Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 7 March 2018 [1]

Case C-90/17

Turbogás Produtora Energética SA
v
Autoridade Tributária e Aduaneira

(Request for a preliminary ruling from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration)) (Portugal))

(Reference for a preliminary ruling — Taxation of energy products and electricity — Directive 2003/96/EC — Article 14(1)(a) — Exemption of energy products and electricity used to produce electricity — Third subparagraph of Article 21(5) — Entity producing electricity for its own use — Exemption for small producers of electricity)

Introduction

1. In the present case, the Portuguese court has referred questions for a preliminary ruling concerning the interpretation of one of the provisions of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity. [2] Providing an answer to these questions does not pose any major difficulties. The problem, however, is that providing an answer that will be useful for resolving the dispute pending before that court also calls for the interpretation of other provisions of that directive besides the one included by the referring court in its request. Therefore, the Court should, in my view, broaden its analysis so as to include those additional provisions.

Legal framework

EU law

2. Article 1 of Directive 2003/96 stipulates:

‘Member States shall impose taxation on energy products and electricity in accordance with this Directive.’

1 Original language: Polish.

2 OJ 2003 L 283, p. 51.

3. Pursuant to Article 14(1)(a) of that directive:

'In addition to the general provisions set out in Directive 92/12/EEC [3] on exempt uses of taxable products, and without prejudice to other Community provisions, Member States shall exempt the following from taxation under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

(a) energy products and electricity used to produce electricity and electricity used to maintain the ability to produce electricity. However, Member States may, for reasons of environmental policy, subject these products to taxation without having to respect the minimum levels of taxation laid down in this Directive. ...'

4. Lastly, pursuant to the first and third subparagraphs of Article 21(5) of Directive 2003/96:

'For the purpose of applying Articles 5 and 6 of Directive 92/12/EEC, electricity and natural gas shall be subject to taxation and shall become chargeable at the time of supply by the distributor or redistributor …

…

An entity producing electricity for its own use is regarded as a distributor. Notwithstanding Article 14(1)(a), Member States may exempt small producers of electricity provided that they tax the energy products used for the production of that electricity.'

Portuguese law

5. Pursuant to Article 4(1)(b) of the Código dos Impostos Especiais de Consumo (Portuguese Excise Duty Code) ('the CIEC'), persons liable to pay excise duty on electricity are to include, inter alia, entities producing electricity for their own use ('autoprodutores'). Pursuant to Article 9(1) of the CIEC, the release for consumption of electricity is to include, inter alia, the production thereof by such entities for their own use. Pursuant to Article 89(2)(a) of the CIEC, electricity used to produce electricity and to maintain the ability to produce electricity is to be exempt from tax. Lastly, pursuant to Article 96A(1) of the CIEC, distributors of electricity must be registered for the purposes of collecting excise duty.

Facts, procedure and the questions referred

6. Turbogás — Produtora Energética SA ('Turbogás') is a Portuguese company which engages in the production of electricity by burning natural gas. The Turbogás power plant has an installed capacity of 990 MW, which allows that company to generate around 9% of all electricity produced in Portugal.

7. Turbogás consumes part of the electricity it produces for purposes related to that production. As is apparent from the order for reference, that company was not entitled to exempt the electricity produced for its own use from excise duty. However, the company did not declare that electricity for tax purposes and did not pay tax on it.

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).

8. As the result of an inspection, the tax authorities estimated the amount of electricity produced by Turbogás for its own use in 2012 and 2013 and, by decision of 4 August 2014, ordered the payment of overdue tax in the amount of EUR 71 197.17 together with interest in the amount of EUR 4 986.52. An appeal against that decision was dismissed on 7 January 2016. On 20 April 2016, Turbogás submitted a request for an arbitration tribunal to be set up, seeking a declaration that the decision of 4 August 2014 was invalid. The arbitration tribunal was set up on 1 July 2016.

9. In its application, Turbogás maintains, first of all, that it cannot be regarded as an entity producing electricity for its own use ('autoprodutor') within the meaning of Article 4(1)(b) of the CIEC. The company bases this claim on the wording of the Portuguese version of the third subparagraph of Article 21(5) of Directive 2003/96, which in the second sentence uses the expression '*estes* pequenos produtores' ('*these* small producers'). According to Turbogás, the use of this wording means that the entirety of the third subparagraph of Article 21(5) of Directive 2003/96 applies exclusively to small producers of electricity, and therefore only such producers are to be regarded as distributors of electricity and subject to tax. Since Turbogás is clearly not a small producer of electricity, it should not be regarded as a distributor of the electricity which it consumes for its own use and should also not be subject to tax.

10. In those circumstances, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration)) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Pursuant to and for the purposes of [the third subparagraph of] Article 21(5) of Directive [2003/96], must entities which produce electricity for their own use be small producers in order to be … regarded as distributors, and [thus] subject to tax in accordance with the first [subparagraph] of Article 21(5) of that directive, so that other entities (those which are not small producers) which produce electricity for their own use are excluded from that classification as distributors, or must all entities which produce electricity for their own use (regardless of their respective size and of whether they do so as their main or secondary economic activity), and are not exempt as small producers under the second sentence of the third [subparagraph] of Article 21(5) of that directive, be regarded as distributors, and [thus] subject to tax in accordance with the first [subparagraph] of Article 21(5) of that directive?

(2) In particular, may an entity, such as the one at issue in [the main proceedings], which is a large electricity producer, producing around 9% of the national energy for sale to the national grid, be regarded as "an entity producing electricity for its own use", as referred to in [the third subparagraph of] Article 21(5) of Directive [2003/96], when only a small part of the electricity which it produces is consumed in its own production of new electricity as an integral part of its production process?'

11. The request for a preliminary ruling was received by the Court on 21 February 2017. Written observations were submitted by Turbogás, the Portuguese Government and the European Commission.

Analysis

Preliminary observation

12. In the dispute before the referring court, Turbogás bases its arguments on the interpretation of the third subparagraph of Article 21(5) of Directive 2003/96, and thus the questions referred for a preliminary ruling also concern that provision. However, the purpose of the main proceedings is not to determine the status of Turbogás as an entity producing electricity for its own use, which is

governed by that provision, but rather to assess whether the decision of 4 August 2014 ordering that company to pay excise duty on the electricity which it produces and consumes for the purposes of its production is lawful. From this point of view, the interpretation of Article 14(1)(a) of Directive 2003/96 appears relevant.

13. Therefore, after examining the issues expressly indicated in the questions referred for a preliminary ruling, I shall also refer to a matter which was not directly addressed therein, namely the interpretation of Article 14(1)(a) of that directive and its relationship to the third subparagraph of Article 21(5) thereof. Such a broadening of the scope of the questions referred for a preliminary ruling is in my view permissible, since according to settled case-law, in the procedure laid down in Article 267 TFEU which provides for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. Furthermore, the Court may decide to take into consideration rules of EU law to which the national court has made no reference in the wording of its question.[4] In my view, it is not possible to give a useful answer to the questions referred in the present case, in particular to the second question, without taking the interpretation of Article 14(1)(a) of Directive 2003/96 into account when interpreting the third subparagraph of Article 21(5) of that directive.

Third subparagraph of Article 21(5) of Directive 2003/96

14. In the first question referred for a preliminary ruling in the present case, the referring court asks whether, in the light of the third subparagraph of Article 21(5) of Directive 2003/96, only entities producing electricity for their own use which are small producers are to be regarded as distributors of electricity.

15. To recap: Turbogás claims that since in the Portuguese language version of Directive 2003/96 the phrase 'these small producers' is used in the second sentence of the third subparagraph of Article 21(5), the entire provision applies exclusively to small producers of electricity. Therefore, according to Turbogás, that provision does not apply to large producers of electricity who consume part of the electricity they produce for the purposes of that production.

16. However, it is difficult to agree with that line of argument.

17. First, in my understanding, apart from the Portuguese language version of Directive 2003/96, the phrase 'these small producers' appears only in the Spanish version thereof. In particular, it certainly does not appear in the French, English, German or Polish versions. Thus, a literal interpretation of the provision in question, which takes into account not one, but all language versions, does not allow the argument put forward by Turbogás to be accepted.

18. A systematic and teleological interpretation of the third subparagraph of Article 21(5) of Directive 2003/96 leads to similar conclusions.

4 See, recently, judgment of 13 October 2016, *M. and S.* (C-303/15, EU:C:2016:771, paragraph 16 and the case-law cited).

19. Pursuant to Article 21(1) of Directive 2003/96, read in conjunction with the provisions of Directive 92/12,[5] the chargeable event for the tax on the products covered by Directive 2003/96 is in principle their production or their use as motor fuel or heating fuel. The exception here is electricity (as well as natural gas), where the tax becomes chargeable at the time of supply by the distributor to the end user. This is stipulated in the first subparagraph of Article 21(5) of Directive 2003/96. This is accompanied by the exemption of energy products and electricity used to produce electricity provided for in Article 14(1)(a) of that directive. As a result, electricity is taxed only once — at the distribution stage.

20. In the case of entities producing electricity for their own use, there is no distribution because the electricity is consumed by the same entity that produces it. The producer of the electricity is at the same time its user, without the participation of an intermediary in the form of a distributor. For this reason, the first sentence of the third subparagraph of Article 21(5) of Directive 2003/96 stipulates that an entity producing electricity for its own use is to be regarded as a distributor. This must be understood as meaning that it is to be regarded as a distributor for the purposes of applying the first subparagraph of Article 21(5) of that directive, that is, for the purposes of determining the chargeable event. Since, according to the first sentence of the third subparagraph of Article 21(5) of Directive 2003/96, an entity producing electricity for its own use is to be regarded as a distributor, its consumption of that electricity for its own use results in tax being chargeable pursuant to the first subparagraph of Article 21(5) of that directive. This solution prevents a loophole in the system of taxation arising in such a situation as a result of the absence of a distributor supplying electricity.

21. On the other hand, the second sentence of the third subparagraph of Article 21(5) of Directive 2003/96 allows Member States to exclude small producers of electricity from this mechanism. Therefore, such small producers need not be regarded as distributors, and as a consequence the electricity they produce is not subject to tax because there is no chargeable event in the form of distribution. In such a situation, a loophole in the system of taxation is prevented by the requirement, also contained in that provision, that, by way of derogation from the exemption provided for in Article 14(1)(a) of that directive, Member States taking advantage of this option have taxed the energy products used by those small producers to produce electricity for their own use. This solution allows both the entities concerned and the tax authorities of Member States to avoid the administrative costs of taxing such electricity and supervising taxpayers; in the case of small producers, those costs could even exceed the tax revenue thus obtained. A similar logic appears to underlie, for example, Article 21(3) of Directive 2003/96.[6]

22. The placing of the first and second sentences of the third subparagraph of Article 21(5) of Directive 2003/96 into a single unit of text merely means that the administrative simplification provided for in the second sentence applies only to those small electricity producers which produce that electricity for their own use and which are therefore in principle covered by the first sentence. There is nothing, however, to support the argument that the entire third subparagraph of Article 21(5) applies exclusively to small producers of electricity, since the principle arising from that provision is the taxation of the production of energy for one's own use through such producers being regarded as distributors. That principle provides for a certain exception only in situations where, due to the small scale of electricity production, taxation would not be rational given the administrative burden and costs entailed thereby. If the argument put forward by Turbogás were to be accepted, it would result in entities which produce electricity for their own use, but which are not small producers, being exempt from tax without any justification.

23. I therefore propose that the answer to the first question referred for a preliminary ruling should be that the third subparagraph of Article 21(5) of Directive 2003/96 must be interpreted as also applying to entities producing electricity for their own use which are not small producers of electricity.

5 As of 15 January 2009, that directive has been replaced by 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).

6 That provision allows the untaxed use of energy products for the production of energy products.

24. It is true that Directive 2003/96 does not define the concept of small producers of electricity, leaving this issue to be regulated by the national law of the Member States. The fact that Turbogás is not a small producer does not appear to be in dispute in the main proceedings, however, since that company accounts for a significant proportion of all national electricity production. Nevertheless, as I shall try to demonstrate below, this is of no relevance as regards the resolution of the present case.

Interpretation of the third subparagraph of Article 21(5) of Directive 2003/96, read in conjunction with Article 14(1)(a) of that directive

25. By the second question referred for a preliminary ruling, the referring court is attempting to determine whether an entity such as Turbogás whose main activity is the production of electricity, where it consumes a small part of that electricity for the purposes of that production, can be regarded as an entity producing electricity for its own use within the meaning of the third subparagraph of Article 21(5) of Directive 2003/96.

26. The Portuguese Government proposes that this question be answered in the affirmative; it considers that, with respect to the part of the electricity that Turbogás consumes for the purposes of undertaking its production, that company is an entity that produces electricity for its own use within the meaning of the aforementioned provision, on an equal footing with any other such entity. In my view, however, the matter is not as simple as that.

Relationship between the third subparagraph of Article 21(5) of Directive 2003/96 and Article 14(1)(a) of that directive

27. In my view, the answer to this question is negative, but not for the reasons put forward by Turbogás in the main proceedings. This is because the reasons why Turbogás is not subject to the third subparagraph of Article 21(5) of Directive 2003/96 do not relate solely to the interpretation of that provision, but rather result from its relationship to Article 14(1)(a) of that directive. In this respect, I fully share the views of the Commission as expressed in its observations in the present case.

28. As I have already pointed out above,[7] Directive 2003/96 regulates the taxation of electricity in a precise manner, and its rules regarding such taxation diverge from the rules for the taxation of other products covered by that directive.

29. This is because the system established by Directive 2003/96 provides for the taxation of electricity at the stage of its distribution to end users by the distributor, pursuant to the first subparagraph of Article 21(5) of that directive. The taxes harmonised in Directive 2003/96 are indirect taxes, and therefore distributors obviously pass on the tax burden to users of electricity by including the tax in the price thereof.

30. The same mechanism for shifting the tax burden to subsequent stages of trading also applies to other energy products taxed under Directive 2003/96, in accordance with the nature of those taxes as indirect taxes. Those products are taxed at the production stage or at the stage when they are used as motor fuels or heating fuels.

7 See point 19 of this Opinion.

31. Electricity is a special product from the point of view of Directive 2003/96. On the one hand, it is a product taxed under that directive. On the other hand, in the European Union it is largely produced by burning energy products, which are also in principle taxed. If the energy products used to produce electricity were taxed in the same way as other products covered by Directive 2003/96, the users of that electricity would be taxed twice: as a result of the taxation of energy products and as a result of the taxation of the electricity itself.

32. In order to avoid such double taxation, Article 14(1)(a) of Directive 2003/96 provides for an obligatory exemption from taxation for energy products used to produce electricity. The same exemption applies to electricity used to produce electricity. It applies both to electricity purchased from third parties and to electricity which the electricity producer first produces and then uses for the purposes of that production.

33. The exemption provided for in Article 14(1)(a) of Directive 2003/96 is, in principle, obligatory. Although, under the second sentence of that provision, Member States may tax energy products and electricity used to produce electricity for reasons of environmental protection, it is not apparent from the case file that Portugal has taken advantage of this possibility.

34. As I have indicated above,[8] the purpose of the provisions contained in Article 21 of Directive 2003/96 is not to subject products to taxation or to exempt products from taxation, but solely to determine the time of taxation by indicating the chargeable event. Determining the time of taxation can, of course, apply only to taxed products; it does not apply to products which are exempt.

35. Therefore, if the third subparagraph of Article 21(5) of Directive 2003/96 prescribes that an entity producing electricity for its own use must be regarded as a distributor of that electricity for the purposes of applying the first subparagraph of Article 21(5),[9] it can only apply to electricity producers that are subject to tax under other provisions of that directive. Given that electricity used to produce electricity is exempt from taxation pursuant to Article 14(1)(a) of that directive, the third subparagraph of Article 21(5) thereof does not apply to producers of such electricity.

36. In other words, the third subparagraph of Article 21(5) of Directive 2003/96 applies only to entities that produce electricity which they subsequently use for purposes other than electricity production. However, if the main activity of the entity in question is the production of electricity, and if it uses part of the electricity it produces for the purposes of that production, the abovementioned provision does not apply to such an entity.

37. As I pointed out in my recent Opinion in *Koppers Denmark*,[10] it is true that the practical effect of Article 21(3) of Directive 2003/96 is similar to a tax exemption. According to that provision, the consumption within an establishment producing energy products of energy products produced within that establishment is not to be regarded as a chargeable event. Since there is no other time of taxation, that provision means in essence that such products are exempt. However, this practical effect of Article 21(3) of the aforementioned directive cannot be used to draw the conclusion that the application of the third subparagraph of Article 21(5) of that directive to entities consuming electricity for the purposes of their own electricity production could result in that electricity being taxed, which would undermine the effectiveness of the exemption provided for in Article 14(1)(a) of that directive.

8 See points 19 and 20 of this Opinion.

9 For the record, the first subparagraph of Article 21(5) of Directive 2003/96 indicates the distribution of electricity as the chargeable event.

10 My Opinion of 22 February 2018 in *Koppers Denmark* (C-49/17, EU:C:2018:93, point 38).

38. In the light of the above, the answer to the question posed by the referring court should be that the third subparagraph of Article 21(5) of Directive 2003/96, read in conjunction with Article 14(1)(a) of that directive, must be interpreted as meaning that an entity such as Turbogás which, when producing electricity, consumes part of the electricity it produces for the purposes of its production, cannot be regarded as a distributor of that electricity within the meaning of that provision.

The issue of Turbogás not being exempt under Article 14(1)(a) of Directive 2003/96

39. As is apparent from the order for reference in the present case, the Portuguese tax authorities did not grant Turbogás an exemption under the provisions transposing Article 14(1)(a) of Directive 2003/96 into Portuguese law with respect to the electricity that it produces and then consumes for the purposes of its electricity production. The reasons cited for that non-exemption include formal defects on the part of Turbogás consisting in its failure to register as a distributor of electricity and the absence of meters that would make it possible to determine the amount of electricity produced by that company for its own use. Having established that Turbogás was not entitled to an exemption, the Portuguese tax authorities therefore regarded Turbogás as a distributor of electricity, which that company produces for its own use, and ordered tax to be paid.

40. Like the Commission, I consider such a position to be incorrect from the point of view of compliance with Directive 2003/96.

41. As I have already stated, the exemption provided for in Article 14(1)(a) of Directive 2003/96 is obligatory, subject to the possibility of taxation for reasons of environmental protection. However, Portugal has not made use of that possibility. Moreover, that exemption is not a privilege for electricity producers, but rather an element of the electricity taxation system, since it allows electricity to be taxed at the distribution stage, without imposing a double tax burden on recipients thereof.

42. Thus, while Member States are to apply the exemptions provided for in Article 14(1) of Directive 2003/96 'under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse', those conditions cannot make the right to an exemption conditional upon meeting specific formal requirements in situations where there are no indications of evasion or abuse. Therefore, the term 'conditions' must be understood as the rules governing the application of an exemption rather than the circumstances upon which the right to an exemption depends, since the right to an exemption is unconditional.

43. An — albeit imperfect — analogy can be drawn between this right and the right to deduct tax paid at an earlier stage of trading under the value added tax system. That right to deduct is likewise an integral part of that system. Therefore, the Court's reasoning, according to which a failure to comply with the formal rules for deducting value added tax paid may result in administrative sanctions but cannot undermine the right to deduct itself, can be applied by analogy to the exemption provided for in Article 14(1)(a) of Directive 2003/96.[11] Likewise, in the case of electricity used to produce electricity, a party's failure to meet formal requirements may result in administrative sanctions proportional to the seriousness of the failure, but it cannot result in a refusal of the right to exempt such electricity under Article 14(1)(a) of Directive 2003/96.

44. Such a failure cannot a fortiori result in the application to that entity of the third subparagraph of Article 21(5) of that directive, whose purpose is to determine the chargeable event in respect of taxable products rather than to tax products which should be exempt under other provisions thereof.

11 See, recently, judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 41).

45. As a result, an entity such as Turbogás should benefit from the exemption provided for in Article 14(1)(a) of Directive 2003/96 in respect of the electricity produced by it which it uses for the purposes of electricity production.

Conclusion

46. In the light of all of the foregoing, I propose that the Court answer the questions referred for a preliminary ruling by the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration)), Portugal, as follows:

(1) The third subparagraph of Article 21(5) 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 also applying to entities producing electricity for their own use which are not small producers of electricity.

(2) The third subparagraph of Article 21(5) of Directive 2003/96, read in conjunction with Article 14(1)(a) of that directive, must be interpreted as meaning that an entity which, when producing electricity, consumes part of the electricity it produces for the purposes of its production, cannot be regarded as a distributor of that electricity within the meaning of that provision. Such an entity should benefit from the exemption provided for in Article 14(1)(a) of that directive in respect of the electricity produced by it which it uses for the purposes of electricity production.