Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 22 February 2018 [1]

Case C-49/17

Koppers Denmark ApS
v
Skatteministeriet

(Request for a preliminary ruling
from the Østre Landsret (Eastern Regional Court, Denmark))

(Reference for a preliminary ruling — Taxation of energy products and electricity — Directive 2003/96/EC — Article 21(3) — Consumption of energy products within the curtilage of an establishment producing energy products — Energy products used other than as motor fuels or as heating fuels — Consumption of solvent as fuel at a coal tar distillation plant)

Introduction

1. The legal question raised in this case essentially concerns the relationships between a number of provisions of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity. [2] Since the directive is not a model of clear and logical formulation of legal provisions, it is difficult to provide a fully coherent interpretation of it that would be satisfying in every respect. However, an analysis of the provisions of interest to the referring court in the context of other provisions of the directive makes it possible, in my view, to provide a definitive answer to the questions referred, even if that answer is somewhat unsatisfactory from the point of view of the coherence of the provisions of the directive.

Legal framework

EU law

2. Article 1 of Directive 2003/96 provides that 'Member States shall impose taxation on energy products and electricity in accordance with this Directive'.

3. Article 2 of the directive defines its scope as follows:

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

…

1 Original language: Polish.

2 OJ 2003 L 283, p. 51.

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

…

4. This Directive shall not apply to:

…

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

— energy products used for purposes other than as motor fuels or as heating fuels,

…’

4. Article 21 of Directive 2003/96 states:

‘1. In addition to the general provisions defining the chargeable event and the provisions for payment set out in Directive 92/12/EEC,[3] the amount of taxation on energy products shall also become due on the occurrence of one of the chargeable events mentioned in Article 2(3).

…

3. The consumption of energy products within the curtilage of an establishment producing energy products shall not be considered as a chargeable event giving rise to taxation, if the consumption consist[s] of energy products produced within the curtilage of the establishment … Where the consumption is for purposes not related to the production of energy products and in particular for the propulsion of vehicles, this shall be considered a chargeable event, giving rise to taxation.

…’

National law

5. According to the information provided in the request for a preliminary ruling, during the relevant period solvent used as heating fuel was taxable in Denmark pursuant to Paragraph 1(3) of the Mineralolieafgiftslov (Law on mineral oil tax), Paragraph 1(1)(1) of the Kuldioxidafgiftslov (Law on carbon dioxide tax) and Paragraph 1(1) of the Svovlafgiftslov (Law on sulphur tax).

6. Article 21(3) of Directive 2003/96 is implemented in Paragraph 7(3) of the Law on carbon dioxide tax and Paragraph 8(4) of the Law on sulphur tax. During the relevant period, Paragraph 7(3) of the Law on carbon dioxide tax was worded as follows:

‘Energy products covered by Paragraph 2(1) used directly in the production of an equivalent energy product shall be exempt from carbon dioxide tax. This shall not apply, however, to energy products used as motor fuel.’

3 Council Directive 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 directive was in force at the material time. Under Article 5(1) of that directive, the chargeable event for excise duty on energy products is their production within the territory of the European Union or their importation into that territory.

Paragraph 8(4) of the Law on sulphur tax read as follows during the relevant period:

'Energy products covered by Paragraph 1 used directly in the production of an equivalent energy product shall be exempt from sulphur tax. This shall not apply, however, to energy products used as motor fuel.'

Facts, procedure and questions referred

7. Koppers Denmark ApS ('Koppers Denmark') is a company governed by Danish law. At its establishment in Nyborg (Denmark), it produces a number of products derived from the refining and distillation of coal tar, including a solvent which accounts for about 3% to 4% of its production. All these products are classified under CN codes 2707 and 2708.

8. Solvent is the only one of the products made at the Koppers Denmark establishment in Nyborg that is used by the company as heating fuel and it is therefore in principle subject to taxes on energy products. The other products, although they can be used as heating fuels, are not used in this manner and are therefore not subject to taxes on energy products.

9. Production takes place at a coal tar distillation plant and at a naphthalene plant. The two plants are interconnected and are dependent on a common heat supply and a common process control system. Residues from the coal tar distillation plant are further processed at the naphthalene plant, and solvent produced at the naphthalene plant is used as fuel at the coal tar distillation plant. Solvent is further used as a supporting fuel for the burning of distillation gas from both the coal tar distillation plant and the naphthalene plant. The heat from the burning process is reapplied at the plants.

10. Koppers Denmark originally declared that its consumption of solvent was subject to energy tax but, in its letters of 13 November and 22 December 2008, it requested reimbursement of the tax for the period from 1 October 2005 to 31 December 2007. On 24 September 2010, SKAT (the Danish tax authority) ruled that Koppers Denmark's consumption of solvent as heating fuel at the coal tar distillation plant was not tax exempt on the ground that the solvent was not used to produce equivalent energy products, as the products produced were not taxable.

11. Koppers Denmark appealed against that ruling to the Landsskatteretten (National Tax Tribunal, Denmark), which on 8 June 2015 upheld SKAT's decision, inter alia on the ground that the consumption of the solvent as heating fuel was not covered by Article 21(3) of Directive 2003/96, as the solvent was not used to produce energy products that fall within the scope of the directive. On 7 September 2015, Koppers Denmark appealed against the National Tax Tribunal's decision to the Retten i Svendborg (District Court, Svendborg, Denmark), which found that the case raised issues of principle and accordingly referred it for adjudication at first instance by the Østre Landsret (Eastern Regional Court, Denmark) pursuant to Paragraph 226(1) of the Retsplejelov (Law on the administration of justice).

12. Having doubts as to the correct interpretation of Article 21(3) of Directive 2003/96, that court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 21(3) of Directive [2003/96] to be interpreted as meaning that the consumption of self-produced energy products for the production of other energy products is tax exempt in a situation such as that in the main proceedings, in which the energy products produced are not used as motor fuels or as heating fuels?

(2) Is Article 21(3) of Directive [2003/96] to be interpreted as meaning that the Member States may restrict the scope of the exemption so as to cover only consumption of an energy product used in the production of an equivalent energy product (i.e. an energy product which, like the energy product consumed, is also subject to tax)?'

13. The request for a preliminary ruling was received by the Court on 1 February 2017. Written observations were submitted by Koppers Denmark, the Danish Government and the European Commission. All of those parties were also represented at the hearing on 10 January 2018.

Analysis

First question referred for a preliminary ruling

Introductory remarks

14. To recap: the first question referred for a preliminary ruling concerns whether, in the light of Article 21(3) of Directive 2003/96, the consumption of an energy product by its producer as heating fuel for the production of other energy products constitutes a chargeable event for the tax on energy products where the energy products produced in this manner are neither used nor intended to be used as motor fuels or heating fuels.

15. The essential legal issue here is the interpretation of the concept of energy products in the context of products which, although they fall within the scope of the definition of energy products contained in Article 2(1) of Directive 2003/96, are neither used nor intended to be used as motor or heating fuels, and therefore, under the first indent of Article 2(4)(b), the directive does not apply to them.

16. Koppers Denmark takes the view that the provision contained in Article 21(3) of Directive 2003/96 should be interpreted literally, and therefore the concept of energy products used therein must be understood as covering any products which fall within the definition contained in Article 2(1) of the directive. The Danish Government and the Commission consider, by contrast, that the definition of energy products should be interpreted in conjunction with the exclusion contained in the first indent of Article 2(4)(b) of the directive. In their view, therefore, the concept of energy products used in Article 21(3) of the directive includes only those products that fall within the scope of the directive, namely, those which are used or intended to be used as motor fuel or heating fuel.

17. At first sight, it may appear that, if the establishment referred to in the first sentence of Article 21(3) of Directive 2003/96 uses energy products produced at that establishment as heating fuel, it is by definition an establishment producing energy products, and the provision in question applies automatically as a result. However, that was probably not the legislature's intention, because in that case the provision in the second sentence of Article 21(3) of the directive, which refers to energy products and electricity not produced within the curtilage of the establishment that consumes them for the production of other energy products, would become meaningless. In my view, the first sentence of Article 21(3) of Directive 2003/96 refers to the establishment's final output rather than to by-products that are subsequently used to produce other products. In the latter case, Article 21(6)(a) of the directive could possibly apply, whereas Article 21(3) requires for its application that energy products constitute the establishment's final output.

18. Consequently, it is necessary to analyse the relationship between the definition of energy products contained in Article 2(1) of Directive 2003/96 and the provision in the first indent of Article 2(4)(b) of the directive. The literal wording of those two provisions allows for different interpretations. One of them is an interpretation that restricts the concept of energy products to those products that are not used other than as motor fuels or as heating fuels. Another possible interpretation of Article 2(4)(b) of Directive 2003/96 excludes the products listed therein from harmonised taxation under the directive, but does not affect the scope of the terms used therein.

Restrictive interpretation of the concept of energy products

19. The first of these possible interpretations would be consistent with the line of reasoning put forward by the Danish Government and the Commission. Article 2(4)(b) of Directive 2003/96 should therefore be read as a provision that generally restricts the scope of the directive. Its first indent would thus clarify the definition of the concept of 'energy products' contained in Article 2(1) of the directive, with the result that any further use of this concept in subsequent provisions would have to be construed as covering only those products in the categories listed in Article 2(1) which are not used other than as motor fuels or as heating fuels.

20. Under Article 21(3) of Directive 2003/96, this would lead to the conclusion that the use of energy products as heating fuel for the production of other energy products does not constitute a chargeable event only if these other energy products are not used other than as motor fuels or as heating fuels. This conclusion appears to be logically justified, since, in this manner, only products subject to taxation under the provisions of the directive can affect the level of taxation of other products covered by the directive.

21. However, this interpretation has a number of shortcomings which, in my view, preclude it from being adopted.

Criticism of the restrictive interpretation of the concept of energy products — linguistic arguments

22. From the point of view of the literal wording of the provisions of Directive 2003/96, the above interpretation ignores the fact that Article 2(4)(b) of Directive 2003/96 does not exclude from the directive's scope 'the products referred to in paragraph 1' or products covered by specific codes of the Combined Nomenclature that are not used as motor fuels or heating fuels. In the first indent of that provision, it is explicitly stated that Directive 2003/96 does not apply to '*energy products* used for purposes other than as motor fuels or as heating fuels'.[4]

23. This means that products covered by the definition contained in Article 2(1) of Directive 2003/96, but not used as motor fuels or heating fuels, admittedly fall outside the scope of the directive, but are still energy products within the meaning of its provisions. This conclusion is confirmed by the fact that the very definition of energy products contained in Article 2(1) of the directive provides, in respect of certain product categories, that they are energy products only if they are used as motor fuels or heating fuels. This is the case with the products listed in Article 2(1)(a), (d) and (h). In other cases, however, including in respect of the products listed in Article 2(1)(b), which are the subject of the main proceedings, there is no such proviso.

4 Emphasis added.

24. In its written observations, the Commission explains this fact as follows: some categories listed in Article 2(1) of Directive 2003/96 include products that are not normally used as motor fuels or heating fuels, and therefore the legislature stated that these products are energy products only when they are used as motor fuels or heating fuels. On the other hand, products in the other categories are, in the Commission's view, normally used as motor fuels or heating fuels, and therefore no such proviso is necessary.

25. The fact remains that most categories of products listed in Article 2(1) of Directive 2003/96 include, albeit in different proportions, both products that are or may be used as motor fuels or heating fuels and products that are not or cannot be used in this manner. Therefore, if the legislature had wanted to draw a precise distinction between energy products and other products on the basis of the criterion of the manner of use, it would have sufficed to include an appropriate general proviso in the definition of energy products. However, the legislature's intention was apparently to distinguish between products which are not energy products at all if they are not used as motor fuels or heating fuels and products which remain energy products within the meaning of the directive, but are not subject to its provisions if and as long as they are not used in this manner. In my view, this prevents Article 2(4) of Directive 2003/96 from being interpreted as an inseparable element of the definition of energy products and precludes the conclusion that, whenever the directive refers to energy products, this concept does not cover products not used as motor fuels or heating fuels, even if they fall within the definition contained in Article 2(1) of the directive.

26. Similarly, I am not persuaded by the argument put forward by the Commission which is based on the obligation of uniform interpretation of the concept of 'energy products' used in Article 21(3) of Directive 2003/96. The Commission contends that, in that provision, the concept refers both to products used by an establishment to produce other energy products (which I will refer to as 'intermediate products') and to the final products themselves. Since the intermediate products are to be used as heating fuel, and therefore must be subject to the provisions of the directive, the final products must also be subject to those provisions and thus cannot be excluded from their scope under Article 2(4) of Directive 2003/96.

27. Of course, a term should be interpreted uniformly within a single legal act, let alone within a single provision. In my view, however, the Commission's reasoning is vitiated by the logical error known as *petitio principii*. It is obvious that the intermediate product must be used as heating fuel in the production of final products, since any other use of this product could not constitute a chargeable event under Directive 2003/96 and thus no application of Article 21(3) of the directive would be possible either. Therefore, the condition that the energy product is used as heating fuel is necessarily met here. This, however, does not follow from the application of the first indent of Article 2(4)(b) of the directive to the interpretation of the concept of 'energy products' in respect of intermediate products, but rather from their *actual* use as heating fuel.

28. Therefore, in extrapolating this actual use of intermediate products to the meaning of the concept of 'energy products' in respect of final products, the Commission committed the aforementioned logical error. However, the first sentence of Article 21(3) of Directive 2003/96 can be understood as follows: 'the use of products falling within the definition contained in Article 2(1) of this directive as heating fuel for the production of other products falling within that definition does not give rise to a chargeable event'. Such an interpretation would be entirely reasonable, without the need for recourse to Article 2(4) of the directive. Thus, the principle of uniform interpretation of a concept within a single provision does not preclude the concept of 'energy products' from being interpreted as covering all products that fall within the definition contained in Article 2(1) of Directive 2003/96.

29. However, the fundamental reasons which, in my view, preclude the proposition that Article 2(1) of Directive 2003/96 must be interpreted in conjunction with Article 2(4) are of a systemic nature.

Analysis of the first indent of Article 2(4)(b) of Directive 2003/96 in the context of the other provisions of the directive

30. Pursuant to Article 2(2) of Directive 2003/96, in addition to the energy products listed in Article 2(1), the directive also applies to electricity. Similarly to energy products, electricity is subject to taxation under the directive, although on somewhat different terms from those products. At the same time, pursuant to the third and fourth indents of Article 2(4)(b), the directive does not apply to electricity 'used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes' as well as 'when it accounts for more than 50% of the cost of a product'. In addition, under Article 14(1)(a) of Directive 2003/96 'energy products and electricity used to produce electricity …' must be exempt from taxation.

31. In accordance with all the principles for interpreting legal provisions, all the indents of Article 2(4)(b) of Directive 2003/96 must be interpreted as having the same effect in the sense that their relationship to the other provisions of the directive must be the same. Therefore, if it is accepted that the first indent of Article 2(4)(b) of the directive restricts the definition of 'energy products' contained in Article 2(1), with the result that the understanding of this concept in other provisions of the directive does not cover products used other than as motor fuels or as heating fuels, then the same should apply by analogy to electricity used in the manner indicated in the third and fourth indents of Article 2(4)(b) of the directive. Electricity used for the purposes of chemical reduction and in electrolytic and metallurgical processes and electricity accounting for more than 50% of the cost of a product would not fall within the scope of the concept of 'electricity' within the meaning of Directive 2003/96. Therefore, it would also have no effect on the taxation of other products covered by the directive.

32. This, in turn, would lead to absurd conclusions under Article 14(a) of Directive 2003/96, since it would mean that energy products and electricity that are used to produce electricity used for the purposes of chemical reduction and in electrolytic and metallurgical processes as well as those that are used to produce electricity accounting for more than 50% of the cost of a product would not be exempt, and would therefore have to be taxed in accordance with the general rules laid down in the directive. Such an outcome is unacceptable for three reasons.

33. First, after electricity has been produced, it is sent to the grid, from which users, via distributors, draw certain amounts of energy. Thus, there is no direct link between a specific producer and the electricity it produces, on the one hand, and a specific user, on the other. A fortiori, there is no such link between a producer or distributor of energy products used to produce electricity and a user of that electricity. The identification and subsequent taxation of energy products that are used to produce electricity used for the purposes of chemical reduction and in electrolytic and metallurgical processes would therefore be extremely difficult, if not impossible. This would be even more difficult in the case of energy products used to produce electricity that accounts for more than 50% of the cost of another product.

34. Secondly, even if it were possible to tax selectively in such a way energy products used to produce electricity depending on the use made of that electricity or on its share in the cost of production of other products, such taxation would make the exclusion provided for in the third and fourth indents of Article 2(4)(b) of Directive 2003/96 meaningless. This is because the electricity used in the manner indicated therein would not be taxed directly, but its price would include the tax on energy products used in its production, and the related burden would certainly, as is the nature of indirect taxes, be passed on to electricity users.

35. Thirdly and lastly, this interpretation would also be incompatible with the principle set forth in Article 21(5) of Directive 2003/96, according to which electricity is subject to taxation at the time of supply by the distributor. This method of determining the moment of chargeability of the tax on electricity is possible owing to the application of the exemption provided for in Article 14(1)(a) of the

directive: since electricity is taxed as a final product and not at the stage of the fuel used to produce it, the moment of chargeability can be postponed until the final stage of trade in electricity, namely, until the time when it is delivered to the customer. However, if it is assumed that the exclusion of certain uses of electricity under the third and fourth indents of Article 2(4)(b) of Directive 2003/96 results in no exemption for energy products used to produce electricity, this electricity would not only be de facto taxed despite that exclusion (see the preceding point), but in addition it would be taxed at the stage of its production rather than distribution.

36. On those grounds, I do not consider it possible to accept the reasoning that the exclusion contained in Article 2(4)(b) of Directive 2003/96 has the effect of restricting the definition of the products listed therein, for the purposes of other provisions of the directive. This concerns both electricity, which is referred to in the third and fourth indents of that provision, and energy products, which are referred to in the first indent.

37. In my view, this argument is not affected by the fact that Article 14(a) of Directive 2003/96 concerns exemption from taxation while Article 21(3) of the directive refers to an event which is not considered a chargeable event.

38. The practical effect is the same in both cases. Where an establishment uses the energy products it has produced for the production of other energy products, it is difficult to determine another moment of chargeability, and thus the effect is the same as if those products were exempt. Indeed, this is the manner in which the provision in question was transposed into Danish law (see point 6 above).

39. On the other hand, the material point here is not the effect of the mechanism provided for in Article 14(1)(a) and in Article 21(3) of Directive 2003/96, respectively, but rather the relationship between the different products that is set out therein. In both cases we are dealing with products that are subject to the provisions of the directive and that are used to produce other products, including the products listed in Article 2(4)(b) of the directive (in the first indent in the case of Article 21(3) and in the third and fourth indents in the case of Article 14(1)(a), respectively). Therefore, the effect of one or another interpretation of Article 2(4)(b) of the directive on the answer to the question concerning the application of both provisions must be identical.

40. In conclusion, the interpretation of Article 2(4)(b) of Directive 2003/96 according to which the exclusion, laid down in that provision, from the scope of the directive means that the products listed therein cannot affect the level of taxation of other products falling within the scope of the directive leads to unacceptable conclusions under Article 14(1)(a) of the directive. This interpretation must therefore be rejected both in relation to the third and fourth indents and in relation to the first indent of Article 2(4)(b).

Interpretation of Article 2(4)(b) of Directive 2003/96 as a sui generis tax exemption

41. In view of the above, I am of the opinion that a different interpretation of Article 2(4)(b) of Directive 2003/96 from that proposed by the Danish Government and the Commission must be adopted. Indeed, I consider that this provision de facto exempts the products listed therein from the taxation provided for under the directive. These products are therefore not subject to harmonised taxation, but on the other hand they remain energy products and electricity, respectively, within the meaning of the directive. The fact that this exemption is formulated as an exclusion from the scope of the directive means that Member States remain free to determine the possible taxation of these products under separate national provisions. This freedom is considerably more restricted in the case of products which fall within the scope of Directive 2003/96 but are exempt under its provisions.[5]

5 Article 3(3) of Directive 92/12. See judgment of 5 July 2007, *Fendt Italiana* (C-145/06 and C-146/06, EU:C:2007:411, paragraph 44).

42. This interpretation makes it possible to ensure that the provisions of the directive are coherent with respect to the taxation of electricity. The exemption provided for in Article 14(1)(a) of Directive 2003/96 is therefore also applicable to products used to produce electricity that is subsequently used in one of the ways indicated in the third and fourth indents of Article 2(4)(b) of the directive, which makes it possible to avoid the practical and logical difficulties discussed in points 33 to 35 above.

43. This interpretation is also consistent with the original proposal for Directive 2003/96 presented by the Commission.[6] That proposal did not include a provision equivalent to the current Article 2(4) of the directive. Instead, the proposal provided for the exemption from taxation of certain categories of energy products, including those which are not used as motor fuels or heating fuels (the current first indent of Article 2(4)(b) of Directive 2003/96) and electricity used for the purposes of chemical reduction and in electrolytic and metallurgical processes (the current third indent of Article 2(4)(b) of Directive 2003/96).[7] The provision equivalent to the current Article 21(3) of the directive expressly referred to the definition of energy products, listing Combined Nomenclature codes for the products whose production did not involve the taxation of the energy products used in their production that originated from the same establishment.[8] Had wording such as that of the proposal for Directive 2003/96 been adopted, the current position of the Danish Government and of the Commission would have therefore been indefensible even without recourse to systemic analysis.

44. Similar logic also applied under Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils,[9] which was replaced by Directive 2003/96. Pursuant to Article 8(1)(a) of Directive 92/81 'mineral oils used for purposes other than as motor fuels or as heating fuels' were exempt from the harmonised excise duty provided for in that directive, while Article 4(3) of Directive 92/81 introduced a principle similar to that laid down in the first sentence of Article 21(3) of Directive 2003/96. Thus, the position of the Danish Government and of the Commission presented in this case would be equally difficult to maintain under Directive 92/81.

45. As regards Article 21(3) of Directive 2003/96, my proposed interpretation means that this provision (the first sentence) always applies if the products produced by the establishment in question are in one of the categories listed in Article 2(1) of the directive, irrespective of whether or not they are used as motor fuels or heating fuels.

46. I do not share the view of the Danish Government, expressed in its observations in the present case, that this interpretation of Article 21(3) of Directive 2003/96 renders the first indent of Article 2(4)(b) meaningless. This is because, as I have pointed out above, the objective of the latter provision is in fact to exempt the products listed therein from harmonised taxation under the directive, while at the same time leaving Member States free to tax them under separate provisions.

47. For the same reason, in my view there is no contradiction between the interpretation proposed by me and the conclusions resulting from the Court's judgment of 5 July 2007 in *Fendt Italiana*,[10] since that judgment means only that Member States are not allowed to subject products that are used other than as motor fuels or as heating fuels to the harmonised taxation provided for in Directive 2003/96. However, this does not mean that these products cease to be energy products within the meaning of the directive. Moreover, the Court itself uses the term 'energy products' when referring to this category of products.[11]

6 COM(97) 30 final.

7 See Article 13(1)(a) of the proposal.

8 See Article 18(3) of the proposal.

9 OJ 1992 L 316, p. 12.

10 C-145/06 and C-146/06, EU:C:2007:411.

11 See judgment of 5 July 2007, *Fendt Italiana* (C-145/06 and C-146/06, EU:C:2007:411, paragraph 41).

48. The question remains as to the rationale of Article 21(3) of Directive 2003/96 if interpreted in accordance with my proposal. While the justification for exempting products used to produce electricity irrespective of the subsequent use of that electricity is understandable, for instance for the reasons discussed in points 33 to 35 above, it may appear that not taxing energy products used to produce other energy products which are not subsequently used as motor fuels or heating fuels is not entirely justified.

49. According to the Danish Government and the Commission, Article 21(3) of Directive 2003/96 is intended to avoid the double taxation of energy products: once directly and once indirectly by taxing the energy products used in their production. Such an objective of the provision in question would support the interpretation proposed by the Danish Government and the Commission, according to which only the use of energy products for the production of other energy products that are taxed, namely, products used as motor fuels or heating fuels, is not considered to give rise to a chargeable event.

50. However, it should be noted that Directive 2003/96 does not contain a general prohibition on the double taxation of energy products. The single tax principle applies only to electricity: it is taxed at the distribution stage, and the energy products used in its production are exempt (see points 34 and 35 above). However, with respect to energy products, the second sentence of Article 21(3) of the directive provides only an option for Member States, under which they 'may also consider the consumption of electricity and other energy products not produced within the curtilage of such an establishment [that is to say, an establishment that produces energy products] … as not giving rise to a chargeable event'. Thus, energy products used to produce other energy products but not produced within the curtilage of the same establishment may equally be taxed irrespective of the fact that final products are taxed as well. It is true that Denmark took advantage of this option, exempting from taxation all energy products used to produce other energy products, irrespective of their place of production.[12] Nevertheless, this does not alter the fact that Directive 2003/96 does not contain any general single tax principle for the taxation of energy products.

51. The rationale for the first sentence of Article 21(3) of Directive 2003/96 appears rather to be the difficulty that would ensue from the taxation of products that are simultaneously produced and consumed at the same establishment. Such an arrangement would not only place an additional burden on the establishment, but would also require close supervision by the tax authorities. No such difficulties arise in the case of energy products produced by a producer other than the establishment in which they are subsequently used, since the producer or the distributor is subject to tax and then passes on that tax in the price of energy products sold. Thus, the second sentence of Article 21(3) leaves the issue of the taxation of such situations to the discretion of Member States.

52. I am aware that, even with such a justification, my proposed interpretation of the first sentence of Article 21(3) of Directive 2003/96 — according to which the concept of 'energy products' contained therein covers all products listed in Article 2(1) of the directive, even those used other than as motor fuels or as heating fuels — results in a certain gap in the system of taxation provided for in the directive, since energy products used to produce products that are not taxed should, in principle, be taxed.

12 In my view, this follows in any event from the provisions of Danish law cited in point 6 of this Opinion.

53. First, however, as the Commission itself notes in its observations (see point 23 of this Opinion), in the case of product categories that are only occasionally used as motor fuels or as heating fuels, Article 2(1)(a), (d) and (h) of Directive 2003/96 already includes the appropriate proviso. Therefore, products in these categories are not energy products within the meaning of the directive unless they are used as motor fuels or as heating fuels. On the other hand, the remaining categories include products normally used or intended for use as motor fuels or heating fuels. Any gap in taxation will therefore relate to exceptional cases such as that in the main proceedings.

54. Secondly, to interpret Article 2(4) of Directive 2003/96 as a provision that restricts the scope of the concepts used in Article 2(1) and (2) of the directive, giving rise to the difficulties discussed in points 33 to 35 of this Opinion, would undermine the coherence of the system of taxation established by the directive to a much greater extent than the aforementioned gap in taxation resulting from my proposed interpretation.

55. For this reason too, I am not convinced by the Commission's argument that Article 21(3) of Directive 2003/96 must, as an exception to the principle of taxation of energy products, be interpreted strictly. While it is true that exceptions must be interpreted strictly and, in any event, not broadly, this must not lead to fundamental inconsistencies in the interpretation of other provisions of the directive such as those indicated in points 33 to 35 of this Opinion.

56. Thirdly and lastly, Directive 2003/96 contains a plethora of exclusions, exemptions, and derogations.[13] As a result, the system provided for in the directive is not based on the principle of universal taxation without any exceptions, and thus, in my view, the non-taxation of energy products used within the establishment in which they are produced cannot materially undermine the logic of that system.

57. In the light of all the foregoing, I propose that the Court's answer to the first question referred for a preliminary ruling should be that the first sentence of Article 21(3) of Directive 2003/96 must be interpreted as meaning that the concept of 'energy products' used therein covers all products referred to in Article 2(1) of the directive, irrespective of whether or not they are used as motor fuels or heating fuels.

Second question referred for a preliminary ruling

58. The second question concerns whether Member States may restrict the application of Article 21(3) of Directive 2003/96 to situations where an energy product is used to produce energy products that are taxable under the directive. However, the referring court does not state whether its question concerns only a restriction to energy products used as motor fuels or heating fuels, and thus not excluded pursuant to the first indent of Article 2(4)(b) of the directive, or rather a more far-reaching restriction, for example to products that do not fall under any of the numerous exemptions provided for in the directive.

59. However, in either case a distinction should be made between the legal nature of the provision in the first sentence of Article 21(3) of Directive 2003/96 and the provision in its second sentence.[14]

13 In addition to the exemptions discussed in this Opinion, see, for example, the second and fifth indents of Article 2(4)(b), Articles 15 and 17, and the derogations for individual Member States provided for in Articles 18, 18a and 18b of Directive 2003/96.

14 To recap: the second sentence of Article 21(3) of Directive 2003/96 provides that '*Member States may* also *consider* the consumption of electricity and other energy products not produced within the curtilage of such an establishment … as not giving rise to a chargeable event' (emphasis added).

60. The first sentence of Article 21(3) of the directive is a provision binding on the Member States, which are therefore obliged to transpose it into national law and ensure that it is fully effective. Consequently, they cannot in any way restrict the scope of its application in a manner deviating from its correct interpretation that will result, inter alia, from the judgment of the Court in the present case. Thus, if the Court finds, in accordance with my proposed answer to the first question referred for a preliminary ruling, that this provision applies to the production of all energy products within the meaning of Article 2(1) of Directive 2003/96, irrespective of how they are used, the Member States will not be entitled to restrict its application. The answer to the second question referred for a preliminary ruling will therefore be in the negative in so far as it concerns the first sentence of Article 21(3) of the directive.

61. The second sentence of Article 21(3) of Directive 2003/96 is a provision that is optional in nature and, in addition, several options for its application appear to be provided for. I would therefore be inclined to take the view that here the Member States enjoy a much greater margin of discretion.

62. However, the main proceedings concern the use of energy products within the curtilage of the establishment which produces them, and so the first sentence of Article 21(3) of Directive 2003/96 is applicable. A question concerning the interpretation of the second sentence of that provision would thus be hypothetical. I propose, therefore, that the answer to the second question referred for a preliminary ruling should be limited to the interpretation of the first sentence of Article 21(3) of the directive.

Conclusion

63. In the light of all the foregoing, I propose that the Court's answer to the questions referred for a preliminary ruling by the Østre Landsret (Eastern Regional Court, Denmark) should be as follows:

(1) The first sentence of Article 21(3) 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 meaning that the concept of 'energy products' used therein covers all products referred to in Article 2(1) of the directive, irrespective of whether or not they are used as motor fuels or heating fuels.

(2) Member States are not entitled to restrict the scope of that provision on the basis of the nature or use of the energy products produced by an establishment to which that provision applies.