

Downloaded via the EU tax law app / web

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

5 May 2022 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Rates – Temporary provisions for particular labour-intensive services – Point 2 of Annex IV – Renovation and repairing of private dwellings – Application of a reduced rate of VAT to repair and maintenance services for lifts in residential buildings)

In Case C-218/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 17 February 2021, received at the Court on 1 April 2021, in the proceedings

Autoridade Tributária e Aduaneira

v

DSR – Montagem e Manutenção de Ascensores e Escadas Rolantes SA,

THE COURT (Sixth Chamber),

composed of I. Ziemele, President of the Chamber, T. von Danwitz and A. Kumin (Rapporteur),
Judges,

Advocate General: T. ?apeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- DSR – Montagem e Manutenção de Ascensores e Escadas Rolantes SA, by J. Vilaça da Fonseca, advogado,
- the Portuguese Government, initially by P. Barros da Costa, L. Inez Fernandes and R. Campos Laires, and subsequently by P. Barros da Costa and R. Campos Laires, acting as Agents,
- the European Commission, by M. Afonso and V. Uher, 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 concerns the interpretation of point 2 of Annex IV to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

(OJ 2006 L 347, p. 1; ‘the VAT Directive’).

2 The request has been made in proceedings between the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal) (‘the tax authority’) and DSR – Montagem e Manutenção de Ascensores e Escadas Rolantes SA (‘DSR’) concerning the rate of value added tax (VAT) applicable to the lift repair and maintenance services carried out by that company.

Legal context

European Union law

3 The VAT Directive includes Title VIII, entitled ‘Rates’, which contains Chapter 2, entitled ‘Structure and levels of rates’. That chapter includes, inter alia, Articles 96 and 98 of that directive.

4 Article 96 of that directive states:

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

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

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

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

...’

6 At the time of the facts in the main proceedings, Title VIII of the VAT Directive contained Chapter 3, entitled ‘Temporary provisions for particular labour-intensive services’. That chapter included, inter alia, Articles 106 and 107 of that directive.

7 Article 106 of that directive provided:

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

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

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

8 Article 107 of that directive provided:

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

- (a) they must be labour-intensive;
- (b) they must largely be provided direct to final consumers;
- (c) they must be mainly local and not likely to cause distortion of competition.

There must also be a close link between the decrease in prices resulting from the rate reduction and the foreseeable increase in demand and employment. Application of a reduced rate must not prejudice the smooth functioning of the internal market.'

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

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

10 Chapter 3 of Title VIII of the VAT Directive and Annex IV thereto were repealed by Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112 as regards reduced rates of value added tax (OJ 2009 L 116, p. 18). By contrast, Directive 2009/47 inserted a point 10a into Annex III to the VAT Directive, that annex containing the list of supplies of goods and services to which the reduced rates of VAT referred to in Article 98 of that directive may be applied. The content of that point 10a is identical to that of point 2 of the former Annex IV to the VAT Directive.

Portuguese law

The VAT Code

11 Article 18(1) of the Código do Imposto sobre o Valor Acrescentado (Value Added Tax Code), in the version applicable to the facts in the main proceedings ('the VAT Code'), provided:

'The rates of the tax shall be as follows:

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

...

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

12 Point 2.24 of List I annexed to the VAT Code provided:

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

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

The Civil Code

13 Under Article 204 of the Código Civil (Civil Code):

'1. "Immovable property" shall mean:

...

(e) integral parts of agricultural and urban buildings.

...

3. Any movable property which is materially and permanently connected to the building is an integral part of it.'

14 Article 1207 of that code provides:

'A works contract is a contract under which one of the parties undertakes in relation to the other party to carry out a certain work, for a price.'

15 Under Article 1421(2)(b) of that code, lifts are presumed to be common parts of a building.

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

16 DSR is a company which produces lifts, hoists and conveyor belts and also provides lift repair and maintenance services.

17 In 2007, DSR applied a reduced rate of VAT to the lift refitting and repair services supplied by it, while invoicing the materials incorporated in connection with those supplies at the standard rate of VAT.

18 Following a tax inspection in 2011, the tax authority found that DSR had wrongly applied the reduced rate of VAT to those services.

19 The tax adjustments carried out following that tax inspection formed the subject of an action brought by DSR before the Tribunal Administrativo e Fiscal do Porto (Administrative and Tax Court, Porto, Portugal), which upheld that action by judgment of 16 October 2017. In that regard, that court held, *inter alia*, that lifts are an integral part of the buildings in which they are installed and that, therefore, the application of the reduced rate of VAT is not precluded in respect of the repair and maintenance services for such lifts, provided that those services are carried out under a works contract and that that rate is applied only to the labour.

20 The tax authority brought an appeal against the judgment of 16 October 2017 before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), the referring court.

21 In support of its appeal, the tax authority submits that, under point 2.24 of List I annexed to the VAT Code, the reduced rate of VAT is to be applied to certain works contracts relating to immovable property for residential use, excluding materials which constitute a significant part of the service supplied. In order to clarify the content of that point 2.24, the Direcção de Serviços do IVA (VAT Services Directorate, Portugal) issued circulars that are binding on the tax authority.

22 In that regard, it is apparent from Circular No 30036 of 4 April 2001 that the term 'immovable property for residential use' in that point 2.24 should be interpreted restrictively, since the *ratio legis* of that provision does not permit the inference that it applies to repair and maintenance services relating to fixtures that form an integral part of buildings. Thus, lift repair and maintenance services should be assessed at the standard rate of VAT, and the definition adopted in Article 1421(2)(b) of the Civil Code, which includes lifts in the common parts of immovable property, is irrelevant in that context.

23 Furthermore, the tax authority maintains that its interpretation is consistent with EU law, since it is apparent from the case-law of the Court, in particular the judgment of 8 May 2003, *Commission v France* (C-384/01, EU:C:2003:264), that Member States have the possibility of restricting the application of a reduced rate of VAT to concrete and specific aspects of a supply of

goods or a supply of services, and that possibility is consistent with the principle that exemptions or derogations must be interpreted restrictively.

24 The referring court observes that the application of a reduced rate of VAT is a harmonised matter and that point 2 of Annex IV to the VAT Directive, according to which a reduced rate of VAT may be applied to the renovation and repairing of private dwellings, excluding materials which account for a significant part of the value of the service supplied, is relevant in the present case. That court expresses doubts as to whether the lift refitting and repair services at issue fall within the scope of point 2 of that Annex IV.

25 According to that court, to accept the more restrictive view of the tax authority would mean rejecting the argument put forward in the judgment of 16 October 2017, according to which the reduced rate of VAT is applicable to certain ‘works contracts’ relating to ‘immovable property’ ‘for residential use’, as those words appear in point 2.24 of List I annexed to the VAT Code, and which have, moreover, been interpreted in accordance with other national provisions such as Article 204(1)(e) and (3), Article 1207 or Article 1421(2)(b) of the Civil Code.

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

‘(1) Is it compatible with [EU] law, in particular Annex IV to the ... VAT Directive, for point [2.24] of List I annexed to the VAT Code to be applied in such a way that it is taken to mean that it includes the repair and maintenance of lifts carried out by the undertaking to which the facts summarised above relate and that it results in the application of the reduced rate of VAT?’

(2) Is it compatible with [EU] law, in particular Annex IV to the ... VAT Directive, for that provision of the VAT Code to be applied in such a way that it also takes into account other provisions of national law, namely Article 1207, Article 204(1)(e) and (3), and Article 1421(2)(b) of the Civil Code (provisions governing the concepts of works contract and immovable property and the presumption that a lift is a common part of a building in co-ownership)?’

Consideration of the questions referred

27 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether point 2 of Annex IV to the VAT Directive must be interpreted as meaning that the concept of ‘renovation and repairing of private dwellings’, within the meaning of that provision, covers repair and renovation services for lifts in residential buildings.

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

29 In the absence of any reference to the law of the Member States or of a relevant definition in the VAT Directive, the words used in point 2 of Annex IV to that directive must be interpreted uniformly, irrespective of how they may be characterised in the Member States, and in accordance with their usual meaning in everyday language, while taking into account the context in which they occur and the purposes of the rules of which they are part (see, to that effect, judgments of 9 July 2020, *AJPF Cara?-Severin and DGRFP Timi?oara*, C?716/18, EU:C:2020:540, paragraph 30 and the case-law cited, and of 17 December 2020, *BAKATI PLUS*, C?656/19, EU:C:2020:1045, paragraph 42).

30 At the outset, in so far as, under point 2 of Annex IV to the VAT Directive, the reduced rate of VAT does not apply to materials which account for a significant part of the value of the service supplied, it is sufficient to note that that aspect is not disputed in the present case, since DSR invoiced all the materials incorporated at the standard rate, and only the labour was subject to the reduced rate.

31 That said, it is apparent from the wording of point 2 of Annex IV, first, that two distinct activities are covered by that provision, namely renovation and repairing, and, second, that those activities must relate to private dwellings.

32 As regards the words 'renovation' and 'repairing', it should be noted that they refer, respectively, to the refurbishment of an object and the restoration of a damaged object.

33 Such services are characterised, in particular, by their occasional nature, so that mere maintenance services, supplied on a regular and continuous basis, cannot be regarded as falling within point 2 of Annex IV to the VAT Directive.

34 As regards the term 'private dwellings', it should be noted that the word 'dwelling' generally refers to immovable or even movable property, or a part thereof, intended for residential use and which therefore serves as a residence for one or more persons. Furthermore, the adjective 'private' makes it possible to draw a distinction with non-private dwellings, such as staff accommodation or hotels.

35 Accordingly, the renovation and repairing services referred to in point 2 of Annex IV to the VAT Directive must relate to property used for private residential purposes, whereas services relating to property used for other purposes, such as commercial purposes, are not covered by that provision.

36 In that context, the Portuguese Government submits, in essence, that the term 'private dwelling', in so far as it is less broad than terms such as 'building' or 'residential building', refers in an individualised manner to each of the independent units in a building that are actually intended for residential use, over which the owner or tenant has complete control, and that it is necessary to distinguish such independent units from the areas of common access in such a building. Thus, according to that view, renovation and repair services relating to shared facilities, including lifts, do not fall within point 2 of Annex IV to the VAT Directive.

37 In that regard, however, it should be noted that, in the case of a residential building consisting of several apartments, shared facilities are, as a general rule, important or even indispensable for the use of individual apartments.

38 In those circumstances, it must be held that, in the case of such residential buildings, shared facilities are covered by the term 'private dwellings', within the meaning of point 2 of Annex IV to the VAT Directive, with the result that renovation and repair services relating to those facilities fall within the scope of that provision. On that basis, lifts, which form an integral part of the buildings that have them, are included in those facilities.

39 Accordingly, it must be concluded from the wording of point 2 of Annex IV to the VAT Directive that that provision covers repair and renovation services for lifts in residential buildings, excluding maintenance services for such lifts.

40 As regards the context of which point 2 of Annex IV to the VAT Directive is part, that provision, in so far as it allows a reduced rate of VAT to be applied, constitutes an exception to the

principle of the application of the standard rate and must therefore be interpreted strictly (see, to that effect, judgment of 1 October 2020, *Staatssecretaris van Financiën (Reduced rate of VAT for aphrodisiacs)*, C-331/19, EU:C:2020:786, paragraph 30 and the case-law cited).

41 The interpretation set out in paragraph 39 above, in so far as it is based on the importance of shared facilities for the use of the individual apartments of a residential building, meets that requirement.

42 It must, however, be added that, since renovation and repair services carried out in buildings used for non-residential purposes must remain subject to the application of the standard rate of VAT, a pro rata allocation should be made in the case of renovation and repair services relating to shared facilities in mixed-use buildings, which include units intended for private residential use and units intended for other purposes, such as commercial purposes.

43 The interpretation set out in paragraph 39 above is also consistent with the purpose of Annex IV to the VAT Directive, since it is apparent from the title of Chapter 3 of Title VIII of that directive that the EU legislature envisaged a reduction in the VAT rate applied to labour-intensive services, which is the case with lift repair and renovation services.

44 That being so, as the Portuguese Government submits, the Court has held that the Member States have the possibility of applying the reduced rate of VAT selectively, provided, first, that they isolate, for the purposes of the application of the reduced rate, only concrete and specific aspects of the category of supply in question and, second, that they comply with the principle of fiscal neutrality (see, to that effect, judgment of 5 September 2019, *Regards Photographiques*, C-145/18, EU:C:2019:668, paragraphs 42 and 43 and the case-law cited).

45 In the present case, although it is ultimately for the referring court to interpret national law and, accordingly, to examine whether the Portuguese legislature transposed point 2 of Annex IV to the VAT Directive selectively, in so far as it excluded services relating to lifts in residential buildings from the scope of the reduced rate of VAT, nothing in the wording of the national provision implementing that point 2, namely point 2.24 of List I annexed to the VAT Code, appears to indicate that the Portuguese legislature did so, since the position of the tax authority is, on the contrary, based on the restrictive interpretation advocated by internal instructions.

46 Since the provisions of a directive must be implemented with unquestionable legal certainty and with the requisite specificity, precision and clarity, a Member State cannot rely on mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, in order to demonstrate a selective transposition of a provision of the VAT Directive authorising the application of a reduced rate of VAT for a category of services (see, to that effect, judgment of 4 June 2009, *SALIX Grundstücks-Vermietungsgesellschaft*, C-102/08, EU:C:2009:345, paragraphs 42 and 43 and the case-law cited).

47 In the light of all the foregoing considerations, the answer to the questions referred is that point 2 of Annex IV to the VAT Directive must be interpreted as meaning that the concept of 'renovation and repairing of private dwellings', within the meaning of that provision, covers repair and renovation services for lifts in residential buildings, excluding maintenance services for such lifts.

Costs

48 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 (Sixth Chamber) hereby rules:

Point 2 of Annex IV to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the concept of ‘renovation and repairing of private dwellings’, within the meaning of that provision, covers repair and renovation services for lifts in residential buildings, excluding maintenance services for such lifts.

[Signatures]

* Language of the case: Portuguese.