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Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

18 April 2024 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Scope – Economic activity – Supply of services – Article 135 – Exemptions for other activities – Granting of credit – Sale by auction of pledged goods – Single supply – Distinct and independent supplies – Ancillary or principal supplies)

In Case C-89/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 25 January 2023, received at the Court on 16 February 2023, in the proceedings

Companhia União de Crédito Popular SA

v

Autoridade Tributária e Aduaneira,

THE COURT (Seventh Chamber),

composed of F. Biltgen, President of the Chamber, N. Wahl and M.L. Arastey Sahún (Rapporteur),
Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Portuguese Government, by P. Barros da Costa, R. Campos Laires and A. Rodrigues, acting as Agents,
- the European Commission, by M. Afonso and M. Herold, 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 Article 135(1)(b) 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 Companhia União de Crédito Popular

SA ('CUCP') and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal) concerning the payment of value added tax (VAT) on transactions relating to the sale by auction of pledged goods in the context of a pawnbroker loan.

Legal context

European Union law

3 Under the second paragraph 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 2(1)(a) and (c) of that directive provides:

'The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

...

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such'.

5 Article 73 of that directive provides:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

6 Article 78 of that directive states:

'The taxable amount shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself;

(b) incidental expenses, such as commission, packing, transport and insurance costs, charged by the supplier to the customer.

For the purposes of point (b) of the first paragraph, Member States may regard expenses covered by a separate agreement as incidental expenses.'

7 Under Article 135(1)(b) of the VAT Directive:

'Member States shall exempt the following transactions:

...

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

Portuguese law

The Civil Code

8 Article 666(1) of the Código Civil (Civil Code) provides:

‘A pledge confers on the creditor the right to payment of his or her claim, together with interest, if any, in preference to other creditors, for the value of a movable asset or for the value of claims or other rights not subject to a mortgage, belonging to the debtor or to a third party.’

9 Under Article 1142 of that code:

‘A loan is a contract whereby one party lends money or another fungible asset to the other party and that other party is obliged to return an asset of the same kind and quality’

10 Article 1150 of that code states:

‘The lender may terminate the contract if the borrower fails to pay the interest due.’

The VAT Code

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

‘The following shall be subject to value added tax:

(a) The supply of goods and of services for consideration within the national territory by a taxable person acting as such.’

12 Article 9(27)(a) and (b) of that code provides:

‘The following shall be exempt from tax:

...

(27) The following transactions:

(a) The granting and the negotiation of credit, in any form, including discount and rediscount transactions, and the administration and management of credit by the person who granted it;

(b) The negotiation and lodging of guarantees, sureties and other guarantees, and the administration and management of credit guarantees by the person who provided them.

13 Article 16 of that code is worded as follows:

‘(1) Without prejudice to paragraphs 2 and 10, the taxable amount in respect of the taxable supply of goods or services shall be equivalent to the value of the consideration received or to be received from the purchaser, the recipient or a third party.

...

(5) The following shall be included in the taxable amount in respect of the taxable supply of goods or services:

- (a) taxes, duties, levies and other charges, excluding the value added tax itself.
- (b) ancillary expenses charged, such as those relating to commissions, packaging, transport, insurances and advertising incurred on behalf of the client.

...'

Decree-Law No 365/99

14 Article 1(2) of Decreto-Lei n.o 365/99, estabelece o regime jurídico do acesso, do exercício e da fiscalização da actividade de prestamista (Decree-Law No 365/99 setting out the rules governing taking-up, exercising and supervising the activity of lending secured by a pledge), of 17 September 1999, in the version applicable to the facts in the main proceedings ('Decree-Law No 365/99'), provides:

'The exercise by a natural or legal person of the activity of providing loans secured by a pledge ['pawnbroking'] shall be regarded as the activity of a lender.'

15 Article 18(1) of that decree-law states:

'The redemption of the pledged goods is subject to the prior payment of the principal, the interest and the legal commissions that are due.'

16 Under Article 20(1) of that decree-law:

'In the event of arrears for a period exceeding three months, the pledged item may be disposed of through a sealed competitive bidding procedure, by auction or by direct sale to entities that, by law, have the right to acquire certain goods'

17 Article 23 of that decree-law provides:

'(1) The sale by auction shall take place on the day and time specified in the sale notices, in the presence of a representative from the civil authority.

(2) The pledged goods shall be allocated to the interested party making the highest bid upon payment of a security for the respective value.

(3) The lack of any proposed security shall cause the goods at issue to be consigned to another sale by auction or by sealed bidding.'

18 Article 25 of Decree Law No 365/99 is worded as follows:

'The sale price shall be increased by 11% in respect of a sales commission payable to the lender.'

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

19 CUCP is a company incorporated under Portuguese law which carries on the activity of a pawnbroker, consisting in the granting of loans guaranteed by movable property. That activity is exempt from VAT under Article 9(27)(a) of the VAT code, relating to the granting and negotiation of credit.

20 When the borrowers do not reclaim the pledged goods or are late by more than three months in reimbursing the amount borrowed or paying the relevant interest, CUCP holds an auction of those goods. In such a situation, it earns a sales commission, on the basis of Article 25

of Decree-Law No 365/99 which is borne by the borrower. The amount of that commission is, in accordance with that provision, equal to 11% of the auction price of the goods.

21 Following a tax inspection relating to the years 2010 and 2011, the Tax and Customs Authority considered, first, that CUCP had not charged VAT on the sales commissions.

22 Secondly, it considered that those commissions did not pay for a supply ancillary to the pawnbroker agreement but rather a transaction that was independent of the granting of that credit and that they could not therefore benefit from the exemption provided for in Article 9(27)(a) of the VAT Code.

23 Accordingly, the Tax and Customs Authority taxed those commissions at the normal rate of VAT and consequently carried out adjustments to the amount of VAT owed by CUCP in respect of the years 2010 and 2011 for amounts of EUR 107 124.33 and EUR 201 419.52 respectively.

24 On 6 May 2013, the Tax and Customs Authority confirmed those adjustments.

25 By decisions of 30 May 2014 and 10 December 2014, the Tax and Customs Authority rejected, respectively, the internal review and the administrative appeal brought by CUCP, on the ground inter alia that the sale by auction of pledged goods did not merely constitute a means of better enjoying the lender's main service, namely pawnbroking, but is an end in itself. That sale, having regard to the case-law established in the judgment of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108), cannot be regarded as being a supply ancillary to that principal supply. In addition, that sale is merely a mechanism for collecting debts from borrowers, enabling a lender to invoke the guarantee given during the conclusion of the pawnbroker agreement, and is not part of that agreement.

26 On 30 April 2015, CUCP brought an action before the Tribunal Administrativo e Fiscal do Porto (Administrative and Tax Court, Oporto, Portugal) which dismissed the action. Subsequently, that company brought an appeal before the referring court, the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal).

27 Before that court, first, CUCP claims that the organisation of the sale by auction cannot be dissociated from the pawnbroker loan, the grant of which is exempt from VAT. Secondly, it claims that the sales commission, the rate of which is set by the legislature, is not the consideration for a supply of services but has the nature of a fee.

28 The referring court observes from the outset that the sales commission provided for in Article 25 of Decree-Law No 365/99 is intended to compensate the lender for the organisation and completion of the sales of the pledged goods for which it is responsible. The referring court states, consequently, that that sales commission, which is not consideration for a public service, is not in the nature of a fee.

29 As regards the issue of whether the sale by auction is ancillary to a pawnbroker agreement, that court considers, having regard to the case-law resulting from the judgment of 4 March 2021, *Frenetikexito* (C-581/19, EU:C:2021:167), that sales by auction of pledged goods do not form part of the services of granting credit and do not therefore form a single transaction with those services.

30 The service of granting credit can be guaranteed without any limitation even if a third party were responsible for the sale of the pledged goods. In addition, the pledge contract will depend neither substantively nor procedurally on the entity that sells the pledged goods in the event of the failure to perform that contract.

31 The referring court states, however, that in view of the fact that the national legislation regulates the sale by auction of pledged goods and makes the lender responsible for organising that sale, it is possible that that activity may be characterised as a supply that is ancillary to the granting of a pawnbroker loan.

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

‘For the purposes of determining whether the 11% commission [that Article 25 of Decree-Law No 365/99] allots to the lender for the sale of pledged goods is eligible for the exemption provided for in Article 135(1)(b) of the [VAT Directive] (corresponding to Article 9(27)(a) of the [VAT Code]), can the sale of the pledged goods (Article 19 et seq. of Decree-Law [No 365/99]), where the borrower fails to pay in accordance with the legal conditions, be regarded as an ancillary service to the services provided by the lender (activity of lending secured by a pledge)?’

Consideration of the question referred

33 By its single question, the referring court asks, in essence, whether Article 135(1)(b) of the VAT Directive must be interpreted as meaning that the supplies relating to the organisation of a sale by auction of goods provided as a pledge are ancillary to the principal supplies relating to the granting of credit secured by a pledge, for the purposes of that provision, so that they share the tax treatment of those principal supplies in relation to VAT.

34 According to settled case-law, where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which that transaction takes place in order to determine whether the transaction gives rise, for the purposes of VAT, to two or more distinct supplies or to one single supply (see, to that effect, judgment of 20 April 2023, *Dyrektor Krajowej Informacji Skarbowej*, C?282/22, EU:C:2023:312, paragraph 27 and the case-law cited).

35 In particular, while it follows from the second subparagraph of Article 1(2) of the VAT Directive that each transaction must normally be regarded as distinct and independent, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system. There is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (judgment of 20 April 2023, *Dyrektor Krajowej Informacji Skarbowej*, C?282/22, EU:C:2023:312, paragraph 28 and the case-law cited).

36 Moreover, in certain circumstances, several formally distinct supplies, which could be provided separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent (judgment of 20 April 2023, *Dyrektor Krajowej Informacji Skarbowej*, C?282/22, EU:C:2023:312, paragraph 29 and the case-law cited).

37 That is the case where, inter alia, one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as one or more ancillary supplies which share the tax treatment of the principal supply. In that respect, a criterion to be taken into consideration is the absence of a distinct purpose of the supply from the perspective of the average consumer. Thus, a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied (see, to that effect, judgments of 20 April 2023, *Dyrektor Krajowej Informacji Skarbowej*, C?282/22, EU:C:2023:312, paragraph 30, and of 5 October 2023, *Deco Proteste – Editores*,

C?505/22, EU:C:2023:731, paragraph 23 and the case-law cited).

38 In the context of the cooperation established by Article 267 TFEU, it is for the national courts to determine whether, in the circumstances of the particular case, the supply concerned constitutes a single supply and to make all definitive findings of fact in that regard (judgment of 20 April 2023, *Dyrektor Krajowej Informacji Skarbowej*, C?282/22, EU:C:2023:312, paragraph 31 and the case-law cited). However, it is for the Court to provide the national courts with all the guidance as to the interpretation of European Union law which may be of assistance in adjudicating on the case pending before them (judgment of 17 December 2020, *FRANCK*, C?801/19, EU:C:2020:1049, paragraph 27 and the case-law cited).

39 The case in the main proceedings concerns the sale by auction of pledged goods in the context of a pawnbroker loan, where the borrower concerned does not meet his or her obligations under the loan agreement within a period of more than three months. The referring court considers that the supplies relating to the granting of loans guaranteed by movable goods that are pledged are covered by the wording ‘the granting and the negotiation of credit’, within the meaning of Article 135(1)(b) of the VAT Directive. Even if it considers that, in the case in the main proceedings, supplies relating to the organising of the sale by auction of pledged goods cannot be considered to be supplies that are inseparable from the supply of granting pawnbroker loans in the context of which those goods serve as collateral and that they do not therefore form a single transaction with those loans for the purposes of VAT, that court has doubts in that regard since the national legislation provides that the organising of the sale by auction of pledged goods is the responsibility of the lender.

40 As regards Article 135(1)(b) of the VAT Directive, it must be stated that the granting of credit, within the meaning of that provision, consists, inter alia, in the provision of capital against remuneration (judgment of 6 October 2022, *O. Fundusz Inwestycyjny Zamkni?ty reprezentowany przez O*, C?250/21, EU:C:2022:757, paragraph 33 and the case-law cited).

41 In particular, the expression ‘the granting and the negotiating of credit’ in that provision must be interpreted broadly so that its scope cannot be limited to loans and credits granted by banking and financial institutions only (judgment of 17 December 2020, *FRANCK*, C?801/19, EU:C:2020:1049, paragraph 35 and the case-law cited).

42 In that regard, it follows from the case-law that, although remuneration for making capital available in the context of granting credit is, as a rule, ensured through the payment of interest, other forms of consideration cannot prevent a transaction from being classified as the granting of credit within the meaning of Article 135(1)(b) of the VAT Directive. The Court has already held that the advance financing of the purchase of goods in return for an increase in the amount reimbursed by the beneficiary of that financing constitutes a financial transaction similar to the granting of credit and therefore, exempt from VAT under that provision (judgment of 6 October 2022, *O. Fundusz Inwestycyjny Zamkni?ty reprezentowany przez O*, C?250/21, EU:C:2022:757, paragraph 34 and the case-law cited).

43 It should, however, be borne in mind, in that regard, that the terms used to specify the exemptions provided for in Article 135(1) of the VAT Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (judgment of 6 October 2022, *O. Fundusz Inwestycyjny Zamkni?ty reprezentowany przez O*, C?250/21, EU:C:2022:757, paragraph 31 and the case-law cited).

44 In that regard, and without prejudice to the task of the referring court to make definitive assessments in accordance with the case-law in paragraph 38 of the present judgment, it appears

that the sale by auction of pledged goods, after a period of three months has elapsed during which the borrower has not met his or her contractual obligations, on the one hand, and the granting of the pawnbroker loan, on the other, constitute distinct and independent supplies under Article 135(1)(b) of the VAT Directive.

45 First, those supplies do not depend either substantively or procedurally on one another. It is apparent from the case file before the Court that the supply consisting in the granting of credit may be provided in the same manner if the sale by auction of the pledged goods at issue in the main proceedings were organised and carried out by a third party.

46 Secondly, the sale by auction of pledged goods cannot be considered, as stated by the European Commission in its written observations, as amounting to the usual outcome of granting a pawnbroker loan. On the contrary, that sale is only made in a situation where the borrower fails to fulfil his or her obligations under the pawnbroker agreement. Furthermore, it is also apparent from the case file before the Court that the borrower is able, up to the moment of the auction, to pay the principal sum and the relevant interest in order to recover the pledged goods. Accordingly, the sale by auction at issue in the main proceedings cannot be regarded as being inseparable from the granting of the pawnbroker loan.

47 Thirdly, it appears that the sale by auction of pledged goods has a distinct purpose compared to the granting of a pawnbroker loan. It is true that reserving the right for the lender to enforce the guarantee through the forced sale of the pledged goods, to recover the principal and the relevant interest, is covered by the very nature of the pawnbroker agreement. However, that fact cannot be interpreted as meaning that the sale by auction is ancillary to the granting of the pawnbroker loan. Although that sale refers to the payment of the principal and the interest pertaining to that loan, it is apparent from the case file before the Court that, in accordance with the case-law cited in paragraph 37 of the present judgment, it constitutes not merely the means of better enjoying the supply relating to the granting of that loan, but an end in itself.

48 Fourthly, such an assessment of the distinct and independent nature of the supplies relating to the organisation of the sale by auction of pledged goods is consistent with the requirement to interpret strictly, the terms used to specify the exemptions provided for in Article 135(1) of the VAT Directive, as is apparent from paragraph 43 of the present judgment.

49 Fifthly, such an assessment cannot be called into question by the fact that the organisation of the sale by auction in the event of default by the borrower for more than three months and the granting to the lender of a sales commission for an amount equal to 11% of the auction price of the goods are, respectively, provided for in Article 20(1) and in Article 25 of Decree-Law No 365/99. It appears, subject to verification by the referring court, that that commission is not the consideration, in the form of a fee, for a public service, but is intended only to compensate the lender for organising and completing the sale by auction of pledged goods.

50 In the light of the foregoing, the answer to the question raised is that Article 135(1)(b) of the VAT Directive must be interpreted as meaning that supplies relating to the organisation of sales by auction of goods provided as a pledge are not ancillary to the principal supplies relating to the granting of credit secured by a pledge, for the purposes of that provision, so that they do not share the tax treatment of those principal supplies in relation to VAT.

Costs

51 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 (Seventh Chamber) hereby rules:

Article 135(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

must be interpreted as meaning that supplies relating to the organisation of sales by auction of goods provided as a pledge are not ancillary to the principal supplies relating to the granting of credit secured by a pledge, for the purposes of that provision, so that they do not share the tax treatment of those principal supplies in relation to value added tax.

[Signatures]

* Language of the case: Portuguese.