



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

2 October 2014*

(Reference for a preliminary ruling — Directive 2003/96/EC — Taxation of energy products and electricity — Article 2(4)(b) — Dual use of energy products — Concept)

In Case C-426/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Gerechtshof 's-Hertogenbosch (Netherlands), made by decision of 14 September 2012, received at the Court on 18 September 2012, in the proceedings

X

v

Voorzitter van het managementteam van het onderdeel Belastingdienst-/Z van de rijksbelastingdienst,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Safjan (Rapporteur), J. Malenovský, A. Prechal and K. Jürimäe, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 December 2013,

after considering the observations submitted on behalf of:

- X, by F. Suwandy and W. de Wit, belastingadviseurs,
- the Netherlands Government, by M. Noort, acting as Agent,
- the European Commission, by W. Mölls and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 May 2014,

gives the following

* Language of the case: Dutch.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 2(4)(b) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51), as amended by Council Directive 2004/74/EC of 29 April 2004 (OJ 2004 L 157, p. 87, and corrigendum OJ 2004 L 195, p. 26; ‘Directive 2003/96’).
- 2 The request has been made in proceedings between X, a legal person, and the Voorzitter van het managementteam van het onderdeel Belastingdienst/Z van de rijksbelastingdienst (Head of the management team of the ‘Tax services/Z’ division of the National Tax Administration; ‘the Inspector’) concerning the refund of fuel tax received on coal delivered for the requirements of X’s sugar production activity.

Legal context

EU law

- 3 As provided in recitals 3, 4, 6, 7 and 22 in the preamble to Directive 2003/96:
 - ‘(3) The proper functioning of the internal market and the achievement of the objectives of other Community policies require minimum levels of taxation to be laid down at Community level for most energy products, including electricity, natural gas and coal.
 - (4) Appreciable differences in the national levels of energy taxation applied by Member States could prove detrimental to the proper functioning of the internal market....
 - (6) In accordance with Article 6 of the Treaty, environmental protection requirements must be integrated into the definition and implementation of other [EU] policies.
 - (7) As a party to the United Nations Framework Convention on Climate Change, the [European Union] has ratified the Kyoto Protocol [signed at New York on 9 May 1992]. The taxation of energy products and, where appropriate, electricity is one of the instruments available for achieving the Kyoto Protocol objectives.
- ...
- (22) Energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. To that extent, it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy products as well as mineralogical processes. Electricity used in similar ways should be treated on an equal footing.’
- 4 Article 2 of that directive provides:
 - ‘1. For the purposes of this Directive, the term “energy products” shall apply to products:
 - (a) falling within headings ... 1507 to 1518 [of the Combined Nomenclature in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Council Regulation (EC) No 254/2000 of 31 January 2000 (OJ 2000 L 28, p. 16; ‘the CN’)], if these are intended for use as heating fuel or motor fuel;

(b) falling within CN codes 2701, 2702 and 2704 to 2715;

...

3. When intended for use, offered for sale or used as motor fuel or heating fuel, energy products other than those for which a level of taxation is specified in this Directive shall be taxed according to use, at the rate for the equivalent heating fuel or motor fuel.

In addition to the taxable products listed in paragraph 1, any product intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels, shall be taxed at the rate for the equivalent motor fuel.

In addition to the taxable products listed in paragraph 1, any other hydrocarbon, except for peat, intended for use, offered for sale or used for heating purposes shall be taxed at the rate for the equivalent energy product.

4. This Directive shall not apply to:

(a) output taxation of heat and the taxation of products falling within CN codes 4401 and 4402;

(b) the following uses of energy products and electricity:

- energy products used for purposes other than as motor fuels or as heating fuels,
- dual use of energy products
- An energy product has a dual use when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel. The use of energy products for chemical reduction and in electrolytic and metallurgical processes shall be regarded as dual use,
- electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes,

...'

Netherlands law

- 5 Article 20 of the Law introducing taxes for the protection of the environment (*Wet belastingen op milieugrondslag*) of 23 December 1994 (Stb. 1994, No 923), in the version applicable to the facts of the main proceedings, most recently amended by the Law amending certain laws on taxation and certain other laws (*Wet houdende wijziging van enkele belastingwetten en enige andere wetten*), of 14 December 2006 (Stb. No 682; 'the Wbm'), provided:

For the application of this chapter and the provisions which are based upon it, the following definitions apply:

a. coal: products falling within CN codes 2701, 2702 and 2704;

...

e. dual use: the use of coal both as heating fuel and for purposes other than as motor fuel or heating fuel.'

6 Article 21 of the Wbm was worded as follows:

‘Article 21

1. The name “fuel tax” shall refer to a tax levied on coal.
2. The tax shall be levied in respect of the delivery or the use of coal.

...’

7 Article 26(3) of the Wbm provided:

‘A tax exemption shall be applied in respect of the dual use of coal.’

8 Article 27 of the Wbm provided:

‘1. Users of coal delivered to them by third parties for purposes other than as fuel or for dual use, shall, at their request, be granted a tax refund by the Inspector.

...

3. The Inspector shall make a ruling on the request referred to in the first and second paragraphs by means of a decision which is open to appeal.

...’

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

9 X produces sugar and products containing sugar from sugar beet for the industrial and consumer markets. The production process gives rise to by-products such as animal feed and earth foam (lime fertiliser).

10 During the period at issue in the main proceedings, coal was delivered to X to be used in its sugar production process.

The production process

11 The first step in the process of producing sugar from sugar beet involves the extraction of raw juice from the sugar beet. Next, the raw juice is purified, and then the thin juice obtained from the purification process is subject to evaporation and crystallisation which finally results in granulated sugar. That process also gives rise to a precipitate, a lime fertiliser by-product, which is used in the agricultural industry for maintaining the pH balance in soil. The precipitate is known as ‘earth foam’ and consists mainly of calcium carbonate.

12 In order to purify the raw juice extracted from sugar beet the sugar processor requires lime-kiln gas. To obtain that, gas limestone and coal are premixed and fed into a lime-kiln, in which there is a chemical reaction. That chemical reaction creates, firstly, quicklime and carbon dioxide, the latter being the product of a reaction between coal and/or anthracite and oxygen, then lime-kiln gas. The lime-kiln gas contains approximately 40% carbon dioxide. It must be free from impurities. Fuels other than anthracite or coal are not suitable for the production of the ‘pure’ lime-kiln gas required for the purification process.

- 13 Approximately 12% of the lime-kiln gas produced in the lime kiln is discharged into the air. The remainder (88%) is used in the carbonatations. After the lime-kiln gas has been used in the carbonatations, part of the lime-kiln gas is blown off. The remainder of the carbon dioxide generated in the lime kiln, amounting to 66%, is absorbed by the earth foam.
- 14 The earth foam obtained during sugar production is sold by X to the agricultural sector as a lime fertiliser for the pH maintenance, pH improvement and structural improvement of agricultural land.

The claim for a refund

- 15 By letter of 7 March 2008, X requested a refund of an amount of EUR 97 114.23 in respect of fuel tax for the period from 1 October 2007 to 31 December 2007. By a decision of 24 April 2008, the Inspector refused the refund. He also rejected the claim brought by X against that decision.
- 16 The action brought against that decision having been declared unfounded by the court at first instance, X appealed against that judgment before the referring court.
- 17 X argues that the concept of ‘dual use’ in Article 20(e) of the Wbm must be interpreted in accordance with the concept of dual use as referred to in Article 2(4)(b) of Directive 2003/96. In accordance with that interpretation, the use of coal in the sugar production process which X carries out constitutes such dual use. X also points out that comparable producers in, inter alia, Belgium, Germany, France and the United Kingdom are not subject to the tax provided for in that directive.
- 18 In the view of the Inspector, the coal was used only by X only as fuel. The useful application of a product of the combustion of the coal (carbon dioxide) does not constitute dual use of that coal. He also submits that if the view were to be taken that such use of coal constitutes dual use thereof within the meaning of Directive 2003/96, that would not be the case under the Wbm. The national legislature was thus at liberty to interpret the concept of dual use in Article 20(e) of the Wbm differently, in the event more strictly, than the interpretation given to that concept by the EU legislature in Article 2(4)(b) of Directive 2003/96.
- 19 The referring court observes in that regard that if it were to have to apply, in the case before it, the concept of ‘dual use’ within the meaning of Directive 2003/96, a literal reading of the opening words of Article 2(4) of the directive leads to the incongruous result that X would be unable to rely on the direct effect of the directive in order to defend itself against the Inspector’s contention that in the present case there is no dual use within the meaning of Article 20(e) of the Wbm.
- 20 In those circumstances the *Gerechtshof ’s-Hertogenbosch* decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:
- ‘1. Is there dual use within the meaning of Article 2(4)(b) of Directive [2003/96] in the case where coal (products within the CN codes 2701, 2702 and 2704) is used as heating fuel in a lime kiln, while the carbon dioxide generated in that lime kiln from the coal (and limestone) is used for the production of lime-kiln gas, which is subsequently used in, and is indispensable for, the purification of the raw juice obtained from sugar beet?
 2. Is there dual use within the meaning of Article 2(4)(b) of Directive [2003/96] in the case where coal (products within the CN codes 2701, 2702 and 2704) is used as heating fuel, while 66% of the carbon dioxide generated during the heating and taken up by the lime-kiln gas is absorbed, during the subsequent purification referred to above, by earth foam, which is sold as lime fertiliser to the agricultural sector?

3. In the event that there is dual use within the meaning of Article 2(4)(b) of Directive [2003/96]: having regard to the text of the opening words of Article 2(4) of Directive 2003/96/EC, is that directive not applicable, with the result that the appellant cannot rely (for the interpretation in national legislation of the concept of dual use as referred to in Article 20(e) of the Wbm) on the direct effect of that directive?
4. In the event that there is dual use within the meaning of Article 2(4)(b) of Directive [2003/96] and the latter is (consequently) inapplicable: in the case of the levying of a tax such as the present fuel tax, does EU law preclude a more restrictive interpretation of the concept of dual use under domestic law as compared with an interpretation in accordance with Directive [2003/96]?

Consideration of the questions referred

The first and second questions

- 21 By its first and second questions, which it is appropriate to consider together, the referring court wishes to know, in essence, whether, when coal is used as heating fuel in the sugar production process and the carbon dioxide generated by the combustion of that energy product is in turn used for the purposes of that production process and/or to produce chemical fertiliser, there is 'dual use' within the meaning of Article 2(4)(b) of Directive 2003/96.
- 22 There is a definition of dual use of energy products in the second indent of Article 2(4)(b) of Directive 2003/96. An energy product has a dual use when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel.
- 23 The expression 'for purposes other than as ... heating fuel' is used in both the first and the second indents of Article 2(4)(b) of that directive, so that it must be interpreted in the same way in both provisions. A combined reading of the two first indents of Article 2(4)(b) of Directive 2003/96, in conjunction with the introductory part of that provision, suggests that the use of an energy product is excluded from the scope of the directive only if that product, in its function as an energy source, is itself used other than as heating fuel or motor fuel.
- 24 Thus, there may be dual use of an energy product burned in a manufacturing process where, as is the case in the circumstances of the main proceedings, that process cannot be completed without a substance that can be generated, which is not in dispute, only by the combustion of that energy product.
- 25 Since the energy product in question is thus used as an energy source in that manufacturing process in order to obtain the gas generated exclusively by burning that energy product, it is possible to take the view that two concomitant uses are made of that function as a source of energy.
- 26 However, if, in circumstances such as those in the main proceedings, a gas generated by combustion is not the product required to complete the production process, but a residue of that process which is merely recycled, there is no dual use of the actual energy product. Thus, the mere fact that the gas generated constitutes a primary material in a separate manufacturing process, such as the production of chemical fertilizer, cannot suffice for the view to be taken that there is dual use of the energy product which was burned.

- 27 If the view were to be taken that the mere recycling of a residue of the combustion of an energy product means that there is 'dual use' within the meaning of Article 2(4)(b) of Directive 2003/96, whether or not such an energy product falls within the scope of that directive would depend, in those circumstances, on whether or not a particular producer recycled the residue of the combustion of the energy product concerned.
- 28 Consequently, the answer to the first and second questions is that Article 2(4)(b) of Directive 2003/96 must be interpreted as meaning that the fact of using, firstly, coal as a heating fuel in the sugar production process and, secondly, carbon dioxide generated by the combustion of that energy product to produce chemical fertilizers does not constitute 'dual use' of that energy product within the meaning of that provision. However, the fact of using, firstly, coal as a heating fuel in the sugar production process and, secondly, carbon dioxide generated by the combustion of that energy product for the purposes of the same production process does constitute such 'dual use' if it is established that the sugar production process cannot be completed without using the carbon dioxide generated by the combustion of the coal.

The third and fourth questions

- 29 By its third and fourth questions, which it is appropriate to consider together, the referring court asks, in essence, whether a Member State is entitled to apply, in its national law, a more restrictive scope of the concept of 'dual use' than that which it has under the second indent of Article 2(4)(b) of Directive 2003/96, in order to levy a tax on energy products excluded from the scope of that directive.
- 30 With regard to Directive 2003/96, it follows from the very wording of the second indent of Article 2(4)(b) thereof that it 'shall not apply' to the dual use of energy products. As the Court has previously held in connection with the first indent of that provision, the exclusion of the products concerned from the scope of that directive means that the Member States are able to tax the energy products in question in compliance with EU law (see, to that effect, judgment in *Fendt Italiana*, C-145/06 and C-146/06, EU:C:2007:411, paragraphs 38 and 41).
- 31 It follows that a Member State is entitled to levy a tax on energy products which are excluded from the scope of Directive 2003/96 because they fall within the concept of 'dual use' within the meaning of the second indent of Article 2(4)(b) of that directive.
- 32 In that regard, whether, in this case, the national legislature intended to apply a definition different from that contained in the directive is a question of pure national law and is for the referring court to decide, before applying its national law in consequence thereof.
- 33 In the light of the foregoing, the answer to the third and fourth questions is that a Member State is entitled to apply, in its national law, a more restrictive scope of the concept of 'dual use' than that which it has under the second indent of Article 2(4)(b) of Directive 2003/96, in order to levy a tax on energy products excluded from the scope of that directive.

Costs

- 34 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 (Ninth Chamber) hereby rules:

1. **Article 2(4)(b) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, as amended by Council Directive 2004/74/EC of 29 April 2004, must be interpreted as meaning that the fact of using, firstly, coal as a heating fuel in the sugar production process and, secondly, carbon dioxide generated by the combustion of that energy product to produce chemical fertilizers does not constitute ‘dual use’ of that energy product within the meaning of that provision.**

However, the fact of using, firstly, coal as a heating fuel in the sugar production process and, secondly, carbon dioxide generated by the combustion of that energy product for the purposes of the same production process does constitute such ‘dual use’ if it is established that the sugar production process cannot be completed without using the carbon dioxide generated by the combustion of the coal.

2. **A Member State is entitled to apply, in its national law, a more restrictive scope of the concept of ‘dual use’ than that which it has under the second indent of Article 2(4)(b) of Directive 2003/96, as amended by Directive 2004/74, in order to levy a tax on energy products excluded from the scope of that directive.**

[Signatures]