

## Portuguese Supreme Administrative Court clarifies law on VAT and real estate development

Andreia Pereira de Morais Leitao analyses the findings of the judiciary in a recent real estate case which called for clearer interpretation of the Portuguese VAT code against EU law.



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By Andreia Gabriel Pereira

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The case pitted the Portuguese VAT code against EU law



The judgment by the Portuguese Supreme Administrative Court dated May 20 2020 and issued in an exceptional review appeal (Case No. 01687/13) clarifies that the real estate development activity does not, in itself, constitute an exempt activity under Article 9 (30)(31) of the Portuguese VAT Code.

The judgment draws reference to the time of the facts and the VAT exemptions applicable to the supply of immovable property and the leasing of immovable property. Nonetheless, the court also explained that such activity may involve carrying out transactions that fall under the mentioned exemptions. The real estate development activity is defined as the “construction or reconstruction of buildings”.

In 2015, the court had accepted this exceptional appeal based on the fact that determining if the real estate development activity was an activity exempt from VAT, according to the Portuguese VAT Code rules, raised legal difficulties, involving the interpretation of Portuguese national law (VAT Code) and EU law (the Sixth Directive at the time of the facts). Hence the court considered this to be a sensitive issue, which could be raised in future situations and for which there was no clearly applicable Supreme Administrative Court case law.

However in May 2020, the court stated that the real estate development activity involves the gathering of legal, financial and technical means in order to carry out the construction of buildings and is not, in itself, exempt from VAT. It further considered that since the appellant’s activity includes the purchase, sale and lease of real estate and not only real estate development, the judgment under appeal, according to which the appellant’s activity was formed by operations exempt from VAT, should be confirmed.

The appellant had also argued to be irrelevant the fate given in the future to the buildings subject to real estate development, since the activities provided for in Article 9 of the Portuguese VAT Code (exempt activities) cannot be sporadic or hypothetical but have to be actual activities of the taxable person.

In this context, the court states it is necessary to determine whether, according to the provisions of Article 22 (1) of the Portuguese VAT Code, it is at the moment when the invoices are received that the possibility of exercising the right to deduct arises. Likewise, it also mentions whether the fact that at the time the VAT deduction regarding the building construction the taxable person had not yet concluded any lease, or carried out any supply of immovable property, should mean he did not exercise any exempt activity under the terms of Article 9 of the Portuguese VAT Code.

The court began by clarifying that, as a rule, the right to deduct VAT arises when the deductible tax becomes chargeable. This is the rule that results from Article 22 (1) of the Portuguese VAT Code. Consequently, as the European Court of Justice (ECJ) has sustained, only the quality in which the individual acts at that moment should influence the right to deduct (see Case C-672/16).

However, the right to deduct may not always be exercised at that time. The court explained this to be the situation under scrutiny, as the waiver of VAT exemption by taxable persons who dedicate themselves to the lease and supply of immovable property, and therefore the VAT deduction, depends on the obtention of an official model declaration. Moreover, it requires an issuance of a certificate by the Portuguese tax authorities, which will be exhibit when the lease agreement is signed or the deed of transmission is executed.

This being said, the Supreme Administrative Court concluded that the destination that may be given, in the future, to properties subject to real estate development is not irrelevant, since the exemptions provided for in Article 9 (30)(31) of the Portuguese VAT Code depend upon the nature of the activity actually carried out.

In the present case, it was evident to the court that the appellant’s activity involved transactions exempt from VAT, namely the purchase, sale and lease of immovable property. Thus, the right to deduct was excluded, as the case involved more than just real estate development and no waiver of mentioned exemption had been obtained.

Finally, the Portuguese Supreme Administrative Court considers that the issues at stake do not give rise to doubts about the interpretation of European Union law, or about the position adopted falling under the ECJ’s case law, so there is not any necessity for a preliminary ruling request.

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