Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

9 September 2021 *

[Text rectified by order of 29 September 2021]

(Reference for a preliminary ruling – Taxation – Taxation of energy products and electricity – Directive 2003/96/EC – Article 17(1)(a) – Tax reductions on the consumption of energy products and electricity in favour of energy-intensive businesses – Optional reduction – Arrangements governing the repayment of tax levied in breach of provisions of national law adopted on the basis of a power granted to the Member States in that directive – Payment of interest – Principle of equal treatment)

In Case C-100/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 19 November 2019, received at the Court on 26 February 2020, in the proceedings

XY

v

Hauptzollamt B,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász (Rapporteur), C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– [As rectified by order of 29 September 2021] XY, by L. Jesse, Rechtsanwalt,

– Hauptzollamt B, by G. Rittenauer, acting as Agent,

* Language of the case: German.

– the German Government, by J. Möller and S. Heimerl, acting as Agents,

– the European Commission, by A. Armenia and R. Pethke, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 May 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 17(1)(a) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

2 The request has been made in proceedings between XY and Hauptzollamt B (Principal Customs Office B, Germany) concerning a tax adjustment relating to the taxation of XY's electricity consumption, in particular whether XY is entitled to the payment of interest on the amount of electricity tax which it overpaid and which it was thus refunded.

Legal context

EU law

3 Recitals 3 to 5 of Directive 2003/96 state:

'(3) The proper functioning of the internal market and the achievement of the objectives of other Community policies require minimum levels of taxation to be laid down at Community level for most energy products, including electricity, natural gas and coal.

(4) Appreciable differences in the national levels of energy taxation applied by Member States could prove detrimental to the proper functioning of the internal market.

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

4 Article 1 of Directive 2003/96 is worded as follows:

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

5 Article 5 of Directive 2003/96 provides:

'Provided that they respect the minimum levels of taxation prescribed by this Directive and that they are compatible with [EU] law, differentiated rates of taxation may be applied by Member States, under fiscal control, in the following cases:

– when the differentiated rates are directly linked to product quality;

– when the differentiated rates depend on quantitative consumption levels for electricity and energy products used for heating purposes;

– for the following uses: local public passenger transport (including taxis), waste collection, armed forces and public administration, disabled people, ambulances;

– between business and non-business use, for energy products and electricity referred to in Articles 9 and 10.'

6 Article 17 of Directive 2003/96 provides:

'1. Provided the minimum levels of taxation prescribed in this Directive are respected on average for each business, Member States may apply tax reductions on the consumption of energy products used for heating purposes or for the purposes of Article 8(2)(b) and (c) and on electricity in the following cases:

(a) in favour of energy-intensive business

An "energy-intensive business" shall mean a business entity, as referred to in Article 11, where either the purchases of energy products and electricity amount to at least 3.0% of the production value or the national energy tax payable amounts to at least 0.5% of the added value. Within this definition, Member States may apply more restrictive concepts, including sales value, process and sector definitions.

"Purchases of energy products and electricity" shall mean the actual cost of energy purchased or generated within the business. Only electricity, heat and energy products that are used for heating purposes or for the purposes of Article 8(2)(b) and (c) are included. All taxes are included, except deductible [value added tax (VAT)].

"Production value" shall mean turnover, including subsidies directly linked to the price of the product, plus or minus the changes in stocks of finished products, work in progress and goods and services purchased for resale, minus the purchases of goods and services for resale.

"Value added" shall mean the total turnover liable to VAT including export sales minus the total purchases liable to VAT including imports.

Member States, which currently apply national energy tax systems in which energy-intensive businesses are defined according to criteria other than energy costs in comparison with production value and national energy tax payable in comparison with value added, shall be allowed a transitional period until no later than 1 January 2007 to adapt to the definition set out in point (a) first subparagraph;

(b) where agreements are concluded with undertakings or associations of undertakings, or where tradable permit schemes or equivalent arrangements are implemented, as far as they lead to the achievement of environmental protection objectives or to improvements in energy efficiency.

2. Notwithstanding Article 4(1), Member States may apply a level of taxation down to zero to energy products and electricity as defined in Article 2, when used by energy-intensive businesses as defined in paragraph 1 of this Article.

3. Notwithstanding Article 4(1), Member States may apply a level of taxation down to 50% of the minimum levels in this Directive to energy products and electricity as defined in Article 2, when used by business entities as defined in Article 11, which are not energy-intensive as defined in paragraph 1 of this Article.

4. Businesses that benefit from the possibilities referred to in paragraphs 2 and 3 shall enter into the agreements, tradable permit schemes or equivalent arrangements as referred to in paragraph 1(b). The agreements, tradable permit schemes or equivalent arrangements must lead to the achievement of environmental objectives or increased energy efficiency, broadly equivalent to what would have been achieved if the standard Community minimum rates had been observed.'

7 Under Articles 7, 15, 16 and 19 of Directive 2003/96, the Member States may also apply exemptions or reductions of the level of taxation in the cases referred to therein.

8 The first sentence of Article 21(5) of Directive 2003/96 provides:

'For the purpose of applying Articles 5 and 6 of [Council] Directive 92/12/EEC [of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 2000/47/EC of 20 July 2000 (OJ 2000 L 193, p. 73)], electricity and natural gas shall be subject to taxation and shall become chargeable at the time of supply by the distributor or redistributor.'

German law

9 The Stromsteuergesetz (Law on electricity tax) of 24 March 1999 (BGBl. 1999 I, p. 378, and BGBl. 2000 I, p. 147), as amended by the Law of 19 December 2008 (BGBl. 2008 I, p. 2794) ('the StromStG'), provides in Paragraph 3, headed 'Tax rate':

'The tax shall be EUR 20.50 per megawatt-hour.'

10 Paragraph 9 of the StromStG, headed 'Tax exemptions and reductions', provides in subparagraph 3:

'Electricity shall, except in the cases referred to in point 2 of subparagraph 2, be subject to a reduced tax rate of EUR 12.30 per megawatt-hour if it is drawn by undertakings in the manufacturing sector or agricultural and forestry undertakings for operational purposes and is not exempt from taxation under subparagraph 1.'

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

11 XY is an undertaking in the manufacturing sector which in 2010, in the course of its activities, drew electricity from the supply network in order to charge batteries.

12 In its electricity tax declaration for the year 2010, XY declared the quantity of electricity drawn in respect of its own consumption and selected the reduced tax rate provided for in Paragraph 9(3) of the StromStG. In the corresponding notice of assessment, however, Principal Customs Office B applied the electricity tax at the standard rate, which XY contested.

13 After it had been held in judicial proceedings relating to the year 2006 that the reduced tax rate provided for in Paragraph 9(3) of the StromStG was applicable, Principal Customs Office B reconsidered its decision concerning the year 2010, ultimately taking the view that XY was entitled to seek the application of that rate, and, on 27 August 2013, corrected XY's notice of assessment and refunded the amount overpaid by it in respect of the year 2010.

14 In December 2014, XY sought interest on the amount refunded in respect of the year 2010, a request which Principal Customs Office B refused.

15 The action brought by XY for payment of that interest was dismissed by the Finanzgericht (Finance Court, Germany), on the ground that XY was not entitled to it under either EU law or German law. In particular, according to that court, EU law did not require interest to be paid on the amount refunded. First, the drawing of electricity for the purpose of charging batteries does not fall within the scope of Directive 2003/96. Second, and in any event, application of the tax reduction at issue in the main proceedings is optional, and therefore EU law does not require interest to be paid in the event of a refund.

16 XY brought an appeal on a point of law against that judgment before the Bundesfinanzhof (Federal Finance Court, Germany), the referring court. In XY's submission, under the case-law of the Court of Justice interest should be paid where taxes levied in breach of EU law are refunded, including where optional tax reductions are applied. Furthermore, the charging of a battery is a reversible process that falls within the scope of Directive 2003/96.

17 Contrary to the Finanzgericht (Finance Court), the Bundesfinanzhof (Federal Finance Court) takes the view that XY's activity falls within the scope of Directive 2003/96 and is unsure only as to whether interest must be paid on the amount of electricity tax that was overpaid and refunded to XY.

18 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is interest payable under EU law in respect of an entitlement to a refund of incorrectly assessed electricity tax if the assessment of the electricity tax in a lower amount was based on the optional tax reduction pursuant to Article 17(1)(a) of [Directive 2003/96] and the tax assessment in too high an amount was based solely on an error in the application of the national provision adopted to transpose Article 17(1)(a) of Directive 2003/96?'

Consideration of the question referred

19 By way of preliminary points, it should be noted, first, that, in its observations, the German Government, without raising an objection of inadmissibility, takes the view in essence that, pursuant to Article 21(5) of Directive 2003/96, electricity supplied for storage in batteries must be taxed or also be taxed when it is subsequently distributed to third parties. That view diverges from the premiss of the referring court, which considers that the supply of the electricity for storage in batteries is the only chargeable event for the tax concerned.

20 Those observations do not affect the admissibility of the question referred.

21 In accordance with settled case-law of the Court, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it and to understand the reasons for the referring court's view that it needs answers to those questions in order to rule in the dispute before it (judgments of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 27, and of 12 December 2019, *Slovenské elektrárne*, C-376/18, EU:C:2019:1068, paragraph 24 and the case-law cited).

22 It is apparent from the question referred that it is related to the actual facts and to the purpose of the main action, which is concerned not with the interpretation of the provisions of Directive 2003/96 but with the conditions governing the refund of tax levied on the basis of the incorrect application of national legislation implementing a power provided for by that directive.

23 Second, the German Government states that the question referred should have referred not to Article 17(1)(a) of Directive 2003/96, but to the fourth indent of Article 5 thereof.

24 In that regard, as the Advocate General has observed in point 56 of his Opinion, both the tax advantages for energy-intensive businesses, provided for in Article 17(1)(a) of Directive 2003/96, and the application of differentiated rates of taxation according to business or non-business use of electricity, referred to in the fourth indent of Article 5 of that directive, are optional for the Member States. The resolution of the legal issue raised in the question asked may therefore be relevant for the outcome of the main proceedings irrespective of the legal basis on which the German legislature introduced the differentiation of the rates of taxation concerned.

25 Accordingly, the referring court should be regarded as asking, in essence, whether EU law requires that, in the event of refund of the amount of electricity tax wrongly levied on account of the incorrect application of a national provision adopted on the basis of a power granted to the Member States by Directive 2003/96, interest be paid on that amount.

26 It is clear from settled case-law that the right to a refund of charges levied in a Member State in breach of rules of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law as interpreted by the Court. The Member States are therefore in principle required to repay charges levied in breach of EU law (judgments of 19 July 2012, *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478, paragraph 24 and the case-law cited, and of 23 April 2020, *Sole-Mizo and Dalmandi Mezőgazdasági*, C-13/18 and C-126/18, EU:C:2020:292, paragraph 34 and the case-law cited).

27 Furthermore, the Court has held that, where a Member State has levied charges in breach of the rules of EU law, individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it which relate directly to that tax. That also includes losses constituted by the unavailability of sums of money as a result of a tax being levied prematurely. It is clear from that case-law that the principle that Member States are obliged to repay with interest amounts of tax levied in breach of EU law follows from EU law (judgments of

19 July 2012, *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478, paragraphs 25 and 26 and the case-law cited, and of 23 April 2020, *Sole-Mizo and Dalmandi Mezőgazdasági*, C-13/18 and C-126/18, EU:C:2020:292, paragraphs 35 and 36 and the case-law cited).

28 As the Advocate General has observed in point 74 of his Opinion, the obligation to pay interest on the amount of tax levied in breach of EU law also applies where that breach results from a failure to observe the general principles of EU law.

29 Directive 2003/96 has the objective, as is apparent from recitals 3 to 5 and Article 1 thereof, of creating a harmonised taxation system for energy products and electricity (see, to that effect, judgment of 3 December 2020, *Repsol Petróleo*, C-44/19, EU:C:2020:982, paragraph 21).

30 Under that system, the EU legislature has, in particular by virtue of Articles 5, 7, 15 to 17 and 19 of the directive, conferred on the Member States a set of powers for introducing differentiated rates of taxation, exemptions from taxation or tax reductions in respect of excise duty, powers which form an integral part of the harmonised taxation system established by the directive.

31 According to the Court's case-law, the Member States must exercise the discretion that they have under those articles in compliance with EU law and its general principles and, in particular, in compliance with the principle of equal treatment (see, to that effect, judgment of 30 January 2020, *Autoservizi Giordano*, C-513/18, EU:C:2020:59, paragraph 35 and the case-law cited). Moreover, that requirement applies both to the measures by which that discretion is exercised and to the application of those measures.

32 The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgment of 30 January 2020, *Autoservizi Giordano*, C-513/18, EU:C:2020:59, paragraph 37 and the case-law cited).

33 In that regard, it must be stated that, for the purposes of the amount of tax wrongly levied and the corresponding obligation to refund it, an economic operator who is subject, pursuant to a provision of national law implementing the power provided for by Directive 2003/96, to a reduced rate of electricity tax, the amount of which has been wrongly levied, is in a situation comparable to that of an economic operator subject to the standard rate of that tax pursuant to a provision of that directive, the amount of which has been wrongly levied.

34 Those two situations should not be treated differently, which means that, where a refund is made, interest must be paid on the amount of tax wrongly levied.

35 The comparison between the economic operators must be carried out on the basis of whether or not they have had to suffer losses constituted by the unavailability of sums of money as a result of the tax being wrongly levied, for the purposes of the case-law cited in paragraph 27 of the present judgment, irrespective of whether the standard rate or the reduced rate of that tax applies to them, as both rates fall within the same harmonised system established by Directive 2003/96.

36 In the light of all the foregoing considerations, the answer to the question referred is that EU law requires that, in the event of refund of the amount of electricity tax wrongly levied on account of the incorrect application of a national provision adopted on the basis of a power granted to the Member States by Directive 2003/96, interest be paid on that amount.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

EU law must be interpreted as requiring that, in the event of refund of the amount of electricity tax wrongly levied on account of the incorrect application of a national provision adopted on the basis of a power granted to the Member States by Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, interest be paid on that amount.

[Signatures]