Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

3 April 2014*

(Directive 2003/96/EC — Taxation of energy products — Products not listed in Directive 2003/96/EC — Meaning of 'equivalent heating fuel or motor fuel')

In Joined Cases C-43/13 and C-44/13,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decisions of 14 November 2012, received at the Court on 28 January 2013, in the proceedings

Hauptzollamt Köln

v

Kronos Titan GmbH (C-43/13),

and

Hauptzollamt Krefeld

v

Rhein-Ruhr Beschichtungs-Service GmbH (C-44/13),

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: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Hauptzollamt Köln, by J. Krebs, acting as Agent,

— Kronos Titan GmbH, by W. Meilicke and D.E. Rabback, Rechtsanwälte,

— the Hauptzollamt Krefeld, by X. Konoplev, acting as Agent,

* Language of the case: German.

— Rhein-Ruhr Beschichtungs-Service GmbH, by D. Schiebold and N. Liebheit, Rechtsanwälte,

— the Portuguese Government, by L. Inez Fernandes, A. Cunha and R. Collaço, acting as Agents,

— the European Commission, by C. Barslev and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2013,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 2(3) 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).

2 The requests have been made in two sets of proceedings between, first, the Hauptzollamt Köln (Principal Customs Office, Cologne) and Kronos Titan GmbH ('Kronos'), and, secondly, the Hauptzollamt Krefeld (Principal Customs Office, Krefeld) and Rhein-Ruhr Beschichtungs-Service GmbH ('RRBS'), concerning the level of taxation applicable to toluene, on the one hand, and white spirit and the light fuel oil Exxsol D60 on the other, products that Kronos and RRBS, respectively, use as heating fuels.

Legal context

Directive 2003/96

3 Recitals 2 to 6, 9, 17 and 18 in the preamble to Directive 2003/96 are worded as follows:

'(2) The absence of Community provisions imposing a minimum rate of taxation on electricity and energy products other than mineral oils may adversely affect the proper functioning of the internal market.

(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.

(5) The establishment of appropriate Community minimum levels of taxation may enable existing differences in the national levels of taxation to be reduced.

(6) In accordance with Article 6 of the [EC] Treaty, environmental protection requirements must be integrated into the definition and implementation of other Community policies.

…

(9) Member States should be given the flexibility necessary to define and implement policies appropriate to their national circumstances.

…

(17) It is necessary to establish different Community minimum levels of taxation according to the use of the energy products and electricity.

(18) Energy products used as a motor fuel for certain industrial and commercial purposes and those used as heating fuel are normally taxed at lower levels than those applicable to energy products used as a propellant.'

4 Article 1 of Directive 2003/96 provides that the Member States are to impose taxation on energy products and electricity in accordance with that directive.

5 Article 2(1), (3) and (5) of that directive contains the following provisions:

'(1) For the purposes of this Directive, the term "energy products" shall apply to products:

(a) …

(b) falling within CN codes … 2704 to 2715;

(c) falling within CN codes 2901 and 2902;

…

(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.

…

(5) References in this Directive to codes of the combined nomenclature shall be to those of Commission Regulation (EC) No 2031/2001 of 6 August 2001, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff [OJ 2001 L 279, p. 1].

…'

6 Article 4 of that directive reads as follows:

'(1) The levels of taxation which Member States shall apply to the energy products and electricity listed in Article 2 may not be less than the minimum levels of taxation prescribed by this Directive.

(2) For the purpose of this Directive "level of taxation" is the total charge levied in respect of all indirect taxes (except VAT) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption.'

7 Articles 7 and 8 of Directive 2003/96 provide that the minimum levels of taxation applicable to motor fuels and to products used as motor fuel, respectively, are to be fixed as set out in Tables A or B of Annex I to the directive. Under Article 9 of the directive, the minimum levels of taxation applicable to heating fuels are set out in Table C of Annex I.

8 None of those tables contains levels for toluene (CN code 2902 30 00), white spirit or light fuel oil (the latter two falling within CN code 2710 11 21).

9 Table C of Annex I to Directive 2003/96 is set out as follows:

Table C. – Minimum levels of taxation applicable to heating fuels and electricity

	Business use	Non-business use
Gas oil (in euro per 1 000 l) CN codes 2710 19 41 to 2710 19 49	21	21
Heavy fuel oil (in euro per 1 000 kg) CN codes 2710 19 61 to 2710 19 69	15	15
Kerosene (in euro per 1 000 l) CN codes 2710 19 21 and 2710 19 25	0	0
LPG (in euro per 1 000 kg) CN codes 2711 12 11 to 2711 19 00	0	0
Natural gas (in euro per gigajoule gross calorific value) CN codes 2711 11 00 and 2711 21 00	0.15	0.3
Coal and coke (in euro per gigajoule gross calorific value) CN codes 2701, 2702 and 2704	0.15	0.3
Electricity (in euro per MWh) CN code 2716	0.5	1.0

German law

10 Paragraph 2 of the Law on the Taxation of Energy of 15 July 2006 (Energiesteuergesetz, 'the EnergieStG'), in the version in force in 2007 and 2008, the time of the facts in the main proceedings, provides:

'(1) The tax to be charged

1. for 1 000 l of petrol coming within subheadings 2710 11 41 to 2710 11 49 of the [CN]

…

(b) with a maximum sulphur content of 10 mg/kg, shall be [EUR] 654.50

…

(3) In derogation from subparagraphs 1 and 2, the tax to be charged … [there follows a detailed list divided into five headings — with subheadings in some cases — [of energy products] and the significantly lower rates of tax allocated to them, which lists, inter alia, gas oil within the subheadings 2710 19 41 to 2710 19 49 of the CN as well as heating oil within the subheadings 2710 19 61 to 2710 19 69 of the CN],

when they are used as heating fuels or when declared for those purposes. …

(4) Products other than those listed in paragraphs 1 to 3 shall be subject to the same taxation as the energy products to which they are closest in terms of their properties and intended use. …'

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

The facts in the main proceedings in Case C-43/13

11 Kronos manufactures titanium dioxide powder, known as 'white pigment'. In order to produce the chemical reaction desired, the temperature has to reach 1 650 degrees Celsius. Kronos achieves this by burning toluene sprayed into an oxygen stream.

12 In 2007, Kronos declared to the Hauptzollamt Köln an amount of approximately EUR 1.1 million in respect of the energy tax for the use of toluene. In so doing, it faithfully followed the legal position of the Hauptzollamt Köln by applying a rate of tax of EUR 654.50/1 000 kilogrammes. That rate is laid down in Paragraph 2(1)(1)(b) of the EnergieStG for petrol falling within subheadings 2710 11 41 to 2710 11 49 of the CN, with a maximum sulphur content of 10mg/kg. Kronos lodged an objection to its declaration at the same time, seeking the application of one of the substantially lower rates of tax laid down in Paragraph 2(3) of the EnergieStG for a series of other energy products used as heating fuels.

13 Toluene not being listed in Paragraph 2 of the EnergieStG, it therefore appeared appropriate, as provided for in Paragraph 2(4), to apply the rate of tax of the energy product to which it was closest in terms of its nature and intended use.

14 The action brought following the dismissal of the objection came before the Finanzgericht (Finance Court), which took the view that the first and third subparagraphs of Article 2(3) of Directive 2003/96 had to be taken into account. Construing Paragraph 2 of the EnergieStG in conformity with Article 2(3) of Directive 2003/96, that court held that since toluene is used as heating fuel, the rate of tax could not be taken from Paragraph 2(1) of the EnergieStG but had to be derived from Paragraph 2(3) of that law, for it was in that provision alone that the rates of tax for heating fuels were laid down.

15 The Hauptzollamt Köln brought an appeal on a point of law ('Revision') against the judgment of the Finanzgericht before the Bundesfinanzhof (Federal Finance Court).

The facts in the main proceedings in Case C-44/13

16 RRBS manufactures surface coatings using a thermal treatment process. For that purpose, it uses white spirit purchased in non-taxed barrels (subheading 2710 11 21 of the CN) and the light fuel oil Exxsol D60 falling within the same heading, which it burns in the process.

17 By tax notices of 1 December 2008 and 7 December 2009 for the years 2007 and 2008, the Hauptzollamt Krefeld determined the energy tax on the white spirit and the light fuel oil Exxsol D60 at EUR 134 747.70 in total, in accordance with a rate of tax of EUR 654.50/1 000 kilogrammes. That rate of tax is laid down in Paragraph 2(1)(1)(b) of the EnergieStG for petrol falling within subheadings 2710 11 41 to 2710 11 49 of the CN, with a maximum sulphur content of 10mg/kg. Since its objection was not successful, RRBS brought an action seeking the application of one of the substantially lower rates of tax laid down in Paragraph 2(3) of the EnergieStG for a series of other energy products used as heating fuels.

18 White spirit and the light fuel oil Exxsol D60 not being listed in Paragraph 2 of the EnergieStG, it therefore appeared appropriate, as provided for in Paragraph 2(4), to apply the rate of tax of the energy products to which they were closest in terms of their nature and intended use.

19 The action came before the Finanzgericht, which took the view that the first and third subparagraphs of Article 2(3) of Directive 2003/96 had to be taken into account. According to that court, since white spirit and the light fuel oil Exxsol D60 are used as heating fuels, the rate of tax was to be derived, construing Paragraph 2 of the EnergieStG in conformity with Article 2(3) of Directive 2003/96, not from Paragraph 2(1) of the EnergieStG but from Paragraph 2(3) of the EnergieStG, for it was in that provision alone that the rates of tax for heating fuels were laid down.

20 The Hauptzollamt Krefeld brought an appeal on a point of law ('Revision') against the judgment of the Finanzgericht before the referring court.

The question referred

21 The referring court, although inclined to the view that the higher taxation of the products at issue, despite their use as heating fuel, is consistent with the requirements of Directive 2003/96, considers, nevertheless, that whether it is consistent is uncertain.

22 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following question, drafted in the same terms in both cases, to the Court of Justice for a preliminary ruling:

'Does Article 2(3) of [Directive 2003/96], in relation to the taxation of energy products other than those for which a level of taxation is specified in the Directive, require the application of a rate of tax which national law specifies for the use of an energy product as heating fuel, provided that that other energy product is also used as heating fuel? Or, in cases in which the other energy product — in circumstances in which it is used as heating fuel — is equivalent to a particular energy product, can the rate of tax specified by national law for this energy product be applied, even in the case where the rate of tax is the same irrespective of whether it is being used as motor fuel or as heating fuel?'

The procedure before the Court

23 By order of 7 February 2013, the President of the Court decided to join Cases C-43/13 and C-44/13 for the purposes of the written procedure, the oral procedure and the judgment.

Consideration of the question referred

24 By its question, the referring court asks, in essence, how the condition, laid down in Article 2(3) of Directive 2003/96, according to which energy products other than those for which a level of taxation is specified in the directive are to be taxed according to use, at the rate for the equivalent heating fuel or motor fuel, is to be construed.

25 As a preliminary point, it should be recalled that, in determining the scope of a provision of EU law, its wording, context and objectives must all be taken into account (Case C-306/12 *Spedition Welter*, EU:C:2013:650, paragraph 17 and the case-law cited).

26 As regards the wording of Article 2(3) of Directive 2003/96, it is true that several language versions, namely, the Spanish, German, English, French and Italian versions, in particular, refer, for the purposes of the determination of the applicable level of taxation, to 'use' as the first criterion, whilst the criterion of 'equivalent' product is referred to only subsequently. Such a sequence may suggest that the actual use to which the product at issue is put is to be examined first of all and that it is only in the second place that the reference product that is 'equivalent' is to be determined.

27 Since the order in which the criteria are presented is not, however, common to all the language versions of Directive 2003/96, it must be ascertained whether the context and objectives of the provision at issue in the main proceedings support the preponderance of the product's actual use over the criterion of equivalence.

28 So far as concerns the context of the provision at issue in the main proceedings, the scheme of Directive 2003/96 is founded on a clear distinction between motor fuels and heating fuels. That distinction, introduced in recitals 17 and 18 in the preamble to that directive, is applied, inter alia, by Articles 7 to 9 of the directive, relating to the detailed rules for setting the minimum levels of taxation applicable, on the one hand, to heating fuels and, on the other, to motor fuels and to products used as motor fuels for specific industrial and commercial purposes.

29 By referring to products used as motor fuels, Article 8 of Directive 2003/96 contributes to clarifying the function performed by the criterion of use in the context of that directive, namely, that of enabling a given product to be taxed, according to the use to which it is put, either as a motor fuel or as a heating fuel.

30 It must therefore be held that the scheme of Directive 2003/96 is founded on a clear distinction between motor fuels and heating fuels on the basis, in particular, of the criterion of use.

31 As regards the objectives pursued by the regime of which the provision at issue in the main proceedings forms part, it is apparent from recitals 3 to 5 in the preamble to Directive 2003/96 that the EU legislature sought, by means of the distinction drawn between motor fuels and heating fuels and by prescribing a certain number of minimum levels of taxation, to ensure that the internal market functions properly.

32 Construing Article 2(3) of Directive 2003/96 as meaning that the Member States are required to apply to any product used as motor fuel or as heating fuel a rate of tax prescribed for, respectively, another motor fuel or another heating fuel, makes it possible to approximate the national tax systems by preventing one and the same product from being taxed in certain Member States as motor fuel whilst in other Member States at the rate for a heating fuel. Construed in this way, the mechanism established by that provision contributes in fact to the proper functioning of the internal market.

33 What is more, construing Article 2(3) of Directive 2003/96 as meaning that the criterion of use as motor fuel or heating fuel is decisive serves to preclude possible distortions of competition between products used for the same purposes.

34 It is therefore necessary, first of all, to determine the use, as motor fuel or heating fuel, to which the product at issue is put, before establishing, secondly, which motor fuel or heating fuel, as the case may be, is equivalent to it within the meaning of that provision.

35 As the Advocate General has observed in point 48 of his Opinion, the concept of 'product equivalence' must be interpreted, in so far as it is at all possible, from the perspective of the substitutability or interchangeability of the energy products at issue. In the main proceedings, it must therefore be ascertained whether any of the products listed in Table C of Annex I to Directive 2003/96 could have been used as a substitute for the energy products in question in order to achieve the result sought in these cases. This will ensure that two products performing the same function are taxed at the same level.

36 It should be pointed out also that, in so far as there is no substitution within the meaning of the paragraph above, the motor fuel or the heating fuel, as the case may be, which is, by its properties and intended use, the closest to the product at issue must be identified. The obligation to distinguish between motor fuels and heating fuels so far as concerns the products for which minimum levels of taxation have not been established on an individual basis at EU level is thereby fulfilled.

37 It follows that the 'equivalent heating fuel or motor fuel' within the meaning of Article 2(3) of Directive 2003/96 must be determined, first, according to the use, as heating fuel or motor fuel, to which the product at issue is put, before identifying for which of the motor fuels or the heating fuels listed in the relevant table in Annex I to Directive 2003/96 the product at issue is in fact a substitute in terms of use or, failing that, the motor fuel or heating fuel which, by its properties and intended use, is closest to that product.

38 In the light of the foregoing, the answer to the question referred is that the condition, laid down in Article 2(3) of Directive 2003/96, according to which energy products other than those for which a level of taxation is specified in the directive are to be taxed according to use, at the rate for the equivalent heating fuel or motor fuel, must be construed as meaning that it must be determined, first, whether the product at issue is used as heating fuel or motor fuel, before identifying, secondly, for which of the motor fuels or the heating fuels, as the case may be, listed in the corresponding table in Annex I to that directive the product at issue is in fact a substitute in terms of use or, failing that, which of those motor fuels or those heating fuels is, by its properties and intended use, the closest to it.

Costs

39 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 (Fourth Chamber) hereby rules:

The condition, laid down in Article 2(3) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, according to which energy products other than those for which a level of taxation is specified in the directive are to be taxed according to use, at the rate for the equivalent heating fuel or motor fuel, must be construed as meaning that it must be determined, first, whether the product at issue is used as heating fuel or motor fuel, before identifying, secondly, for which of the motor fuels or the heating fuels, as the case may be, listed in the corresponding table in Annex I to that directive the product at issue is in fact a substitute in terms of use or, failing that, which of those motor fuels or those heating fuels is, by its properties and intended use, the closest to it.

[Signatures]