Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

10 September 2014*

(Reference for a preliminary ruling — Taxation — Directive 2003/96/EC — Taxation of energy products and electricity — Exceptions — Energy products contained in the standard tanks of commercial motor vehicles and intended to be used as fuel by those vehicles — Definition of 'standard tanks' within the meaning of Article 24(2) of that directive — Tanks fitted by a coachbuilder or a manufacturer's dealer)

In Case C-152/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Düsseldorf (Germany), made by decision of 18 March 2013, received at the Court on 26 March 2013, in the proceedings

Holger Forstmann Transporte GmbH & Co. KG

v

Hauptzollamt Münster,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis (Rapporteur), J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Holger Forstmann Transporte GmbH & Co. KG, by U. Möllenhoff, Rechtsanwalt,

— Hauptzollamt Münster, by A. Scholz, acting as Agent,

— the Czech Government, by M. Smolek, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 30 April 2014,

* Language of the case: German.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 24(2) 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 request has been made in proceedings between Holger Forstmann Transporte GmbH & Co. KG ('Forstmann Transporte') and Hauptzollamt Münster (Principal Customs Office, Münster; 'the Hauptzollamt') concerning the payment of energy tax on diesel purchased in the Netherlands and contained in the tanks of a lorry belonging to that company for use by that vehicle in Germany as fuel.

Legal context

EU law

3 The 19th recital in the preamble to Council Directive 94/74/EC of 22 December 1994 amending Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, Directive 92/81/EEC on the harmonisation of the structures of excise duties on mineral oils and Directive 92/82/EEC on the approximation of the rates of excise duties on mineral oils (OJ 1994 L 365, p. 46) stated as follows:

'… [I]t is necessary to specify that mineral oils released for consumption in a Member State, contained in the fuel tanks of motor vehicles and intended to be used as fuel by such vehicles are exempt from excise duty in other Member States in order not to impede free movement of individuals and goods and in order to prevent double taxation.'

4 To that end, Directive 94/74 amended Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12) by inserting Article 8a. That article not only laid down such an exemption for mineral oils contained in the standard tanks of commercial motor vehicles but also specified what was meant by 'standard tanks'. They were defined, in particular, as being the tanks permanently fixed by the manufacturer to all motor vehicles of the same type as the vehicle in question and whose permanent fitting enables fuel to be used directly, both for the purpose of propulsion and, where appropriate, for the operation, during transport, of refrigeration systems and other systems.

5 Directive 92/81 was repealed by Directive 2003/96, Article 8a being replaced by Article 24 of Directive 2003/96, which is couched in similar terms.

6 Article 24 of Directive 2003/96 provides:

'1. Energy products released for consumption in a Member State, contained in the standard tanks of commercial motor vehicles and intended to be used as fuel by those same vehicles, as well as in special containers, and intended to be used for the operation, during the course of transport, of the systems equipping those same containers shall not be subject to taxation in any other Member State.

2. For the purposes of this Article,

"standard tanks" shall mean:

— the tanks permanently fixed by the manufacturer to all motor vehicles of the same type as the vehicle in question and whose permanent fitting enables fuel to be used directly, both [for] the purpose of propulsion and, where appropriate, for the operation, during transport, of refrigeration systems and other systems. Gas tanks fitted to motor vehicles designed for the direct use of gas as a fuel and tanks fitted to the other systems with which the vehicle may be equipped shall also be considered to be standard tanks;

— the tanks permanently fixed by the manufacturer to all containers of the same type as the container in question and whose permanent fitting enables fuel to be used directly for the operation, during transport, of the refrigeration systems and other systems with which special containers are equipped.

"Special container" shall mean any container fitted with specially designed apparatus for refrigeration systems, oxygenation systems, thermal insulation systems or other systems.'

German law

7 Paragraph 1 of the Law on energy tax (Energiesteuergesetz) of 15 July 2006 (BGBl. 2006 I, p. 1534), in the version applicable to the facts of the main proceedings ('the EnergieStG'), provides that energy products are to be subject, within the fiscal territory, to energy tax. It specifies that the fiscal territory within the meaning of the EnergieStG is the territory of Germany excluding the area of Büsingen and the island of Helgoland.

8 Paragraph 15 of the EnergieStG, in the version in force until 31 March 2010, provided:

'(1) Where energy products within the meaning of Paragraph 4 that are in free circulation in another Member State are acquired for commercial purposes, tax is chargeable when the person acquiring them:

1. receives the energy products within the fiscal territory; or

2. brings or arranges to be brought into the fiscal territory the energy products received outside the fiscal territory. ...

(2) Where energy products within the meaning of Paragraph 4 that are in free circulation in a Member State are brought into the fiscal territory in cases other than those referred to in points 1 and 2 of the first sentence of subparagraph (1), the tax becomes chargeable when they are first taken into possession or used in the fiscal territory for commercial purposes. The person liable to pay the tax is the person who has possession of or uses those products. ...

...

(4) Subparagraphs (1) to (3) shall not apply to:

1. fuel in the standard tanks of vehicles, special containers, work machines and equipment, as well as refrigeration and air-conditioning units,

2. fuel that is carried in the reserve tanks of vehicles up to a total of 20 litres,

3. heating fuel in the storage tank of a vehicle's auxiliary heating.

…’

9 Paragraph 6(15) of the Law of 15 July 2009 amending the laws on excise duty (BGBl. 2009 I, p. 1870) amended Paragraph 15(2) of the EnergieStG with effect from 1 April 2010, so that it is now worded as follows:

‘Where energy products within the meaning of Paragraph 4 that are in free circulation, in terms of tax law, in a Member State are brought into the fiscal territory in cases other than those referred to in points 1 and 2 of the first sentence of subparagraph (1), the tax becomes chargeable when they are first taken into possession or used in the fiscal territory for commercial purposes. This does not apply where energy products taken into possession are destined for another Member State and are being transported through the fiscal territory using an accompanying document as allowed under Article 34 of [Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12)]. The person liable to pay the tax is the person who consigns, takes possession of or uses those products. …’

10 The regulation for implementation of the Law on energy tax (Energiesteuer-Durchführungsverordnung) of 31 July 2006 (BGBl. 2006 I, p. 1753), as amended by Article 6 of the regulation of 5 October 2009 (BGBl. 2009 I, p. 3262), defines the term ‘standard tanks’ as follows in Paragraph 41:

‘Standard tanks within the meaning of Paragraph 15(4), point 1, Paragraph 16(1), second sentence, point 2, Paragraph 21(1), third sentence, point 1, and Paragraph 46(1), second sentence, of the EnergieStG are:

1. the tanks permanently fixed by the manufacturer to all vehicles of the same type which enable fuel to be used directly for the purpose of propulsion of the vehicles and, where appropriate, for the operation, during transport, of refrigeration systems and other systems,

2. the tanks permanently fixed by the manufacturer to all containers of the same type which enable fuel to be used directly for the operation, during transport, of the refrigeration systems and other systems of special containers.

Where a standard tank consists of more than one fuel tank, a shut-off valve in the pipe between two fuel tanks shall not affect classification.’

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

11 Forstmann Transporte is a German road haulage undertaking that provides forwarding services. For this purpose it acquired a motor vehicle from Daimler AG, a lorry manufacturer. In the course of the manufacturing process Daimler AG fitted a fuel tank with a capacity of 780 litres to that vehicle. As Forstmann Transporte intended to have the vehicle modified subsequently, it did not order a second fuel tank from Daimler AG and the vehicle was therefore delivered to it with only one fuel tank.

12 In order for the vehicle manufactured by Daimler AG to be able to transport standardised containers and containers with stands, it was necessary to fit swap-body carriers which that manufacturer could not provide in the desired form. Forstmann Transporte therefore instructed R&S Fahrzeugbau, a coachbuilder, to fit such carriers to the vehicle. When fitting them, R&S Fahrzeugbau had to move the fuel tank fitted by Daimler AG (‘tank 1’) because the carriers could not have been fitted without moving it.

13 In addition, when modifying the vehicle R&S Fahrzeugbau fitted a second fuel tank with a capacity of 780 litres ('tank 2'), which had been acquired beforehand from Hoppe Truck-Tanks GmbH & Co. KG. Forstmann Transporte could have had tank 2 fitted directly by Daimler AG, but this would not have made economic sense because tank 2 would also have had to be moved as part of the modification. The Technischer Überwachungsverein (technical inspection association) checked tanks 1 and 2 for compliance with the provisions on registration of motor vehicles and it raised no objection.

14 Forstmann Transporte regularly refuelled its vehicles in the Netherlands because of the more favourable prices charged there. The vehicle at issue in the main proceedings was refuelled with diesel in Oldenzaal (Netherlands) on 2 December 2009 (495.03 litres for tank 2) and 14 February 2011 (618.92 litres for tank 1 and 570.50 litres for tank 2). After both refuellings the driver immediately crossed the German-Netherlands border and continued his journey in Germany. The fuel was used exclusively for propulsion of the vehicle.

15 On 28 June 2012 Forstmann Transporte declared to the Hauptzollamt, by way of precaution, the diesel refuelled into tank 2, that is to say, 495.03 litres and 570.50 litres.

16 Following that tax declaration, the Hauptzollamt, by notice of 3 July 2012, demanded payment of the sum of EUR 501.22 — EUR 232.86 for the refuelling on 2 December 2009 and EUR 268.36 for the refuelling on 14 February 2011 — by way of energy tax for the fuel contained in tank 2. In accordance with an interpretation of national law resulting from case-law of the Bundesfinanzhof (Federal Finance Court), the Hauptzollamt considered that energy tax was payable by reason of the diesel contained in tank 2 being brought into Germany; that fuel was not exempt from energy tax because the tank, fitted to the vehicle after its manufacture, was not a standard tank given that it had not been permanently fixed by the manufacturer of the chassis.

17 In addition, by notice of 19 September 2012 the Hauptzollamt demanded payment of the sum of EUR 291.14 by way of energy tax for the fuel contained in tank 1. In accordance with the abovementioned interpretation, the Hauptzollamt considered that the diesel contained in tank 1 was not exempt from energy tax either, because that tank, originally fitted by Daimler AG, had likewise, following its removal and refitting, not been permanently fixed by the manufacturer of the chassis and could not therefore be regarded as standard.

18 After lodging objections against those notices, which the Hauptzollamt rejected, Forstmann Transporte brought an action for their annulment before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf).

19 In its request for a preliminary ruling, the national court observes that in the light of the Bundesfinanzhof's current case-law followed in this instance by the Hauptzollamt the action would have to be dismissed. The national court states that in accordance with that case-law the exemption referred to in Paragraph 15(4), point 1, of the EnergieStG cannot apply in the main proceedings given that the term 'standard tanks' — defined in Paragraph 41, first sentence, point 1, of the regulation of 31 July 2006 for implementation of the Law on energy tax, which transposes the first subparagraph of Article 24(2) of Directive 2003/96 — does not cover fuel tanks which have been fitted by dealers or coachbuilders, including when the fitting work is shared between the manufacturer and the coachbuilder. The national court points out that, in this connection, the Bundesfinanzhof has held that the last mentioned provision, modelled on provisions of EU customs law, such as Article 112(1) of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty (OJ 1983 L 105, p. 1), as amended by Council Regulation (EEC) No 1315/88 of 3 May 1988 (OJ 1988 L 123, p. 2) ('Regulation No 918/83'), may be interpreted by reference to the Court of Justice's judgment in *Schoonbroodt* (C-247/97, EU:C:1998:586) concerning the meaning of 'standard tanks' in customs matters, according to which the exemption laid down in Article 112(1) of Regulation No 918/83, which must be interpreted strictly, cannot apply to tanks fitted by dealers and coachbuilders.

20 The national court nevertheless expresses doubts concerning that interpretation of the Bundesfinanzhof and wonders whether the term 'manufacturer' in Article 24(2) of Directive 2003/96 must be given this restrictive interpretation or whether it would be preferable to adopt a broad interpretation whereby that term would also cover coachbuilders and dealers. It considers that the latter interpretation could be justified by the aim of Article 24(2) of the directive, as resulting from the 19th recital in the preamble to Directive 94/74. It observes in this regard that that recital relates to Article 8a of Directive 92/81 which has been replaced by Article 24 of Directive 2003/96 and which the Court interpreted broadly in its judgment in *Meiland Azewijn* (C-292/02, EU:C:2004:499). On the other hand, according to the national court, the restrictive interpretation adopted by the Bundesfinanzhof is based on the judgment in *Schoonbroodt* (EU:C:1998:586) which related to Regulation No 918/83, a measure which, as the Court held in *Meiland Azewijn* (EU:C:2004:499), pursued, however, an objective different from that underlying the provisions relating to excise duty that are relevant in the main proceedings. The national court notes, furthermore, that a broad interpretation of the term might also be justified in the light of the actual conditions of lorry production, in which a number of undertakings participate in order to be able to equip the vehicles in accordance with the technical and/or economic requirements specific to each of them.

21 The national court states that, if the term 'manufacturer' must be interpreted broadly, it should be determined how the requirement in the first indent of Article 24(2) of Directive 2003/96 that the motor vehicles must be 'of the same type' is to be interpreted. According to the national court, a multi-phase production process, which seeks to meet the technical and/or economic requirements specific to each of the vehicles, logically rules out the serial production of certain types of vehicles.

22 In those circumstances, the Finanzgericht Düsseldorf decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the term "manufacturer", within the meaning of the first indent of Article 24(2) of [Directive 2003/96], to be interpreted as also including coachbuilders or dealers, when they have fitted the fuel tank as part of a process of producing the vehicle, and the production process was, for technical and/or economic reasons, carried out through division of labour by various independent businesses?

(2) If the first question should be answered in the affirmative: What interpretation is to be given, in such cases, to the factual criterion, in the first indent of Article 24(2) of [Directive 2003/96], whereby the vehicles in question must be "of the same type"?'

Consideration of the questions referred

23 By its two questions, which it is appropriate to examine together, the national court asks, in essence, whether the term 'standard tanks', referred to in the first indent of Article 24(2) of Directive 2003/96, must be interpreted as excluding tanks fixed permanently to commercial motor vehicles intended for the direct supply of fuel to those vehicles when the tanks have been fitted by a person other than the manufacturer.

24 First of all, as the Advocate General has observed in point 41 of his Opinion, in the current economic and technical context it is common for commercial vehicles to be manufactured in several phases, with the manufacturer producing only the chassis and the cab whilst the rest is then fitted out by specialist undertakings. The same principle applies to fuel tanks. Thus, manufacturers do not offer a single type of tank for each type of vehicle, but different tanks according to the envisaged use of the vehicle, the market for which the vehicle is intended or the wishes of the customer. It is also possible, as was the case in the main proceedings, that the tank is fitted not by the manufacturer, but by a third party in a subsequent phase of the process of manufacturing the vehicle.

25 In these circumstances, it becomes very difficult, or even impossible, to determine whether a given tank actually falls within the category of tanks 'permanently fixed by the manufacturer to all motor vehicles of the same type as the vehicle in question', as is apparent from the wording of the definition of the term 'standard tanks' referred to in the first indent of Article 24(2) of Directive 2003/96. It could even be possible that, in the case of a given type of vehicle, no tank satisfies that definition with the result that users of that vehicle are excluded from entitlement to the exemption provided for in Article 24 of the directive.

26 However, the Court has consistently held that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, inter alia, judgment in *Feltgen and Bacino Charter Company*, C-116/10, EU:C:2010:824, paragraph 12 and the case-law cited). Also, where a provision of EU law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness (see judgment in *Lassal*, C-162/09, EU:C:2010:592, paragraph 51 and the case-law cited).

27 The objectives pursued by the provision at issue are set out in the 19th recital in the preamble to Directive 94/74, according to which the exemption from excise duty in a Member State of fuel released for consumption in another Member State and contained in the tanks of commercial vehicles is granted 'in order not to impede free movement of individuals and goods and in order to prevent double taxation'.

28 To this end, the EU legislature provided that — by way of exception to the general rule set out in Article 7 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1) that a product subject to excise duty which is released for consumption in one Member State and held for commercial purposes in another Member State is taxed in that other Member State — energy products in the form of fuel contained in the tanks of commercial vehicles are subject to taxation in the Member State where the fuel has been released for consumption. The obligation to declare the quantity of fuel contained in the vehicle's tanks whenever an internal border is crossed and the need subsequently, in order to avoid double taxation, to seek refund of the excise duty in the Member State where the fuel was purchased would significantly hinder road transport between Member States and therefore constitute a barrier to trade within the internal market. Article 24 of Directive 2003/96 is thus intended to counteract that barrier and ensure free movement, whilst protecting the Member States' legitimate fiscal interests.

29 In order to safeguard that aim, it is not necessary to ascertain whether the fuel tank has been permanently fixed to the vehicle concerned by the manufacturer or by a third party. It is necessary on the other hand, as the Advocate General has observed in points 32 and 47 of his Opinion, to ascertain whether that tank is used to supply the vehicle directly with fuel for the purpose of its propulsion and, where appropriate, for the operation of its refrigeration systems or its other systems.

30 This analysis is borne out by the second sentence of the first indent of Article 24(2) of Directive 2003/96, according to which '[g]as tanks fitted to motor vehicles … shall also be considered to be standard tanks'. Such gas tanks are not normally fixed by manufacturers, and even less are they fitted 'to all motor vehicles of the same type', as usually motor vehicles are originally intended to be propelled not by gas but by an oil-derived fuel. Accordingly, gas tanks are generally fitted by specialist undertakings independent of the manufacturers.

31 This clarification in the second sentence of the first indent of Article 24(2) of Directive 2003/96 reflects the legislature's intention to define the concept of 'normal tanks' broadly in order that users of vehicles equipped with gas tanks are not unfairly excluded from entitlement to the exemption laid down in Article 24. Whilst it is true that, as the Advocate General has observed in point 49 of his Opinion, that flexibility could be limited to gas tanks at a time when petrol or diesel tanks were normally fitted

as standard, the fact remains that it would not be sufficient in the current economic and technical context of the phased construction of vehicles. Therefore, if the directive provides that gas contained in tanks fixed by third parties is covered by the exemption under consideration, for the same reasons petrol or diesel contained in such tanks must qualify for that exemption.

32 It follows that, in the same way as the Court held in paragraph 41 of the judgment in *Meiland Azewijn* (EU:C:2004:499) in respect of Article 8a of Directive 92/81, Article 24 of Directive 2003/96 must be interpreted broadly. The term 'standard tanks' in Article 24(2) cannot, in particular, be interpreted as excluding tanks permanently fixed to commercial motor vehicles intended for the direct supply of fuel to the vehicles when those tanks have been fitted by a person other than the manufacturer.

33 Furthermore, contrary to the Hauptzollamt's submissions, this conclusion is not contrary to the judgment in *Schoonbroodt* (EU:C:1998:586). In that case, the Court did not interpret a provision of a directive relating to the taxation of energy products within the internal market, such as Article 24 of Directive 2003/96, but, through the Belgian legislation at issue, a provision of Regulation No 918/83 concerning customs matters. Those enactments pursue different objectives (see, to this effect, the judgment in *Meiland Azewijn*, EU:C:2004:499, paragraph 40).

34 Furthermore, whilst it is true that the Court stated, in paragraph 20 of the judgment in *Schoonbroodt* (EU:C:1998:586), that 'there is no significant difference, in the context of the main proceedings, between the definitions of the term "standard tanks" used in the various provisions which may prove to be relevant', the fact remains that the reasoning adopted by the Court in that judgment is founded on its case-law concerning customs matters, and not on the aim of a provision adopted in the context of the internal market.

35 In the light of all the foregoing considerations, the answer to the questions referred for a preliminary ruling is that the term 'standard tanks', referred to in the first indent of Article 24(2) of Directive 2003/96, must be interpreted as not excluding tanks fixed permanently to commercial motor vehicles intended for the direct supply of fuel to those vehicles when the tanks have been fitted by a person other than the manufacturer, in so far as the tanks enable fuel to be used directly, both for the purpose of propulsion of the vehicles and, where appropriate, for the operation, during transport, of refrigeration systems and other systems.

Costs

36 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 (Second Chamber) hereby rules:

The term 'standard tanks', referred to in the first indent of Article 24(2) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, must be interpreted as not excluding tanks fixed permanently to commercial motor vehicles intended for the direct supply of fuel to those vehicles when the tanks have been fitted by a person other than the manufacturer, in so far as the tanks enable fuel to be used directly, both for the purpose of propulsion of the vehicles and, where appropriate, for the operation, during transport, of refrigeration systems and other systems.

[Signatures]