Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 10 February 2015 [1]

Case C-76/14

Mihai Manea
v
Instituția Prefectului — județul Brașov — Serviciul public comunitar regim permise de conducere și înmatriculare a vehiculelor

(Request for a preliminary ruling from the Curtea de Apel Braşov (Romania))

(Free movement of goods — Tax on pollutant emissions levied on motor vehicles on their first registration or the first transfer of the right of ownership — Exemption for motor vehicles subject to taxes previously in force — Prohibition of discriminatory internal taxation within the meaning of Article 110 TFEU — Non-discrimination against second-hand motor vehicles imported from other Member States in favour of similar national vehicles)

Introduction — history and legal framework

1. The issue of the taxation of motor vehicles, including, in particular, second-hand vehicles, is ever present in the case-law of the Court. [2] In recent years the Romanian scheme of a single-payment registration tax has occupied an important place in the case-law concerning this matter. The present case concerns the provisions which — following a number of judgments declaring this scheme incompatible with EU law — are intended finally to remove that incompatibility.

2. The Republic of Romania acceded to the European Union on 1 January 2007. A special tax on passenger cars and motor vehicles, established by Legea nr. 343/2006 din 17 iulie 2006 pentru modificarea şi completarea Legii nr. 571/2003 privind Codul fiscal (Law No 343/2006 of 17 July 2006 amending and complementing Law No 571/2003 on the Tax Code; 'Law No 343/2006') entered into force on the same date. [3] From 1 July 2008 that tax was replaced by the tax on pollution by motor vehicles established by Ordonanța de urgență a Guvernului nr. 50/2008 din 21 aprilie 2008 pentru instituirea taxei pe poluare pentru autovehicule (Government Emergency Order No 50/2008 of 21 April 2008 introducing a tax on pollution by motor vehicles; 'OUG 50/2008'). [4] The tax liability under both those acts arose when a vehicle was first registered on the territory of Romania.

1 — Original language: Polish.

2 — I recall just some of the judgments associated with the issues under consideration in the present case: judgments in *Commission* v *Denmark* (C-47/88, EU:C:1990:449); *Nunes Tadeu* (C-345/93, EU:C:1995:66); *De Danske Bilimportører* (C-383/01, EU:C:2003:352); *Nádasdi and Németh* (C-290/05 and C-333/05, EU:C:2006:652); *Brzeziński* (C-313/05, EU:C:2007:33); and, recently, *X* (C-437/12, EU:C:2013:857).

3 — *Monitorul Oficial al României*, Partea I, nr. 662.

4 — *Monitorul Oficial al României*, Partea I, nr. 327.

3. As a result of a Court judgment,[5] the tax established by OUG 50/2008 was declared contrary to Article 110 TFEU. The Court ruled that the tax levied solely on first registration of a motor vehicle on national territory, and therefore — in relation to second-hand vehicles — solely on vehicles imported from abroad, discourages the purchase of second-hand vehicles from other Member States, without discouraging the purchase of second-hand vehicles of the same age and condition on the domestic market.[6] Subsequently, the Court repeatedly upheld that view in relation to the provisions of OUG 50/2008, in its original version or after cosmetic amendments.[7]

4. On 13 January 2012 OUG 50/2008 was replaced by Legea nr. 9/2012 din 6 ianuarie 2012 privind taxa pentru emisiile poluante provenite de la autovehicule (Law No 9/2012 of 6 January 2012 on the tax on pollutant emissions from motor vehicles; 'Law No 9/2012'). The tax established by that law was also linked to the first registration of a motor vehicle on the territory of Romania. However, the law contained, in addition, an Article 4(2), under which:

'Liability to pay the tax shall also arise upon the first transfer in Romania of the ownership of a second-hand motor vehicle, in respect of which neither the special tax on passenger vehicles and motor vehicles provided for in Law No 571/2003, as subsequently amended and supplemented [including by Law No 343/2006], nor the tax on pollutant emissions from motor vehicles [that is to say, the tax laid down by OUG 50/2008] has been paid, and which does not fall within the category of vehicles excluded or exempted from the payment of those taxes, under the law in force at the time of its registration.'

5. In accordance with Ordonanța de urgență a Guvernului nr. 1/2012 din 30 ianuarie 2012 pentru suspendarea aplicării unor dispoziții ale Legii nr. 9/2012 privind taxa pentru emisiile poluante provenite de la autovehicule, precum și pentru restituirea taxei achitate în conformitate cu prevederile articolului 4 alineatul (2) din lege (Government Emergency Order No 1/2012 of 30 January 2012 on suspending the application of certain provisions of Law No 9/2012 and refunding tax paid in accordance with Article 4(2) of that law),[8] application of Article 4(2) of Law No 9/2012 was suspended from 31 January 2012 until 1 January 2013, and amounts of tax already paid under that provision were refundable. Therefore, up until 1 January 2013 tax levied under Law No 9/2012 remained contrary to Article 110 TFEU, as confirmed by the subsequent case-law of the Court.[9]

6. Law No 9/2012 was in turn replaced on 15 March 2013 by Ordonanța de urgență a Guvernului nr. 9/2013 din 19 februarie 2013 privind timbrul de mediu pentru autovehicule (Government Emergency Order No 9/2013 of 19 February 2013 establishing an environmental duty on motor vehicles; 'OUG 9/2013').[10] Article 4(2) of Law No 9/2012 was thus applied only from 1 January to 14 March 2013. The facts under consideration in the main proceedings also occurred within that period. Therefore, the legal position under Law No 9/2012, having regard to Article 4(2), is the subject of the analysis in the present case.

Facts and procedure

7. Mihai Manea, the applicant in the main proceedings, asked the Instituția Prefectului — județul Brașov — Serviciul public comunitar regim permise de conducere și înmatriculare a vehiculelor (the competent authority as regards the registration of vehicles in Brașov (Romania)), the defendant in the main proceedings, to register a second-hand motor vehicle which he had purchased in Spain. By letter

5 — Judgment in *Tatu* (C-402/09, EU:C:2011:219).

6 — Ibid., operative part.

7 — Judgment in *Nisipeanu* (C-263/10, EU:C:2011:466) and a number of subsequent decisions.

8 — *Monitorul Oficial al României*, Partea I, nr. 97.

9 — Order in *Câmpean* v *Administrația Finanțelor Publice a Municipiului Alexandria* (C-97/13 and C-214/13, EU:C:2014:229).

10 — *Monitorul Oficial al României*, Partea I, nr. 119.

of 5 March 2013 that authority demanded payment of the tax provided for in Law No 9/2012. Mihai Manea brought an action before the Tribunalul Brașov (Court of First Instance, Brașov), seeking registration of the vehicle without an obligation to pay the abovementioned tax which, in his opinion, is contrary to EU law. After the action had been dismissed, the applicant lodged an appeal with the Curtea de Apel Brașov (Court of Appeal, Brașov), which decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Having regard to the provisions of Law No 9/2012 and to the subject of the tax provided for under that law, must Article 110 TFEU be interpreted as precluding a Member State of the European Union from establishing a tax on pollutant emissions applicable to all foreign motor vehicles on their registration in that Member State, but to national motor-vehicles on the transfer of ownership of such vehicles, except where such a tax or a similar tax has already been paid?

(2) Having regard to the provisions of Law No 9/2012 and to the subject of the tax provided for under that law, must Article 110 TFEU be interpreted as precluding a Member State of the European Union from establishing a tax on pollutant emissions which is applicable, in the case of all foreign motor vehicles, on their registration in that Member State, but which, in the case of national motor vehicles, is due only on the transfer of ownership of such vehicles, the result being that a foreign vehicle cannot be used unless the tax is paid, but a national vehicle can be used for an unlimited time without the tax being paid, until the ownership of that vehicle is transferred, if such a transfer takes place?'

Analysis

8. By those questions, which should be examined together, the referring court asks in essence whether Article 110 TFEU precludes a Member State from establishing a single-payment tax on motor vehicles, levied on the first registration of a vehicle on the territory of that State and on the first transfer of ownership of an already registered vehicle, counting from the date on which that tax is established, with an exemption for vehicles on which a similar tax has already been paid in the past, where vehicles already registered on the territory of that State are not subject to the new tax, provided that ownership of those vehicles is not transferred.

9. To answer that question, it is necessary to clarify the following matters: first, the possibility of establishing a tax such as the Romanian tax under consideration in the main proceedings, including the question of the absence of taxation of motor vehicles for which there is no change of ownership; secondly, the possibility of exempting from it vehicles on which a similar tax previously in force has already been paid; and, thirdly, the possibility of applying such an exemption in the case of the Romanian taxes previously in force which have been declared incompatible with EU law.

Possibility of establishing a single-payment registration tax on motor vehicles

10. Setting aside the issue of the exemption of vehicles on which a similar tax has already been paid in the past, the design of the tax established in Romania by Law No 9/2012, in the version applicable in the main proceedings, is quite simple: the tax is due as a single payment when the name of the vehicle owner is entered in the registration document for the first time after the tax enters into force. [11] In that respect it is irrelevant whether or not the vehicle was already registered previously or whether that registration took place in Romania or another State.

11 — In that regard the Romanian legislature draws a distinction between 'registration' in relation to motor vehicles never registered in Romania and 'transfer of ownership' in relation to motor vehicles already registered in that State (see Article 2(h) and (i) of Law No 9/2012).

11. In establishing the tax thus designed, Romania intended to remove the incompatibility with Article 110 TFEU of the tax in force under OUG 50/2008. That incompatibility was due to the fact that the tax was levied solely on the first registration of a motor vehicle in Romania since, in the case of second-hand vehicles, it was imposed on vehicles imported from other Member States but not on vehicles already on the domestic market.[12] However, the tax established by Law No 9/2012 is imposed as a single payment on every motor vehicle which, following its purchase, is registered in the name of a new owner.

12. Such a design of tax does not appear to me to give rise to uncertainty from the point of view of Article 110 TFEU. According to settled case-law, Article 110 TFEU does not prevent a Member State from introducing new taxes or from changing the rate or basis of assessment of existing taxes where they are based on objective criteria and do not result in discrimination against goods from other Member States.[13] In the case of a tax imposed solely on vehicles imported from abroad, the discrimination arises from the fact that the purchaser of such a vehicle must pay the tax in addition to the price, whereas if he buys the same national vehicle, he pays only its price. Applying that tax also to national vehicles eliminates that discriminatory effect.

13. In the Court's case-law a doctrine supplementing the principle of fiscal non-discrimination against goods from other Member States has been developed in relation to second-hand motor vehicles. According to that doctrine, a tax imposed on second-hand vehicles imported from other Member States is not contrary to Article 110 TFEU, provided that its amount does not exceed the residual amount of a similar tax incorporated into the value of second-hand vehicles already present on the national market.[14]

14. The Court has not laid down, in a mandatory manner, the method for calculating the tax on motor vehicles. However, that method must take account of the drop in the value of the vehicle together with its age and condition in such a way that the amount of the tax levied on second-hand vehicles imported from other Member States does not exceed the abovementioned residual amount of the tax incorporated into the market value of national motor vehicles.[15]

15. As regards the tax established by OUG 50/2008, the Court carried out a careful examination of it and found that it satisfied the above criterion.[16] Since the rules for calculating the tax established by Law No 9/2012, laid down in Articles 6 and 9, appear to be close to those in force under OUG 50/2008, there is a high probability that they will also satisfy that condition. However, that is ultimately for the referring court to determine.

16. The issue, raised in the second question referred, of the existence of motor vehicles registered in Romania which are not subject to that tax where there is no change of owner does not appear to me to change that conclusion. First, as the Commission rightly observes in its observations, it is not a tax on use of the motor vehicle but on registration and indirectly on purchase. Secondly, according to settled case-law, within the system of the Treaty Article 110 TFEU supplements the provisions on the abolition of customs duties and charges having equivalent effect. Its aim is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms

12 — Judgment in *Tatu* (C-402/09, EU:C:2011:219, paragraphs 48 to 61).

13 — See, in particular, judgments in *Nunes Tadeu* (C-345/93, EU:C:1995:66, paragraph 11) and *Nádasdi and Németh* (C-290/05 and C-333/05, EU:C:2006:652, paragraphs 49 and 51).

14 — See, in particular, judgments in *Commission* v *Denmark* (C-47/88, EU:C:1990:449, paragraph 20); *Brzeziński* (C-313/05, EU:C:2007:33, paragraph 2 of the operative part); and *Tatu* (C-402/09, EU:C:2011:219, paragraph 39).

15 — See, in particular, judgment in *Tatu* (C-402/09, EU:C:2011:219, paragraphs 40 to 42 and the case-law cited).

16 — Ibid., paragraphs 43 to 47.

of protection which may result from the application of internal taxation that discriminate against products from other Member States [17]. A second-hand vehicle constitutes goods only if it is offered for sale. Therefore, the lack of taxation of motor vehicles which are not traded cannot give rise to discrimination contrary to Article 110 TFEU.

17. Finally, it should be recalled that the Court recently gave a judgment which may suggest that the analysis of the rate, basis of taxation and method of calculation of the tax may prove to be insufficient in certain situations. [18] It may be necessary to try and find on the national market a motor vehicle with characteristics closest to those of the motor vehicle subject to proceedings and compare the amount of tax payable on that second vehicle with the residual amount of tax incorporated into the value of the first. However, that judgment concerned the specific situation of a Netherlands tax where the basis of taxation is calculated on the basis of the list price, reduced in accordance with the level of depreciation of the motor vehicle in relation to second-hand vehicles. [19] I do not consider that the findings made in that judgment can be applied more generally, in particular in relation to taxes with a different design from the Netherlands tax under consideration in that case. Finally, the Court in any event declared the Netherlands tax contrary to Article 110 TFEU on account of the change made to the method of calculating it — in that case an element based on CO_2 emissions was added to the element based on the value of the vehicle, with the result that the tax levied on vehicles imported from other Member States after that change inevitably exceeded the residual amount of tax incorporated into the value of similar vehicles registered in the Netherlands before the change. [20] Therefore, that judgment relates to a situation where the Member State increases a tax already in force, giving rise to discrimination against second-hand vehicles imported from other Member States.

18. I am consequently of the view that in principle a single-payment tax on motor vehicles, levied on their first registration on the territory of the Member State establishing that tax or on the first transfer of ownership of a vehicle already registered, counting from the date on which that tax is established, is not contrary to Article 110 TFEU, provided that it satisfies the criterion referred to at point 14 of this Opinion.

Possibility of exempting from the tax motor vehicles on which a similar tax in force in the past has already been paid

19. In establishing the new tax levied on the registration of motor vehicles, Article 4(2) of Law No 9/2012 at the same time exempts from that tax motor vehicles on which a tax previously in force has already been paid, in other words in accordance with Law No 343/2006 and OUG 50/2008. According to the Romanian Government's clarifications contained in the observations submitted in this case, the exemption is intended to prevent double taxation of the same goods. The question is whether or not that exemption gives rise to further incompatibility of the Romanian tax with Article 110 TFEU.

20. That exemption means that not all second-hand motor vehicles sold on the national market are covered by the new tax, but in principle all motor vehicles imported from other Member States will be subject to it. However, the residual amount of the tax previously in force will be incorporated into the value of the motor vehicles exempted from the new tax. Therefore, the condition for permitting such an exemption is analogous to that referred to in point 14 — the amount of the new tax on motor vehicles imported from other Member States cannot exceed that residual amount of the earlier tax incorporated into the value of similar national vehicles.

17 — Judgment in *Nádasdi and Németh* (C-290/05 and C-333/05, EU:C:2006:652, paragraph 45 and the case-law cited).

18 — Judgment in *X* (C-437/12, EU:C:2013:857).

19 — Ibid., paragraphs 3 to 10 and paragraph 1 of the operative part.

20 — Ibid., paragraphs 39 to 41.

21. Therefore, when establishing the tax referred to in point 18 of this Opinion, the Member State may exempt from it motor vehicles on which a tax previously in force has already been paid, provided that the amount of the new tax levied on second-hand motor vehicles imported from other Member States does not exceed the residual amount of the earlier tax incorporated into the market value of motor vehicles.

22. Since, as I have pointed out, the method of calculating the tax established by Law No 9/2012 is very close to the method of calculating the tax in force under OUG 50/2008, and also the earlier tax stemming from Law No 343/2006, and takes due account of the depreciation of the motor vehicle together with its age and condition, that condition would appear to be satisfied in this instance.

Possibility of applying the exemption in the case of Romanian tax on motor vehicles

23. It is also necessary to consider whether and to what extent the rule referred to in point 21 of this Opinion can be applied in the specific case of the Romanian tax on motor vehicles.

24. As I stated in the introduction, the provisions of Law No 9/2012 establishing the tax at issue in the present case provide for an exemption from that tax for motor vehicles on which the tax in force under Law No 343/2006 or OUG 50/2008 has already been paid.

25. As a result of the *Tatu* judgment, which was confirmed by subsequent judgments,[21] the tax established by OUG 50/2008 was regarded as contrary to Article 110 TFEU in that it discriminated against second-hand motor vehicles imported from other Member States in favour of similar national vehicles.

26. The tax established by Law No 343/2006 has not formed the subject-matter of any reference for a preliminary ruling. However, it should be borne in mind that in a preliminary ruling procedure the Court does not assess the consistency with EU law of specific provisions of the national law of the Member States, but merely provides an interpretation of EU law which the national court can then use as a basis in ruling on its consistency or otherwise. It would appear that the tax established by Law No 343/2006 had the same discriminatory character as was found in relation to the tax established by OUG 50/2008. In that case the Romanian courts should also declare it contrary to Article 110 TFEU on the basis of the *Tatu* judgment and previous case-law.

27. It is settled case-law that charges levied in breach of rules of EU law must be refunded with interest. That obligation is the consequence and complement of the rights conferred on individuals by the provisions of EU law prohibiting such taxes, as interpreted by the Court.[22]

28. Exempting a motor vehicle from a new tax on the basis that a tax previously in force and subsequently declared incompatible with EU law has already been paid on that vehicle does not constitute a correct means of fulfilling that obligation. Those liable for those two taxes are two different persons. The exemption is enjoyed by the purchaser of the motor vehicle who is exempted from the obligation to pay the tax on registering the vehicle in his name, but the person entitled to refund of the previous tax incompatible with EU law is the person who paid it, that is to say, the current seller of the vehicle or one of the previous owners, where the vehicle has already been traded between the date on which the earlier tax was paid and the date on which the new tax entered into force. Therefore, even if the gain to the national treasury from a tax incompatible with EU law were equalised in that way, the benefit would not fall to the person entitled to obtain a refund of that tax

21 — See point 3 of this Opinion.

22 — See, in particular, judgments in *Littlewoods Retail and Others* (C-591/10, EU:C:2012:478, paragraphs 24 to 26) and, in relation to the tax established by OUG 50/2008, *Nicula* (C-331/13, EU:C:2014:2285, paragraphs 27 to 29).

but rather to a third person. The person entitled recovers at most, in the sale price, the residual amount incorporated into the value of the motor vehicle, which, however, will rarely be equal to the amount of that tax which is actually paid, and that amount will certainly not include the interest owed.

29. Consequently, that mechanism for reimbursing tax levied in breach of EU law, by means of an exemption from the new tax, also does not ensure the neutrality of the new tax, as required by Article 110 TFEU. Since the obligation to refund the tax has not been satisfied, the taxable person remains entitled to obtain that refund, and on selling the motor vehicle can thus ask for a lower price which does not take account of the tax paid previously. Therefore, it cannot be held that any residual amount of that tax is incorporated into the value of the vehicle. Vehicles imported from abroad on which the new tax is always levied, since by definition they are not covered by the exemption, are thus automatically at a competitive disadvantage in comparison with national vehicles on which the earlier tax incompatible with EU law has been paid.

30. Therefore, I consider that, while the Member States do in principle have the right to apply the kind of exemption referred to in point 21 of this Opinion, such an exemption cannot be conferred by virtue of payment of a tax previously in force which was subsequently declared incompatible with EU law.

31. In my view that means, in the specific Romanian case under consideration in the main proceedings, that Article 110 TFEU precludes the exemption, provided for in Article 4(2) of Law No 9/2012, from the tax laid down in that provision of motor vehicles on which the tax in force previously under Law No 343/2006 and OUG 50/2008 has already been paid. [23]

32. That finding is not altered by the fact that in *Tatu* the Court held that the tax in force under OUG 50/2008 does not give rise to discrimination between second-hand vehicles imported from other Member States and vehicles already present on the Romanian market after previous importation and payment of that tax. [24] That finding was made before the Court went on in the same judgment to compare the situation of vehicles imported from other Member States with that of vehicles on which that tax had never been paid (vehicles registered in Romanian before it was established) and found that it discriminated against second-hand vehicles in general. [25]

33. However, it should be borne in mind that the case-law of the Court, as a result of which OUG 50/2008 has been found to be incompatible with EU law and which, — as I stated at point 26 — also applies to the tax established in Law No 343/2006, precisely concerned second-hand vehicles. In that case-law the Court ruled that Article 110 TFEU must be interpreted as precluding a Member State from introducing a tax levied on motor vehicles on their first registration in that Member State if that tax is arranged in such a way that it discourages the placing in circulation in that Member State of *second-hand vehicles* purchased in other Member States without discouraging the purchase of *second-hand vehicles* of the same age and condition on the domestic market. [26] From that point of view, the situation of new vehicles is different since a new vehicle is by definition always registered for

23 — A distinction must be drawn between these rules and those under consideration in the judgment in *Nicula* (C-331/13, EU:C:2014:2285). That judgment concerned the mechanism for refunding a tax incompatible with EU law to a person who had paid that tax provided for in a later legal act, namely OUG 9/2013 (see point 6 of this Opinion). However, as I explained above, the present case concerns the exemption of the new owner of a motor vehicle on the basis of a tax paid on that vehicle by the previous owner.

24 — Judgment in *Tatu* (C-402/09, EU:C:2011:219, paragraphs 43 to 47). The Court held that the mechanism for calculating the tax took sufficient account of the motor vehicle's depreciation, so that its amount did not exceed the residual amount of that tax incorporated into the value of similar vehicles on which that tax had been paid previously. See point 15 of this Opinion.

25 — Judgment in *Tatu* (C-402/09, EU:C:2011:219, paragraphs 52 to 61).

26 — Ibid., operative part (emphasis added).

the first time,[27] regardless of whether it was manufactured in the State in which that registration takes place or was imported from abroad. A tax levied on first registration in a specific State thus does not have the same discriminatory character in relation to new vehicles as it has in relation to second-hand vehicles.

34. Consequently, I do not see why the taxes levied pursuant to Law No 343/2006 or OUG 50/2008 on the registration of new motor vehicles should be regarded as incompatible with EU law. Therefore, the exemption provided for in Article 4(2) of Law No 9/2012 is not contrary to Article 110 TFEU in so far as it concerns vehicles registered in Romania as new, naturally subject to the condition referred to at the end of point 21.

Conclusion

35. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Curtea de Apel Brașov as follows:

(1) Article 110 TFEU must be interpreted as not precluding a Member State from establishing a single-payment tax on motor vehicles levied on the first registration of a vehicle on the territory of the Member State establishing that tax and on the first transfer of ownership of a vehicle already registered in that State, counting from the date on which that tax was established. That tax must be designed in such a way that the amount of the tax levied on second-hand vehicles imported from other Member States does not exceed the residual amount of the tax incorporated into the market value of national vehicles.

(2) Nor does Article 110 TFEU preclude a Member State, when establishing such a tax, from exempting from it motor vehicles on which a tax previously in force has already been paid, provided that the amount of the new tax levied on second-hand vehicles imported from other Member States does not exceed the residual amount of the earlier tax incorporated into the market value of national vehicles.

(3) That exemption cannot be conferred by virtue of payment of a tax previously in force which was not compatible with EU law.

27 — A vehicle which has not yet been registered is regarded as new.