

ORDER OF THE COURT (Eighth Chamber)

February 26, 2020 ([*](#))

'Reference for a preliminary ruling - Taxation - Value added tax (VAT) - Deduction of input tax - Directive 2006/112 / EC - Articles 168 and 176 - Exclusion of the right to deduct - Purchase of food services - Standstill clause - Accession to the European Union »

In Case C - 630/19,

REFERENCE for a preliminary ruling from the Tax Arbitral Tribunal (Centro de Arbitragem Administrativa - CAAD) (Portugal), pursuant to Article 267 TFEU (Portugal), made by decision of 7 August 2019, received at the Court of Justice on August 23, 2019, in the process

PAGE International Lda

against

Tributary and customs authority,

THE COURT (Eighth Chamber),

composed of L. S. Rossi (Rapporteur), President of the Chamber, F. Biltgen and N. Wahl, Judges,

Advocate General: G. Hogan,

secretary: A. Calot Escobar,

having regard to the decision taken, after hearing the Advocate General, to decide by reasoned order, in accordance with Article 99 of the Rules of Procedure of the Court of Justice,

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- 1 The reference for a preliminary ruling concerns the interpretation of Article 168 (a) and Article 176 of Council Directive 2006/112 / EC of 28 November 2006 on the common system of tax on added value (OJ 2006 L 347, p. 1; hereinafter 'the VAT Directive').
- 2 This request was made in the context of a dispute between PAGE International Lda (hereinafter "PAGE") and the Tax and Customs Authority (Portugal) regarding the assessment of value added tax (VAT) relating to food and of *catering* during the supply of services rendered by the company.

Legal framework

Union law

- 3 Article 168 (a) of the VAT Directive provides:

'When goods and services are used for the purpose of their taxed transactions, the taxable person is entitled, in the Member State in which he carries out those transactions, to deduct the following amounts from the amount of tax owed:

(a) VAT due or paid in that Member State in relation to the goods that have been or will be delivered to it and in relation to the services that have been or will be provided to it by another taxable person

4 Article 176 of that directive provides:

'The Council, acting unanimously on a proposal from the Commission, determines which expenditure does not entitle the right to deduct VAT. In any case, expenses that are not strictly professional in nature, such as sumptuous, recreational or representation expenses, are excluded from the right to deduct.

Until the entry into force of the provisions referred to in the first subparagraph, Member States may maintain all exclusions provided for in their national legislation on 1 January 1979 or, in the case of Member States which acceded to the Community after that date, on the date of their accession. '

Portuguese law

5 The Value Added Tax Code, approved by Decree-Law No. 394-B / 84, of December 26, 1984, as amended by Law No. 57/2005, of December 13, 2005 (a ('VAT Code'), provides, in Article 21 (1) (d):

"1. However, the tax contained in the following expenses is excluded from the right to deduct:

[...]

d) Expenses related to accommodation, food, beverages and tobacco and reception expenses, including those related to the reception of people outside the company and expenses related to buildings or parts of buildings and their equipment, mainly intended for such receptions ».

6 Article 21 (2) (d) of the VAT Code provides:

"2. However, there is no exclusion of the right to deduct in the following cases:

[...]

d) Expenses mentioned in subparagraphs c) and d), with the exception of tobacco, both from the previous number, made for the direct needs of the participants, related to the organization of congresses, fairs, exhibitions, seminars, conferences and the like, when they result from contracts concluded directly with the service provider or through entities legally qualified for the purpose and proven to contribute to the carrying out of taxable transactions, the tax of which is 50% deductible ».

The dispute in the main proceedings and the question referred

7 PAGE is a private limited company whose professional activity consists of providing "support services" to companies, in order to promote their products and their brands. For this purpose, it produces films, videos and television programs for which it purchases goods and services of a differentiated nature, assuming their integration and functional coordination. This single provision of services is called *handling*.

8 PAGE integrates *catering* services in *handling*, to respond to the participants' food needs when filming their promotional films, namely.

9 These *catering* services are provided by a third party to PAGE, which then bills them to its customers. These invoices mention the provision of a single service called "film production / filming service", which integrates the referred *catering* services.

10 In the periodic statement it submitted for the period 2016-10, PAGE requested the refund of a VAT credit of an amount of 83 561.49 euros, as food expenses incurred and which it considers directly related to the financial year professional activity. As PAGE did not present any document to justify its

request, contrary to what was requested, PAGE was the subject of an inspection action as a result of which the Tax and Customs Authority considered that it had unduly deducted, in relation to various periods, VAT concerning the acquisition of food services. For this reason, for periods prior to the 2016-10 period, this authority issued additional VAT assessments and compensatory interest assessments. For the latter period, reduced the amount of the requested VAT credit to EUR 80 056.29. As a result, the sum of EUR 62 536.48 was charged to the plaintiff in the main proceedings.

- 11 On November 15, 2017, PAGE filed a gracious complaint with the Lisbon Finance Service (Portugal) against the conclusions of the tax inspection report.
- 12 Since that claim was dismissed, the plaintiff in the main proceedings lodged an application for an arbitration decision with the referring court with a view to declaring the illegality of the refusal to refund VAT which was opposed to it and, consequently, of the amounts wrongly imposed on it. charged.
- 13 According to the plaintiff in the main proceedings, the expenses incurred with feeding the participants in the filming of promotional films which it sells to its customers are not covered by the exclusion of the right to deduct VAT, provided for in Article 21 (1). point (d) of the VAT Code. It considers that these expenses should be regarded as expenses falling within the scope of Article 21 (2) (d) of that code and benefit, in that respect, from a 50% VAT deduction. In effect, under the latter provision, there is no exclusion of the right to deduct VAT contained, in this case, in food expenses, when these expenses are incurred by a taxable person acting in his own name, but on behalf of a third party, *catering* .
- 14 In response, the Portuguese Tax and Customs Authority contends that, under Article 21 (2) (d) of the VAT Code, the right to deduct is not excluded when the billing of these expenses is carried out in a detailed and autonomous manner in relation to the *handling* service that the company provides, which did not happen with all invoices issued by the plaintiff in the main proceedings. In effect, this rule aims to avoid tax evasion and avoidance resulting from the deduction of VAT included in expenses related to goods and services which, due to their nature and characteristics, are likely to be used for purposes other than a taxable activity.
- 15 The referring court states that Article 21 of the VAT Code concerns expenditure excluded from the right to deduct VAT and that this article was amended after the accession of the Portuguese Republic to the European Communities, with a view to allowing, until a certain percentage, the deduction of VAT on certain expenses, such as the food costs at issue in the main proceedings. However, it has doubts as to whether Article 21 of the VAT Code complies with Union law, in particular in the light of the VAT Directive and the principles of tax neutrality and proportionality.
- 16 Since the Union legislature did not determine the expenditure which entitles the right to deduct, it wonders, inter alia, whether, in the light of those provisions, a national legislature may refuse or limit the right of a taxable person to deduct all VAT which covers food expenses related to the organization of events, such as filming promotional films, when that taxable person can prove that these expenses were fully allocated to the exercise of his professional activity.
- 17 In these circumstances, the Tax Arbitral Tribunal (Centro de Arbitragem Administrativa - CAAD) (Portugal) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

«The correct interpretation of Article 168 (a) and Article 176 of the [VAT Directive] and the principles of VAT neutrality and proportionality, allow the Portuguese legislature, in paragraph 1 d) and in paragraph d) of paragraph 2 of article 21 of the [VAT Code], limit the right to deduct VAT incurred with food expenses to 50%, even if the taxable person proves that all such expenses has it fully affected the exercise of its taxed economic activity? »

The question referred

- 18 Under Article 99 of its Rules of Procedure, when the answer to a question referred for a preliminary ruling can be clearly inferred from the case-law, the Court of Justice may, at any time, on a proposal from the Judge-Rapporteur, after hearing the Advocate General, decide to give its opinion by reasoned order.
- 19 That provision must be applied in the present case.
- 20 The referring court asks the Court, in substance, whether Article 168 (a) and Article 176 of the VAT Directive are to be interpreted as precluding national legislation such as which is at issue in the main proceedings, which, after the accession of the Member State concerned to the European Union, reduces the scope of expenditure excluded from the right to deduct VAT, authorizing, under certain conditions, a partial deduction of VAT on such taxes expenses, among which, namely, those related to food, even if the taxable person proves that these expenses were fully allocated to the exercise of his taxable economic activity.
- 21 In this regard, it should be borne in mind, first of all, that, according to settled case-law, the right to deduct provided for in Article 168 (a) of the VAT Directive forms an integral part of the VAT mechanism and cannot, in principle, be limited. It is immediately exercised in relation to the total VAT that has encumbered the operations carried out upstream (see, in particular, Judgment of May 2, 2019, *Grupa Lotos*, C - 225/18, EU: C: 2019: 349, n. 25 and case law referred to).
- 22 The system of deductions seeks, in effect, to relieve the entrepreneur entirely of the burden of VAT due or paid in the context of all his economic activities. The common VAT system thus ensures neutrality in the tax burden of all economic activities, regardless of the respective purposes or results, provided that these activities are themselves, in principle, subject to VAT (Judgment of 2 May 2019, *Grupa Lotos*, C - 225/18, EU: C: 2019: 349, paragraph 26 and cited case law).
- 23 It follows that, to the extent that the taxable person, acting in that capacity on the date on which he purchases a good or service, uses that good or service for the needs of his taxed transactions, is authorized to deduct the VAT due or paid in relation to said good or service (Judgment of May 2, 2019, *Grupa Lotos*, C - 225/18, EU: C: 2019: 349, paragraph 27 and case law referred to).
- 24 Secondly, it is also apparent from the case-law that derogations from the right to deduct VAT are permitted only in the cases expressly provided for in the provisions of the directives governing that tax (Judgment of 2 May 2019, *Grupa Lotos*, C - 225/18, EU: C: 2019: 349, paragraph 28 and cited case law).
- 25 Among those derogations is the second paragraph of Article 176 of the VAT Directive, which is identical in substance to the second paragraph of Article 17 (6) of the Sixth Council Directive 77/388 / EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform tax base (OJ 1977, L 145, p. 1; EE 09 F1 p. 54 ; hereinafter 'the Sixth Directive'), the adoption of which had no impact on the case law concerning the interpretation of the latter provision (Judgment of 2 May 2019, *Grupa Lotos*, C - 225/18, EU: C: 2019: 349, n 29 and the case - law cited).
- 26 Like the second subparagraph of Article 17 (6) of the sixth Directive that preceded it, the second subparagraph of Article 176 of the VAT Directive contains a *standstill clause* which provides, in particular, for States which join the Union, the maintenance of national exclusions to the right to deduct VAT, which were applicable before the date of their accession, until the Council adopts the provisions provided for in the first paragraph of that Article 176, which, to date, the Council has not yet done so (Judgment of May 2, 2019, *Grupa Lotos*, C - 225/18, EU: C: 2019: 349, paragraph 30 and the case law referred to).
- 27 Thirdly, the residual competence of the Member States to maintain national exclusions from the right to deduct VAT, under the second paragraph of Article 176 of the VAT Directive, is, however, not absolute. It was in this sense that the Court of Justice held that the *standstill clause* is not intended to allow a new Member State to change its domestic legislation upon accession to the Union, the effect of which is to extend the scope of existing exclusions, in a sense that move this legislation away from the

objectives of the VAT Directive, which would be contrary to the very spirit of that clause (Judgment of 2 May 2019, Grupa Lotos, C - 225/18, EU: C: 2019: 349, paragraph 31 and case law referred to).

28 The situation will already be different, as the Court of Justice has also stated with regard to the interpretation of the second subparagraph of Article 17 (6) of the Sixth Directive, when, after the entry into force of that directive, the rules a Member State reduces the scope of the existing exclusions, thereby approaching the objective of that Directive. In that situation, the Court of Justice has admitted that that regulation is covered by the derogation provided for in the second subparagraph of Article 17 (6) of the Sixth Directive (see, to that effect, in particular, Judgments of 14 June 2001, Commission / France, C - 345/99, EU: C: 2001: 334, paragraph 22, and of 15 April 2010, X Holding and Oracle Nederland, C - 538/08 and C - 33/09, EU : C: 2010: 192, No. 67).

29 In accordance with what was recalled in paragraph 25 in the present order, since the case-law on the interpretation of the second subparagraph of Article 17 (6) of the Sixth Directive is relevant to the interpretation of Article 176 According to the second paragraph of the VAT Directive, it is therefore necessary to consider that a regulation of a Member State which reduces the scope of the exclusions that existed on 1 January 1979, or, if that Member State joined the Union after that date, on the date of its accession, is covered by the derogation provided for in that article.

30 On the other hand, it is for the national courts to determine the content of national legislation at the date of accession of the Member State concerned and to ascertain whether that legislation had the effect of extending the scope of the exclusions that existed after accession (see here). sense, Judgment of May 2, 2019, Grupa Lotos, C - 225/18, EU: C: 2019: 349, paragraph 33 and the case law referred to).

31 In the present case, it must first be stated that, in accordance with Article 395 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adaptations to the Treaties (OJ 1985, L 302, p. 23), interpreted in conjunction with annex XXXVI to the same act, the Portuguese Republic, which joined the European Communities on January 1, 1986, could defer until January 1, 1989 the full application of the rules that constitute the common system VAT (Judgment of 8 March 2012, Commission v Portugal, C - 524/10, EU: C: 2012: 129, paragraph 13).

32 Next, it is clear from the documents available to the Court that, at the date of accession of the Portuguese Republic, Article 21 of the VAT Code excluded from the right to deduct the tax paid upstream on the expenses relating to to food and that, following an amendment to that article, in 2005, the right to deduct VAT for this type of expenditure was allowed, under certain conditions, up to a limit of 50%.

33 It thus appears, subject to verification by the referring court, that, following the amendment to Article 21 of the VAT Code, expenditure which was totally excluded from the right to deduct VAT has now, in certain cases, conditions, a right to partial deduction of this tax. Consequently, this amendment, which reduces the scope of expenditure excluded from this right at the date of the Portuguese Republic's accession to the Union, is covered by the *standstill clause* provided for in the second paragraph of Article 176 of the VAT Directive (see, by analogy) , Judgment of 14 June 2001, Commission / France, C-345/99, EU: C: 2001: 334, n. ^{the} 23 and 24).

34 Finally, it is also necessary to assess, in accordance with case-law, whether the national legislation in question provides sufficiently precisely the nature and object of the goods or services for which the right to deduct VAT is excluded in order to ensure that the option granted to Member States does not serve to provide for general exclusions from that regime (Judgment of 2 May 2019, Grupa Lotos, C - 225/18, EU: C: 2019: 349, paragraph 40 and case law referred to).

35 In this regard, it should be noted that, in its judgment of 15 April 2010, X Holding and Oracle ^{the} Nederland (C-538/08 and C-33/09, EU: C: 2010: 192, n 50s and 51), the Court found that categories of expenditure relating to the provision of meals and drinks to taxable persons' staff as well as the provision of accommodation were defined in a sufficiently precise manner, so that the exclusion

from the right of deduction, provided for by national law at issue in that case, fell within the scope of the *standstill clause* .

- 36 Furthermore, in the judgment of 2 May 2019, Grupa Lotos (C - 225/18, EU: C: 2019: 349, paragraph 42), the Court also held that the category of expenditure relating to 'accommodation and catering services', insofar as it concerns the nature of the aforementioned services, was defined sufficiently precisely from the perspective of the requirements established by case law.
- 37 As the Court of Justice stated in its judgment of 2 May 2019, Grupa Lotos (C - 225/18, EU: C: 2019: 349), in the main proceedings, the category of expenditure relating to food provided for in Article 21 (1) (d) and (2) (d) of the VAT Code appears to be defined in a sufficiently precise manner from the point of view of the requirements established by case-law.
- 38 On the other hand, it must be borne in mind that the circumstance, mentioned by the referring court, that the expenses incurred by the taxable person may be exclusively allocated to the exercise of his professional activities does not affect the scope of the *standstill clause* provided for in Article 176, second paragraph of the VAT Directive. Indeed, in view of the wording and genesis of that article, this clause authorizes Member States to exclude from the right to deduct VAT categories of expenditure which are strictly professional in nature, when the latter are defined in a sufficiently precise manner, within the meaning of law cited in paragraph 34 of this order (see, to this effect, on May 2 , 2019 ^{the} Grupa Lotos, C-225/18 I:.. C: 2019:.. 349, n 47 and 48).
- 39 In view of the foregoing considerations, it is necessary to answer the question submitted that Article 168 (a) and Article 176 of the VAT Directive must be interpreted as meaning that they do not preclude national legislation which, after the accession of the Member State concerned to the Union, it reduces the scope of expenditure excluded from the right to deduct VAT, authorizing, under certain conditions, a partial deduction of VAT on such costs, including, in particular, those relating to food, even if the taxable person proves that these expenses were fully allocated to the exercise of his taxable economic activity.

Costs

- 40 As the case is concerned, as regards the parties to the main proceedings, the nature of an incident raised before the referring court, it is for the latter to decide on the costs.

On those grounds, the Court (Eighth Chamber) declares:

Article 168 (a) and Article 176 of Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that does not preclude national legislation which, after the accession of the State - the Member State concerned to the European Union reduces the scope of excluded from the right expenses to deduct value-added tax by authorizing, under certain conditions, a partial deduction of value added tax on such expenses, among which, namely, those related to food, even if the taxable person proves that these expenses were fully allocated to the exercise of his taxable economic activity.

Done at Luxembourg, on the 26th of February 2020.

The Secretary

The President of the Eighth
Section

A. Calot Escobar

L. S. Rossi

* Language of the case: Portuguese.