and can normally be used for 6 months in every 12-month period, but may be extended by the authorities. Only persons not habitually resident in Spain may avail themselves of such registration.

10.

Further to information provided by Santogal in February 2011, Mercedes-Benz Portugal filed a supplementary vehicle customs declaration ('the supplementary declaration') to cancel the customs declaration of 25 June 2009 because the vehicle had been dispatched to Spain. The customs declaration was cancelled by the competent authorities on 3 March 2011.

11.

By letter of 24 October 2013, sent to the Direção de Finanças de Lisboa (Directorate of Finances, Lisbon, Portugal), the Direção de Serviços Antifraude Aduaneira (Directorate of Customs Anti-Fraud Services, Portugal) recommended an assessment of the VAT owing on the sale of the vehicle at issue. That directorate noted, inter alia, that the purchaser resided in Portugal, that he was registered in that country as the manager of a company and that he had had a tax identification number there for more than a decade. In addition, in response to a request for information, the Spanish authorities purportedly stated that the purchaser did not appear to be resident in Spain in 2010, had never submitted income returns in that country and had never been subject to VAT there.

12.

Santogal was subsequently the subject of a partial internal VAT audit for the month of January 2010. As part of that audit, the tax and customs authority produced a report in which it concluded that the sale of the vehicle was not covered by the exemptions provided for in Article 14 of the RITI, on the ground that, with regard to the exemption under point (b) of that provision, the purchaser did not reside in Spain or carry on any economic activity there. It further stated that, according to its databases, the applicant had a Portuguese taxpayer's number assigned before 2001 and that his country of residence was Portugal.

13.

On 14 October 2014, the tax and customs authority issued an additional VAT assessment in the amount of EUR 89533 and a calculation of default interest for the period from 12 March 2010 to 20 August 2014 in the amount of EUR 15914.80. Santogal paid those amounts in December 2014.

14.

Santogal brought before the referring court an application for the cancellation of those assessments and a claim for damages. Before that court, it argued, inter alia, that the tax and customs authority's interpretation of Article 14(b) of the RITI is contrary to Article 138(2) of the VAT Directive, which has direct effect. It also submitted that any VAT fraud committed by the purchaser could not be relied on as against Santogal.

15.

In the request for a preliminary ruling, the referring court begins by expressing doubts as to the purchaser's place of residence at the time of the vehicle's sale. In particular, that court notes that the purchaser's habitual residence was not in Spain. However, it has not been established that he

resided in Portugal at the time of that sale. Furthermore, the documents produced before the referring court contain no information concerning the payment of VAT on the vehicle in Spain or concerning the fate of the vehicle after the grant of the tourist registration. Nor has it been established that eligibility under the rules on tourist registration ceased in accordance with the detailed rules laid down in Spanish law.

16.

Next, the referring court observes that it has not been shown that Santogal cooperated with the purchaser to avoid paying VAT on the sale of the vehicle. On the contrary, it is of the view that it is clear from the evidence produced before it that Santogal ensured that the conditions for exemption from VAT were satisfied. It notes that neither the customs agents nor the customs authorities raised doubts as to whether the documents produced were sufficient to cancel the customs declaration and that the letter from the Directorate of Customs Anti-Fraud Services was based on additional information to which Santogal did not have access.

17.

Lastly, the referring court considers that the case-law of the Court, in particular the judgment of 7 December, R. (C?285/09, EU:C:2010:742, paragraphs 40 to 46), does not provide the answers to the questions referred in the proceedings brought before it.

18.

In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1)

Is it contrary to Article 138(2)(b) of [the VAT Directive] for provisions of national law [such as those contained in] Articles 1(e) and 14(b) of the [RITI] to require, for the grant of exemption from VAT on the supply for consideration of new means of transport, transported by the purchaser from national territory to another Member State, the purchaser to be established or domiciled in that Member State?

(2)

Is it contrary to Article 138(2)(b) of [the VAT Directive] for exemption from the tax in the Member State of commencement of the transport operation to be refused in circumstances in which the means of transport purchased has been transported to Spain, where it has been granted tourist registration, provisionally and subject to the [Spanish] fiscal rules …?

(3)

Is it contrary to Article 138(2)(b) of [the VAT Directive] to require the payment of VAT by the supplier of a new means of transport in circumstances in which it has not been demonstrated whether or not the tourist registration rules have ceased to apply because of one of the situations provided for in [Spanish law], or whether VAT has been or will be paid by reason of the disapplication of those rules?

(4)

Is it contrary to Article 138(2)(b) of [the VAT Directive] and the principles of legal certainty, proportionality and protection of legitimate expectations to require VAT to be paid by the supplier

of a new means of transport dispatched to another Member State, in circumstances in which:

—

the purchaser, before dispatch, informs the supplier that he resides in the Member State of destination and produces to him a document proving that he has been assigned a [NIE] in that Member State, indicating a residence in that State different from the residence stated by the purchaser himself;

—

the purchaser subsequently gives to the supplier documents proving that the means of transport purchased has undergone a technical inspection in the Member State of destination and that he has been granted a tourist registration in that State;

—

it has not been demonstrated that the supplier cooperated with the purchaser to avoid paying VAT;

—

the customs authorities have not raised any objection to the cancellation of the customs declaration for the vehicle on the basis of the documents in the possession of the supplier?'

19.

Santogal, the Portuguese Government and the European Commission submitted written observations on those questions. In the light of the observations lodged, the Court considered that it had sufficient information and decided not to hold a hearing in accordance with Article 76(2) of its Rules of Procedure.

II – Analysis

A – Admissibility

20.

Although there is no doubt that the Court has jurisdiction to reply to the questions referred by the Tribunal Arbitral Tributário (Tax Arbitration Tribunal), since the Court has already made clear that, despite its name, that body possesses all the characteristics necessary in order to be regarded as a 'court or tribunal of a Member State' for the purposes of Article 267 TFEU, (6) the Portuguese Government pleads the inadmissibility of the reference for a preliminary ruling on three grounds, all of which I consider must be rejected for the reasons set out below.

21.

First, in my opinion, it would be excessively formalistic and contrary to the spirit of cooperation underlying the procedure laid down in Article 267 TFEU, the purpose of which is to provide a useful response to the national courts so that they are able to settle disputes pending before them, to uphold the Portuguese Government's objection that the order for reference is inadmissible by virtue of the fact that it refers not to Article 138(2)(a) of the VAT Directive but to point (b) of that same provision. It is clear that, having regard to the grounds of the order for reference and the wording of the questions referred, which are concerned exclusively with the intra-Community supply of a new means of transport, which is specifically governed by Article 138(2)(a) of the VAT

Directive, the reference to Article 138(2)(b) of the VAT Directive is a simple formal error, which is of no consequence as regards the comprehension and subject matter of the questions concerning an interpretation of EU law referred by the national court. Furthermore, that error was corrected in an email from one of the arbitrators at the referring court, which was annexed to the order for reference and therefore forms part of the case file in the main proceedings, which was acknowledged by all the parties who submitted observations before the Court. The possibility that such an informal correction may infringe national rules of civil procedure, as the Portuguese Government suggests, cannot render the order for reference inadmissible. The Court has already held in that regard that it is not, in principle, for it to determine whether such a decision was taken in accordance with the rules of national law governing organisation and procedure. (7) In view of those factors, there is nothing to prevent the Court from reformulating the questions referred to the effect that they relate to the interpretation of Article 138(2)(a) of the VAT Directive. (8)

22.

Secondly, although it is true, as the Portuguese Government submits, that the order for reference is not a model of clarity as regards the summary of the facts of the main proceedings and even contains some inaccuracies and inconsistences, those shortcoming are not sufficient to rebut the presumption of relevance that attaches to questions referred for a preliminary ruling concerning the interpretation of EU law or to prevent the Court from answering them. (9) In my view, the Court has before it the factual and legal material necessary to give a useful answer to the questions submitted to it in the present case. Moreover, the parties which have submitted written observations, including, in the alternative, the Portuguese Government, were all able to set out their views on the content of the questions referred, having regard to the presentation of the facts and law contained in the order for reference.

23.

Thirdly and finally, it is, in my view, also not possible to uphold the ground of inadmissibility advanced by the Portuguese Government to the effect that the Court would be prompted to answer questions of a hypothetical nature, since the referring court has already found, in its order for reference, a defect in the statement of reasons for the tax and custom authority’s decision requiring the assessment of VAT which should entail the annulment of that decision, regardless of the response to be given by the Court to the request for a preliminary ruling.

24.

It is true that, in accordance with the task assigned to it under the system of cooperation instituted by Article 267 TFEU of contributing to the administration of justice in the Member States, the Court refuses to deliver advisory opinions on hypothetical questions. (10) In such cases, the request for interpretation of EU law made by the national court is not objectively required for that court to make a decision and resolve the dispute before it. In accordance with that case-law, the Court thus found to be inadmissible a reference for a preliminary ruling, made by a national court of first instance, seeking an interpretation of EU customs law in a situation in which the decision to recover a customs debt, which was challenged before that court, was intrinsically dependent on the prior decision in which that debt was found to exist, the annulment of which had been ordered by the court of last instance of the Member State in question. (11) Since the referring court was only called upon to draw conclusions from the annulment of the recovery decision in order to resolve the dispute before it, it was no longer in a position, for the purposes of settling that dispute, to adopt a decision capable of taking account of the Court’s answers to the questions referred to it by the national court. The Court would therefore have had to give an advisory opinion on questions of a hypothetical nature.

25.

That is not however the position in the present case.

26.

First, it is by no means apparent from the order for reference that the defect in the statement of reasons identified by the referring court must entail the annulment in its entirety of the tax and customs authority’s decision, irrespective of the response to be given by the Court to the questions referred to it. The order for reference in fact tends to support the opposing view. Following the finding made concerning that defect in the statement of reasons, the referring court gave detailed consideration to EU law, and examined and dismissed other complaints advanced by Santogal also criticising the reasons stated in the tax and customs authority’s decision, setting out the reasons for dismissing certain evidence produced by Santogal with a view to demonstrating that the purchaser of the new vehicle satisfied the condition of residence in the Member State of destination of that vehicle, a requirement under the provisions of the RITI. That analysis would have been superfluous if the defect in the statement of reasons previously found to exist by the referring court could, on its own, entail the annulment in its entirety of the tax and customs authority’s decision.

27.

Secondly, and more fundamentally, the questions referred for a preliminary ruling relate directly and indirectly to the compatibility with EU law of the requirement laid down in the provisions of the RITI that the grant of the exemption from VAT is subject to the condition that the purchaser of the new vehicle resides in the Member State of destination of that vehicle. It is clear that the answer to those questions remains relevant to the resolution of the dispute in the main proceedings. It determines the legality both of the obligation on the supplier to provide proof of the satisfaction of the residence requirement laid down in the RITI and of the obligation on the tax and customs authority to examine that evidence and to provide an accurate statement of reasons for decisions finding, where appropriate, the evidence produced to be irrelevant or insufficient.

28.

For all those reasons, I propose that the Court should declare that the reference for a preliminary ruling is admissible.

B – Substance

29.

As I have stated in my introductory remarks, and in accordance with the reformulation of the questions referred for a preliminary ruling which I have proposed in point 21 of this Opinion, the referring court essentially wishes to ascertain whether, in the context of an intra-Community supply of a new vehicle, a Member State is allowed to: (a) make the exemption from VAT, provided for in Article 138(2)(a) of the VAT Directive, subject to the condition that the purchaser resides in the Member State of destination of that vehicle (first question); (b) refuse the exemption from VAT where the vehicle has been granted only provisional, tourist registration in the Member State of destination (second question); and (c) request payment of the VAT from the vendor of the vehicle in circumstances which might indicate that the purchaser could have committed VAT fraud, without it however being established that the vendor cooperated with the purchaser to avoid paying VAT (third and fourth questions).

30.

I shall consider in turn those three aspects of the questions raised by the referring court.

1. The right to make the exemption from VAT of an intra-Community supply of a new means of transport subject to the condition that the purchaser resides in the Member State of destination (first question)

31.

As the Court has already made clear on several occasions, the system established with effect from 1 January 1993, seeking the abolition of fiscal frontiers within the Community, is based on a new chargeable event, namely the intra-Community acquisition of goods, enabling the transfer of the tax revenue to the Member State in which final consumption of the goods supplied takes place. (12)

32.

Accordingly, under Article 2(1)(b)(ii) of the VAT Directive, the intra-Community acquisition of a new means of transport by a person not subject to VAT is taxable within the territory of the Member State of destination, whereas, under Article 138(2)(a) of the VAT Directive, the intra-Community supply of that new means of transport is exempt in the Member State in which dispatch or transfer of the means of transport began.

33.

The arrangements in place involve transferring the tax revenue to the Member State in which final consumption of the goods supplied takes place and ensure the clear allocation of powers of taxation.

34.

The exemption of an intra-Community supply corresponding to an intra-Community acquisition thus enables double taxation and, therefore, infringement of the principle of fiscal neutrality inherent in the common system of VAT, to be avoided, (13) while the rules pertaining to the taxation of acquisitions of new means of transport also aim to prevent distortions of competition between the Member States liable to result from the application of differing rates of tax. (14)

35.

Under the first paragraph of Article 20 of the VAT Directive, an intra-Community acquisition is

defined as the transfer of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began.

36.

Article 138(2)(a) of the VAT Directive provides that Member States are to exempt the supply of new means of transport, dispatched or transported to the customer at a destination outside their respective territory but within the European Union.

37.

On account of the necessary correlation between an intra-Community supply and acquisition of goods, including of a new means of transport, since, in the view of the Court, they are, in fact, one and the same financial transaction, it has already been held that the first paragraph of Article 20 and Article 138(1) of the VAT Directive had to be interpreted in such a way as to confer on them identical meaning and scope. (15)

38.

That approach must also apply to the relationships between the first paragraph of Article 20 and Article 138(2)(a) of the VAT Directive with regard to new means of transport, as, inter alia, the Commission agreed in its written observations. (16)

39.

According to the case-law, it follows that the exemption of the intra-Community supply, which precedes the intra-Community acquisition, becomes applicable if three conditions are satisfied, namely when the power to dispose of the goods as owner has been transferred to the purchaser and the supplier establishes that those goods have been dispatched or transported to another Member State and when, as a result of that dispatch or that transport, they have physically left the territory of the Member State of supply. (17)

40.

It is common ground in the main proceedings that the new vehicle was sold in Portugal by Santogal by the issue of an invoice to the purchaser, that the goods were transported to Spain by the purchaser himself and that the vehicle was registered in the latter Member State. The three conditions set out above therefore appear to be satisfied.

41.

In any event, regardless of whether or not all those conditions have been satisfied in the main proceedings, (18) it is clear that Article 138(2)(a) of the VAT Directive in no way makes the right of exemption of the intra-Community supply of a new means of transport subject to the requirement that the purchaser of that means of transport must have a place of residence in the Member State of destination. (19)

42.

As the Portuguese Government acknowledges, the Court has clarified, in the context of the classification of a transaction as an intra-Community acquisition of a new means of transport, that the essential issue is to determine the Member State in which the final, permanent use of the

means of transport will take place. (20)

43.

However, the additional requirement laid down by the provisions of the RITI, which consists in making the exemption of an intra-Community supply subject to the fact that the purchaser is resident in the Member State of destination, allows the Portuguese tax authorities to refuse that exemption, without even taking into account the substantive requirements laid down in Article 138(2)(a) of the VAT Directive, in particular without even considering whether those requirements are satisfied. The fact that the purchaser of a new means of transport does not reside in the Member State of destination cannot, however, automatically mean that the final, permanent use of that means of transport does not take place in that Member State, and that an intra-Community supply, followed by an intra-Community acquisition, has not taken place.

44.

Although it is true that, under Article 131 of the VAT Directive, the exemptions from VAT are to apply in accordance with conditions which the Member States are to lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse, those conditions cannot have the effect of undermining the allocation of powers of taxation between the Member States or the neutrality of VAT, which, as the Court has repeatedly stated, is a fundamental principle of the common system of VAT. (21)

45.

The additional condition required by the provisions of the RITI, which makes the exemption of the intra-Community supply subject to the purchaser’s residence in the Member State of destination, has such an effect. It allows Portugal, regardless of whether or not the three conditions listed in point 39 of this Opinion have been satisfied, to tax the intra-Community supply of a new means of transport, the acquisition of which is subject to the payment of VAT in the Member State of destination. That requirement therefore fails to take account of Article 138(2)(a) of the VAT Directive, the allocation of powers of taxation between the Member States and the principle of fiscal neutrality.

46.

That position clearly does not mean that the purchaser’s place of residence is irrelevant when establishing that the substantive requirements under the VAT Directive applicable to the exemption of an intra-Community supply are satisfied. The Court has acknowledged that, in order to determine whether the goods purchased have actually left the territory of the Member State of supply and, if so, in the territory of which Member State the final consumption must take place, it is necessary to conduct an overall assessment of all the objective evidence, including, as an element to which significance may be attached, the place of residence of the purchaser. (22)

47.

Ultimately, in my view, that approach simply supports the interpretation that the residence of the purchaser of the goods in the Member State of destination cannot, as such, constitute a condition for the grant of the exemption of an intra-Community supply. Similarly, it confirms that the purchaser’s non-residence in that Member State cannot constitute irrefutable proof that the goods have not physically left the territory of the Member State of supply to be used permanently in the Member State of destination. (23)

48.

Like Santogal and the Commission, I therefore take the view that Article 138(2)(a) of the VAT Directive precludes a Member State from making the exemption of an intra-Community supply of a new means of transport subject to the condition that the purchaser of that means of transport resides in the Member State of destination of the transaction.

2. The right to refuse the exemption from VAT where the new means of transport has been granted only temporary, tourist registration in the Member State of destination (second question)

49.

By its second question, the referring court asks whether it is possible to refuse to grant the exemption from VAT to the vendor of a new vehicle where it is shown that that vehicle has been granted only temporary, tourist registration in the Member State of destination.

50.

As is borne out by the statement of reasons in the order for reference, that question arises in the context of the examination of the substance of the tax and customs authority's demonstration that the purchaser did not reside in the Member State of destination. The referring court makes the point that, under the relevant Spanish law to which the tax and customs authority refers, the tourist registration of a vehicle is issued solely to persons who are not resident in Spain.

51.

In other words, the criterion of the vehicle's temporary registration in Spain was used by the tax and customs authority to demonstrate that the purchaser did not reside in that Member State and did not therefore satisfy the requirement of residence laid down in the provisions of the RITI governing the vendor's right of exemption from VAT.

52.

However, as I have explained in my analysis of the first question referred for a preliminary ruling, that requirement laid down in the provisions of the RITI is contrary to Article 138(2)(a) of the VAT Directive.

53.

In those circumstances, accepting that the criterion of the temporary registration of the vehicle in the Member State of destination may form the basis of the refusal to grant the exemption from VAT to the vendor of that new means of transport would, indirectly, amount to validating the condition, laid down in the provisions of the RITI, which makes such exemption subject to the purchaser's residence in the Member State of destination.

54.

That being the case, as part of the overall assessment of the objective evidence on the basis of which a transaction may be classified as an ‘intra-Community supply’, the temporary nature of the registration issued in the Member State of destination may, however, be significant as regards whether or not the condition identified by the Court in the judgment 18 November 2010, X (C?84/09, EU:C:2010:693, paragraph 50), concerning the place of final, permanent use of the new means of transport, has been satisfied.

55.

Nonetheless, in my view, it would be contrary to the allocation of powers of taxation and to the principle of the neutrality of VAT to allow the Member State of supply of that new means of transport, solely on the basis of that one factor, to demand payment of VAT from the vendor. As the main proceedings demonstrate on the basis of the information provided in the order for reference, temporary registration such as that issued in Spain may be granted for a significant period of 12 months, which — it appears — may not only itself be extended but may also expire once the vehicle is granted ordinary registration in Spain following payment of the relevant charges. Accordingly, the mere fact that a new vehicle has been granted temporary registration in the Member State of destination does not mean ipso jure that, once the temporary registration period has expired, the place of final, permanent use of that vehicle will not be within the territory of that Member State, and that it should be concluded that that vehicle has not been the subject of an intra-Community supply.

56.

I am therefore of the view that, regardless of the facts specific to a particular case, a Member State cannot refuse to grant the exemption from VAT to the vendor of a new vehicle, which has been transported to another Member State by its owner, simply because that vehicle was provisionally registered in that latter Member State.

3. The right to demand payment of VAT from the vendor of the new means of transport in circumstances which might indicate that the purchaser could have committed VAT fraud, without it however being established that the vendor cooperated with the purchaser to avoid paying VAT (third and fourth questions)

57.

By its third question, the referring court asks whether a vendor may be refused the exemption from VAT if it is unclear whether or not eligibility under the system of provisional registration has ceased for one of the reasons laid down in the law of the Member State of destination, or whether VAT has been paid, or will be paid, at the end of the eligibility under that system. In its fourth question, it also sets out a number of other circumstances which suggest the uncertainty surrounding the place of final consumption of the new vehicle sold by Santogal, which might indicate that the purchaser could have committed VAT fraud, whilst revealing that Santogal took certain steps with regard to the purchaser and the Portuguese authorities following the sale of the vehicle without it being established that that company cooperated with the purchaser to avoid paying VAT.

58.

Those questions, which may be examined together, are essentially concerned with both the burden of proof and the evidence relating to the final, permanent use of the new means of transport in the Member State of destination which the tax authorities of the Member State of supply may require the vendor to produce in order to benefit from the exemption from VAT

applicable to the intra-Community supply of such a means of transport.

59.

With regard to the burden of proof, the Court has already had occasion to hold, in the context of the provision of the Sixth Directive which is now reproduced in Article 138(1) of the VAT Directive, that it is for the supplier of the goods to furnish the proof that the conditions laid down for the application of that provision, including those imposed by the Member States for the purpose of ensuring the correct and straightforward application of the exemptions and for preventing any evasion, avoidance or abuse, are satisfied. (24) That case-law appears to me to be wholly applicable to the interpretation and application of Article 138(2)(a) of the VAT Directive.

60.

That case-law likewise requires that the supplier act in good faith and take every measure which can reasonably be required of him to ensure that the transaction that he effects does not lead to his participation in tax evasion. (25)

61.

In the context of the sale of a new vehicle, which requires — as I have already stated — an overall assessment of all the objective evidence in order for a transaction to be classified as an intra-Community supply or acquisition, it falls to the supplier, in order to preclude any participation in tax fraud, to collect all the evidence which he is reasonably able to obtain so as to ensure fulfilment of the conditions relating to the intra-Community supply of that vehicle, including in particular that concerned with its final, permanent consumption in the Member State of destination.

62.

The vigilance of the supplier of a new means of transport is all the more necessary in view of the ‘particular nature’ of the intra-Community transactions involving such goods. (26) First, the classification of the transaction is made more complex because the VAT on that transaction must also be paid by a non-taxable individual, who is not subject to the obligations relating to tax returns and accounting, so that a subsequent check of that individual is not possible. Secondly, the individual, as final consumer, cannot claim a VAT deduction, even in the event of resale of a purchased vehicle, and therefore has a greater interest than a trader in avoiding that tax. (27)

63.

It is for that reason that, although, admittedly, in the case of such transactions, the supplier may legitimately rely on the purchaser’s intentions at the time of the acquisition, those intentions should be supported by objective evidence, (28) which may itself be subject to review by the tax authorities and, where appropriate, the courts of the Member State of supply.

64.

However, the referring court rightly points out that the measures to prevent any possible fraud, evasion and abuse which Member States have the power to impose on the supplier of the goods must comply with the general principles of law, including in particular the principles of legal certainty and proportionality, (29) and, moreover, must not undermine the neutrality of VAT. (30)

65.

It is therefore understandable and justified for loss of the right of exemption from VAT to be

ordered only in exceptional situations, namely where the vendor has been led to participate in VAT fraud or where non-compliance with one or more formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements governing the grant of that exemption have been satisfied. (31)

66.

It is in accordance with that case-law that, in the context of the classification of a transaction as an intra-Community acquisition of goods and the determination of the purchaser's status as a taxable person, the Court held that a supplier who has taken all the measures which can reasonably be required of him and whose participation in VAT fraud is unsupported by any evidence could not be required to provide evidence of the taxation of the intra-Community acquisition of the goods in question in order to be exempt under Article 138(1) of the VAT Directive. (32)

67.

In the present case, in which the substantive condition at issue concerns the place of final, permanent consumption of the new means of transport and the referring court states that it has not been demonstrated that the vendor cooperated with the purchaser to avoid paying VAT, it is for that court to consider whether the vendor, having acted in good faith, took all the measures which could reasonably be required of him to show that the transaction concluded by him was indeed an intra-Community supply, within the meaning of Article 138(2)(a) of the VAT Directive, which justified his right to the exemption.

68.

The objective of preventing tax fraud must mean that the suppliers of new means of transport may be subject to stringent requirements vis-à-vis fulfilment of the conditions relating to the intra-Community supply of that type of goods, taking into account the particular nature of that transaction and the associated risks. (33)

69.

The fact that a supplier has not actively (or intentionally) cooperated with the purchaser to avoid paying VAT does not exempt the supplier from his obligation, for preventive purposes, to act in good faith and to take the reasonable steps required to ensure that fraud cannot be committed by the purchaser.

70.

If that obligation proves not to be fulfilled, I am of the view that there may be justification for requiring the supplier to pay the VAT a posteriori.

71.

That approach is not contrary to the rules applicable to intra-Community trade, which tend to divide the risk of the non-payment of VAT between the supplier and the purchaser. (34) In my view, the aim is not to place liability for the payment of VAT a posteriori exclusively on the supplier of new means of transport, since the tax authorities of the Member State of supply can, of course and as a matter of priority, demand such payment from the purchaser, where the purchaser is at the source of the breach of the substantive conditions governing an intra-Community acquisition or supply of such goods. (35)

72.

In the context of such supplies, which entail the transfer of the power of taxation to the Member State of destination, the intention is simply to encourage suppliers to be particularly vigilant to the risk that the transaction may avoid all taxation and, by emphasising the profit-making nature of the transaction, (36) to prevent them from being prompted to ‘close their eyes’ or adopt an overly complaisant attitude towards their co-contractor.

73.

In the main proceedings, it is therefore for the referring court to ascertain whether Santogal, acting in good faith, took all reasonable measures within its power to ensure that the supply of the new vehicle to the purchaser would not result in a breach of the substantive conditions required to classify that transaction as the intra-Community supply of a new means of transport.

74.

That response might be sufficient for the purposes of the interpretation sought by the referring court. However, with a view to giving that court a response which will help it to resolve the dispute brought before it, I consider that it would be appropriate for the Court to be able to provide it with certain clarifications regarding the evidence which may or may not be required of the supplier, in accordance with the principles of EU law. (37)

75.

First of all, in order to enjoy the exemption from VAT in the Member State of supply, the vendor of a new means of transport cannot be required — as the referring court nevertheless seems to consider in its third question referred for a preliminary ruling — to produce conclusive evidence that the VAT has indeed been paid on the acquisition of those goods in the Member State of destination. Such a requirement would run counter to a number of principles, including the principles of proportionality and fiscal neutrality, and cannot be regarded as a reasonable measure, within the meaning of the case-law of the Court, which may be required of the vendor in the course of the transaction, especially where, as in the main proceedings, it appears that the authorities of the Member State of supply are, even after an investigation conducted on the basis of information which the vendor could not access, unable clearly to identify the purchaser’s location and determine the fate of the vehicle.

76.

This does not mean that the vendor is released from the obligation of taking steps to ask the purchaser about the fate of the new means of transport supplied and, therefore, about the payment of VAT in the Member State of destination. This is, however, in my view, an obligation to use best endeavours rather than an obligation to achieve a specific result. The vendor relies primarily on the purchaser’s cooperation and the evidence that the purchaser agrees to provide to the vendor. It would therefore be unreasonable for the Member State of supply to make the exemption of the intra-Community supply subject to the vendor’s provision of evidence that the purchaser has paid the VAT in the Member State of destination. However, it is important that the vendor show that, in all good faith, he took the steps which can reasonably be required of him to ensure, with regard to the purchaser, that the new means of transport supplied will be put to final, permanent use in the Member State of destination.

77.

Next, it appears to me to be wholly impossible to require the vendor, in general, to undertake a thorough examination of the conditions for registration of the new means of transport in the Member State of destination. Even if, as in the main proceedings, the vendor is a professional in the vehicle trade, such a requirement would be unreasonable because it would presuppose that persons subject to VAT in one Member State have a good grasp of the law and practice of other Member States.

78.

However, regardless of the vendor's knowledge of the law of the Member State of destination, clear and consistent information that the registration has been issued temporarily in the Member State of destination must, as the Commission suggests, prompt a professional in the vehicle trade to ask himself whether or not, once the provisional registration period has expired, the vehicle will be put to final, permanent use in the Member State of destination and thus be subject to the payment of VAT in that Member State. In my view, such a professional must therefore take all the reasonable measures within his power to ensure that the purchaser has the intention of complying with that condition, and that intention must be supported by objective evidence, in accordance with the case-law. (38)

79.

In the present case, it appears, according to the information provided by the referring court and the elements highlighted by the Commission in its written observations, that Santogal, when it had information a few days after the sale that the registration of the vehicle in Spain had been issued only on a temporary basis for one year, failed both to ask the purchaser about his intention to use the vehicle in Spain following expiry of the provisional registration and to request that he provide any evidence capable of confirming his intention. In addition, the referring court makes no mention of any steps undertaken by Santogal in relation to the purchaser during that one-year period which would have enabled that company to determine whether the vehicle was in fact going to remain in Spain and be put to final, permanent use in that Member State.

80.

Furthermore, as the Commission also points out in its written observations, the referring court provides no information at all concerning the content of the documentation sent by Santogal to the Portuguese tax and customs authorities a few days before the expiry of the provisional registration of the vehicle in support of its application for cancellation of the customs declaration and for a declaration of the vehicle's dispatch to Spain. In particular, the referring court provides no information from which it is possible to ascertain whether that documentation included documents proving the final, permanent use of the vehicle in the Member State of destination.

81.

Such information is nonetheless essential, as the Commission rightly points out. It would be contrary to the principle of legal certainty for a Member State which initially accepted the documents produced by a supplier as documents supporting the right of exemption from VAT to be able subsequently to require that supplier to pay the VAT on the supply, even though that supplier acted in good faith and took all reasonable measures within his power to ensure that the transaction concluded by him satisfied all the substantive conditions for an intra-Community supply, within the meaning of Article 138(2)(a) of the VAT Directive.

82.

In those circumstances, it is for the referring court to determine whether, in all good faith, Santogal took steps with regard to the purchaser to ensure that he had the intention, after the provisional registration of the new vehicle expired in Spain, to continue to put that vehicle to final, permanent use in the Member State of destination, which intention must be supported by objective evidence including, inter alia, the documents provided by Santogal to the Portuguese tax and customs authority in support of its application for cancellation of the customs declaration. If that is the case, the right of exemption from VAT may not be refused, even if Santogal has failed to correct in good time the invoice initially issued and has not attempted to recover the VAT from the purchaser. Otherwise, I am of the view that, unless the Member State of supply is able to demand the payment of VAT from the purchaser a posteriori, which is a matter to be determined by the referring court, that Member State is justified in requiring Santogal to pay the VAT a posteriori, with a view to preventing the transaction from avoiding all taxation.

III – Conclusion

83.

In the light of all the foregoing considerations, I propose that the questions referred for a preliminary ruling by the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) be answered as follows:

(1)

Article 138(2)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that it precludes a Member State from making the exemption of an intra-Community supply of a new means of transport subject to the condition that the purchaser of that means of transport resides in the Member State of destination of the transaction.

(2)

Regardless of the circumstances specific to a particular case, Article 138(2)(a) of Directive 2006/112 must be interpreted as meaning that it precludes a Member State from refusing to grant the exemption from value added tax to the vendor of a new means of transport, which has been transported to another Member State by its owner, simply because that vehicle was registered temporarily in that latter Member State.

(3)

Article 138(2)(a) of Directive 2006/112 and the principles of legal certainty, proportionality and fiscal neutrality must be interpreted as meaning that they preclude a Member State from refusing to grant the exemption from value added tax to the vendor of a new means of transport where that

vendor has not participated in tax fraud, has acted in good faith and has taken all the reasonable measures within his power to ensure that the transaction which he concluded satisfies all the substantive conditions for an intra-Community supply, within the meaning of that article, in particular the condition relating to the final, permanent consumption of the new means of transport in the Member State of destination.

It is for the referring court to determine whether the vendor in the main proceedings complied with the requirements of good faith and reasonable diligence, in the light, inter alia, of the steps which it took with regard to the purchaser and of the supporting documents produced by him and making it possible to determine that he ensured that the new means of transport would be put to final, permanent use in the Member State of destination following the expiry of the temporary registration period in that Member State. If that is the case, the vendor cannot be refused the right of exemption from value added tax. Otherwise, unless the Member State of supply is able to demand payment of the value added tax from the purchaser a posteriori, that Member State is justified in requiring the vendor of the new means of transport to pay the value added tax a posteriori with a view to preventing the transaction from avoiding all taxation.

(1) Original language: French.

(2) OJ 2006 L 347, p. 1.

(3) According to the documents before the Court, the vehicle is a luxury sports vehicle of the model SLR McLaren, produced in a limited series.

(4) BOE No 221 of 15 September 1993, p. 27037.

(5) BOE No 22 of 26 January 1999, p. 3440.

(6) See the judgment of 12 June 2014, Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta (C?377/13, EU:C:2014:1754, paragraph 34). Since then, the Court has also ruled on the substance of two other references for a preliminary ruling made by that same arbitration tribunal dealing with taxation: see judgments of 11 June 2015, Lisboagás GDL (C?256/14, EU:C:2015:387), and of 15 September 2016, Barlis 06 — Investimentos Imobiliários e Turísticos (C?516/14, EU:C:2016:690).

(7) See, to that effect, inter alia, judgments of 3 March 1994, Eurico Italia and Others (C?332/92, C?333/92 and C?335/92, EU:C:1994:79, paragraph 13), and of 29 June 2010, E and F (C?550/09, EU:C:2010:382, paragraph 35).

(8) For the sake of absolute completeness, I would add that if, as in this case, the information in the case file communicated to the Court so permits, the Court’s power to reformulate questions referred for a preliminary ruling also makes it possible to avert the otherwise probable repetition of the request for a preliminary ruling. It therefore also rests on reasons of economy of procedure. See, to that effect, my Opinions in Gysen (C?449/06, EU:C:2007:663, point 43), and in de Lobkowicz (C?690/15, EU:C:2016:926, footnote 14).

(9) For the record, in accordance with the settled case-law of the Court, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance, which may be rebutted in particular where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it: see, inter alia, judgment of 18 December 2014, Schoenimport Italmoda Mariano Previti and Others (C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraphs 31

and 36).

(10) See, inter alia, to that effect, judgment of 24 October 2013, Stoilov i Ko (C?180/12, EU:C:2013:693, paragraphs 38 and 47 and the case-law cited).

(11) See judgment of 24 October 2013, Stoilov i Ko (C?180/12, EU:C:2013:693, paragraphs 39 to 47).

(12) See, to that effect, inter alia, judgments of 6 April 2006, EMAG Handel Eder (C?245/04, EU:C:2006:232, paragraph 27); of 27 September 2007, Teleos and Others (C?409/04, EU:C:2007:548, paragraphs 21 and 22); and of 18 November 2010, X (C?84/09, EU:C:2010:693, paragraph 22).

(13) See judgment of 27 September 2007, Teleos and Others (C?409/04, EU:C:2007:548, paragraph 25).

(14) See, to that effect, judgments of 6 April 2006, EMAG Handel Eder (C?245/04, EU:C:2006:232, paragraphs 31 and 40), and of 18 November 2010, X (C?84/09, EU:C:2010:693, paragraph 24).

(15) See judgment of 18 November 2010, X (C?84/09, EU:C:2010:693, paragraph 28 and the case-law cited).

(16) Furthermore, the facts giving rise to the judgment of 18 November 2010, X (C?84/09, EU:C:2010:693) related to the intra-Community acquisition of a means of transport (a sailing boat) regarded as ‘new’ by the national court.

(17) See judgments of 27 September 2007, Teleos and Others (C?409/04, EU:C:2007:548, paragraph 42); of 18 November 2010, X (C?84/09, EU:C:2010:693, paragraph 27); of 7 December 2010, R. (C?285/09, EU:C:2010:742, paragraph 41); and of 6 September 2012, Mecsek-Gabona (C?273/11, EU:C:2012:547, paragraph 31).

(18) That issue is considered in points 57 to 82 of this Opinion.

(19) See, by analogy, judgment of 27 September 2012, VSTR (C?587/10, EU:C:2012:592, paragraph 54) with regard to the interpretation of Article 28c(A)(a) of the 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), as amended by Council Directive 98/80/EC of 12 October 1998 (OJ 1998 L 281, p. 31), the content of which is identical to that of Article 138(1) of the VAT Directive.

(20) See judgment of 18 November 2010, X (C?84/09, EU:C:2010:693, paragraph 50).

(21) See, inter alia, judgments of 27 September 2007, Teleos and Others (C?409/04, EU:C:2007:548, paragraph 46); of 27 September 2012, VSTR (C?587/10, EU:C:2012:592, paragraph 44); and, with regard to an intra-Community transfer, of 20 October 2016, Plöckl (C?24/15, EU:C:2016:791, paragraph 36).

(22) See, to that effect, the judgment of 18 November 2010, X (C?84/09, EU:C:2010:693, paragraphs 44 and 45).

(23) In the present case, the fact that, before and after the sale of the new vehicle, the purchaser provided three different addresses in Spain has no bearing on the question whether that vehicle was used (or consumed) finally and permanently in that Member State.

(24) See, inter alia, judgment of 27 September 2012, VSTR (C?587/10, EU:C:2012:592, paragraph 43).

(25) See, inter alia, judgments of 16 December 2010, Euro Tyre Holding (C?430/09, EU:C:2010:786, paragraph 38); and of 27 September 2012, VSTR (C?587/10, EU:C:2012:592, paragraph 52).

(26) See judgment of 18 November 2010, X (C?84/09, EU:C:2010:693, paragraph 42).

(27) Judgment of 18 November 2010, X (C?84/09, EU:C:2010:693, paragraph 43).

(28) See, to that effect, judgment of 18 November 2010, X (C?84/09, EU:C:2010:693, paragraph 47).

(29) See, to that effect, inter alia, judgments of 18 November 2010, X (C?84/09, EU:C:2010:693, paragraph 35), and of 6 September 2012, Mecsek-Gabona (C?273/11, EU:C:2012:547, paragraph 36).

(30) See, to that effect, inter alia, judgments of 18 November 2010, X (C?84/09, EU:C:2010:693, paragraph 37), and of 27 September 2012, VSTR (C?587/10, EU:C:2012:592, paragraph 44).

(31) See, to that effect, inter alia, judgment of 27 September 2012, VSTR (C?587/10, EU:C:2012:592, paragraph 46).

(32) See judgment of 27 September 2012, VSTR (C?587/10, EU:C:2012:592, paragraphs 52, 53 and 55).

(33) See point 63 of this Opinion. I note that the Court has already found in the judgment of 27 September 2007, Teleos and Others (C?409/04, EU:C:2007:548, paragraph 58) that the objective of preventing tax evasion sometimes justifies stringent requirements as regards suppliers' obligations. This is the case, in my view, in the particular situation of the intra-Community supply of new means of transport intended for consumers.

(34) With regard to the principle of the sharing of the burden of the payment of VAT, see the judgment of 27 September 2007, Teleos and Others (C?409/04, EU:C:2007:548, paragraph 57).

(35) See, to that effect, judgment of 27 September 2007, Teleos and Others (C?409/04, EU:C:2007:548, paragraph 67).

(36) In the present case, I note that the vehicle is one of a limited series and was sold for almost EUR 450000.

(37) Since no provision of the VAT Directive lists the evidence which taxable persons are required to adduce in order to be exempted from VAT, that question falls, in principle, within the competence of the Member States (see, to that effect, inter alia, judgments of 27 September 2012, VSTR (C?587/10, EU:C:2012:592, paragraph 42), and of 20 October 2016, Plöckl (C?24/15, EU:C:2016:791, paragraph 35)).

(38) Judgment of 18 November 2010, X (C?84/09, EU:C:2010:693, paragraph 47).