Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 12 May 2021 [1]

Case C-100/20

XY
v
Hauptzollamt B

(Request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany))

(Reference for a preliminary ruling – Taxation – Community framework for the taxation of energy products and electricity – Directive 2003/96 – Article 5 – Differentiated rates of taxation – Article 17(1)(a) – Reduction of electricity tax in favour of energy-intensive businesses – Article 21(5) – Taxation of electricity at the time of supply by the distributor or redistributor – Charging of batteries – Rules for the refund of taxes levied in breach of EU law – Optional tax exemptions and reductions – Payment of interest)

Introduction

1. The question referred for a preliminary ruling in the present case by the Bundesfinanzhof (Federal Finance Court, Germany) concerns a rather unusual matter, namely the rights of a taxpayer who has been wrongly charged tax that is regulated by EU law where the unlawfulness of the taxation results not from an infringement of binding rules of EU law, but merely from an infringement of national legislation which the Member State has adopted on the basis of an option provided for in EU law.

2. This situation is not unambiguous since, on the one hand, there has been no breach of clear and unconditional rules of EU law and, on the other hand, an unlawful act has nevertheless taken place in the context of the application of EU law by a Member State. As I shall explain in this Opinion, it is also difficult to give a clear-cut answer to this question.

3. However, the present case also involves another no less interesting issue: how the storage of electricity in batteries for subsequent supply to end users should be treated from the point of view of excise duty on electricity. Although the referring court does not pose that question, relying instead on its own interpretation, in my view the Court should at least point out in its judgment that answering the question referred for a preliminary ruling does not amount to a confirmation of the interpretation adopted by the referring court.

[1] Original language: Polish.

Legal context

European Union law

4. Article 1 of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity [2] states:

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

5. In accordance with the fourth indent of Article 5 of that directive:

'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:

…

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

6. Article 17(1)(a) of the directive provides:

'Provided the minimum levels of taxation prescribed in this Directive are respected on average for each business, Member States may apply tax reductions … on electricity in the following cases:

(a) in favour of energy-intensive business

…'

7. Finally, pursuant to the first subparagraph of Article 21(5) of Directive 2003/96:

'For the purpose of applying Articles 5 and 6 of Directive 92/12/EEC, [3] 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

8. As regards the taxation of electricity, Directive 2003/96 was transposed into German law by the Stromsteuergesetz (the Law on electricity tax; 'the StromStG'). [4] Paragraph 3 of the StromStG, in the version in force from 19 December 2008, states:

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

[2] OJ 2003 L 283, p. 51.

[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), now 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).

[4] BGBl 2008 I, p. 2794.

9. Pursuant to Paragraph 9(3) of the StromStG:

'Electricity shall … 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.'

Facts, procedure and the question referred for a preliminary ruling

10. XY is a company incorporated under German law. In the course of its activities, which according to the referring court belong to the manufacturing sector ('Produzierende Gewerbe') within the meaning of Paragraph 9(3) of the StromStG, it draws electricity in the form of alternating current from the distribution network and, after converting it into direct current, stores it in batteries. Subsequently, it provides its customers, which are companies in the telecommunications sector, with a comprehensive service consisting in the supply of electricity, including emergency power, as well as air conditioning ('cold supply'), for telecommunications infrastructure equipment. [5]

11. In its tax declaration for the 2010 tax year, XY indicated that it used the electricity it had drawn for its operational purposes and applied to it the reduced rate of electricity tax under Paragraph 9(3) of the StromStG. However, the tax authority issued a decision stating that the standard tax rate should apply.

12. In separate proceedings relating to the 2006 tax year, the Bundesfinanzhof (Federal Finance Court) ruled that XY was entitled to apply a reduced rate of electricity tax. On that basis, the tax authority amended the decision concerning the 2010 tax year and refunded the overpaid tax. In 2014, XY claimed interest on that overpayment, which the tax authority refused. XY's action brought before the court of first instance was dismissed, as the court held, inter alia, that the reduction in the tax rate, provided for in Paragraph 9(3) of the StromStG, is optional from the point of view of EU law and, consequently, the levying of that tax in an amount corresponding to the standard rate, even if incompatible with national law, does not infringe EU law. Therefore, the obligation to refund the overpaid tax together with interest, which arises from the case-law of the Court of Justice, does not apply. XY appealed against that judgment on a point of law to the referring court.

13. 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?'

14. The request for a preliminary ruling was received by the Court on 26 February 2020. Written observations were submitted by XY, the German Government and the European Commission. Those parties as well as Hauptzollamt B (Principal Customs Office in B, Germany) also replied in writing to questions asked by the Court.

[5] The above information is based in part on the clarifications provided by the German Government in its written observations.

Analysis

15. The question referred for a preliminary ruling in the present case is based on the premiss that the electricity which XY drew from the distribution network was subject to taxation at the time of being drawn and that, under German law, a reduced tax rate should apply to that electricity. The German Government, however, contests that premiss in its observations, arguing that the premiss results from the fact that XY's activities have been classified in a manner incompatible with Directive 2003/96, and that the reduced tax rate should not apply to those activities. The effect of adopting the German Government's point of view could be to call into question the very admissibility of the request for a preliminary ruling in the present case, since the question referred would be hypothetical in nature.

16. The Court addressed additional questions to the parties on this issue. Therefore, before examining the legal issue raised by the question referred, I shall devote some space to an analysis of the correct interpretation of the provisions of the directive in circumstances such as those in the main proceedings.

Classification of storage of electricity in batteries for the purposes of Directive 2003/96

Supply of electricity from batteries as (re)distribution [6]

17. In making a reference for a preliminary ruling in the present case, the referring court relies on its previous determination, included in particular in its judgment on the taxation of electricity used by XY in the 2006 tax year. [7] In accordance with that determination, XY consumes the electricity drawn from the distribution network by converting that electricity into chemical energy in batteries. [8] That consumption occurs for XY's operational purposes, as it uses the electricity stored in the batteries, in the form of direct current, in order to provide a single, consolidated service to its customers, which consists in the supply of electricity to power telecommunications equipment, the provision of an air conditioning service for that equipment ('cold supply' in the wording of the judgment in question) and ensuring security of supply in the event of an emergency ('Reservezeit').

18. Nevertheless, in the view of the German Government, such a classification of XY's activities results in an incompatibility with the provisions of Directive 2003/96, since in accordance with the first subparagraph of Article 21(5) of that directive, electricity is subject to taxation at the time of supply by the distributor or redistributor. XY, according to the German Government, should, however, be considered an intermediary in the supply of electricity, that is to say, a redistributor. The company does not consume energy for its operational purposes, but only stores it in batteries and subsequently supplies it to its customers who are the end users of that electricity.

6 It should be noted that the following considerations apply exclusively to the supply of electricity from stationary batteries that remain in the electricity supplier's possession. I am therefore not addressing the issue of the supply of charged batteries or other portable sources of electricity.

7 Judgment of the Bundesfinanzhof (Federal Finance Court) of 19 June 2012, VII R 32/10. That judgment was enclosed both with the German Government's observations and with XY's reply to the Court's additional questions.

8 On the issue of energy conversion see below, in particular point 39.

19. This is important because, whereas XY was classified in the manufacturing sector, which is eligible for the tax reduction provided for in Paragraph 9(3) of the StromStG, its customers, who provide telecommunications services, are not included in that sector and cannot benefit from that reduction. Therefore, the electricity that XY supplies to its customers should be taxed at the standard rate. In such a situation there would be no question of reimbursement of overpaid tax or interest, and the entire main proceedings, and thus also the request for a preliminary ruling in the present case, would become devoid of purpose.

20. I share the German Government's doubts as to the correctness of the referring court's classification of the use of electricity by XY as consumption for its operational purposes.

21. The referring court's ruling on this issue is based on the specific nature of XY's activities. This specific nature consists in the fact that XY supplies electricity exclusively as part of a comprehensive service which also includes other services, exclusively to companies belonging to one group of companies (presumably the group of which it is itself a member) and via separate cables, without using the public electricity distribution network.

22. Nevertheless, it does not appear to me that those circumstances are decisive for the classification of XY's activities for the purposes of Directive 2003/96. The manner in which XY provides its services and the choice of the parties with which it enters into contracts are specific circumstances of the activities of that particular company. However, those circumstances do not alter the fact that, in the course of its activities, the company supplies a definite and measurable quantity of electricity to entities which must be regarded as undertakings independent of it and which use that energy to power telecommunications equipment, that is to say, in accordance with the normal use of electricity.[9] Therefore, it is those entities, and not XY, who are the end users of the electricity supplied to them by that company.

23. As far as use of the public electricity distribution network is concerned, this does not appear to me to constitute a condition for an entity to be considered an electricity distributor or redistributor within the meaning of Directive 2003/96. The directive does not define the terms 'distributor' and 'redistributor', but there is no indication that they are to be limited to operators using a particular type of distribution network. In particular, the Court has already held[10] that these terms should not be interpreted in the light of the concept of 'distribution' within the meaning of Article 2 of Directive 2003/54/EC.[11] Instead, Directive 2003/96 adopts a functional meaning of the term 'distributor'. This is best illustrated by the third subparagraph of Article 21(5), according to which 'an entity producing electricity for its own use is regarded as a distributor'.

24. I do not, therefore, consider that the specific nature of XY's activities prevents it from being regarded as a redistributor of electricity for the purposes of the taxation of that electricity in accordance with the provisions of Directive 2003/96.

25. By contrast, the view taken by the referring court in its case-law leads to results which are contrary to the objectives of that directive.

[9] This, of course, concerns only the electricity that XY stores in batteries and subsequently supplies to its customers. With respect to the electricity that the company uses for other purposes, for example to provide air conditioning services, it is XY that is the end user.

[10] Judgment of 12 February 2009, *Commission* v *Poland* (C-475/07, not published, EU:C:2009:86, paragraph 57).

[11] Directive of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37).

26. First, it is apparent from the explanatory memorandum to the proposal for Directive 2003/96, which the Commission cites in its reply to the Court's questions,[12] that the objective of taxing electricity at the time of its supply (output tax) was to enable Member States to apply differentiated rates of taxation to different categories of end users. However, such a differentiated taxation scheme can work properly only if taxation takes place at the final distribution stage, that is to say, at the stage of supply to end users. Taxation at an earlier stage distorts the functioning of such a system as the rate of taxation might not be tailored to the actual way in which the electricity is used.

27. This is perfectly illustrated by the present case, since XY obtained a reduction in the rate of taxation on the electricity which it drew from the distribution network as an undertaking belonging to the manufacturing sector which is eligible for such a reduction under national law. However, that energy is not ultimately used by the company, but rather by its customers, who do not belong to the manufacturing sector and who would not otherwise be able to benefit from that tax reduction. This, if my understanding is correct, is the reason for all the complex arguments aimed at demonstrating that it is XY that is the end user of the electricity.

28. Second, another objective of electricity being taxed at the time of supply by the distributor or redistributor is taxation of that electricity in the Member State of actual consumption, as is the case for other products which are subject to excise duty. The Court made this very clear in the judgment in *Commission* v *Poland*, accepting the Commission's arguments on that issue.[13] However, where electricity is taxed at the point when it is drawn from the distribution network for storage in batteries and is subsequently supplied to other parties, that objective might not be achieved. Indeed, there is nothing to prevent the supply of electricity stored in batteries on a cross-border basis.

29. Third and last, the method for taxing electricity provided for in Directive 2003/96 is also designed to prevent taxation of that part of the electricity which is lost. Once again, this is a rule which applies to any products subject to excise duty.[14] It is particularly relevant to electricity, as its transmission and storage inevitably entail considerable losses. Only taxation of electricity at the stage of supply to end users makes it possible to avoid or, in any event, minimise the taxation of electricity which is lost.

30. The Commission gives as an example the taxation of gas used as fuel to propel vehicles. Such gas is taxed at the time when it is put into the vehicle's tank, which avoids in particular the taxation of the gas lost during storage and compression. As the Commission rightly points out, in accordance with the first subparagraph of Article 21(5) of Directive 2003/96, the point of taxation for natural gas and electricity should be the same. By analogy with gas, therefore, losses of electricity due to storage should not be taxable. The efficiency of the most popular types of batteries, understood as the ratio of the electric charge drawn during battery discharge to the electric charge delivered during the charging process, is approximately 70-80%.[15] Therefore, taxing the electricity used to charge the batteries instead of the electricity delivered from those

[12] COM(97) 30 final, p. 5.

[13] See judgment of 12 February 2009, *Commission* v *Poland* (C-475/07, not published, EU:C:2009:86, paragraphs 20, 21 and 56).

[14] See Article 7(4) of Directive 2008/118.

[15] Bednarek, K. and Bugała, A., 'Własności użytkowe akumulatorów kwasowo-ołowiowych', *Poznan University of Technology Academic Journals*, No 92/2017, pp. 47-60, at p. 52.

batteries to end users means taxing relatively high electricity losses. The application of a reduced tax rate does not constitute a method of offsetting this over-taxation which would be compatible with Directive 2003/96. [16]

31. XY's argument that, under Decision 2016/2266/EU, [17] the supply of electricity for charging batteries rather than the drawing of electricity from batteries must be regarded as the distribution of that electricity is also incorrect, as that decision concerned electricity for charging batteries in electric cars. In such a situation, electricity from the battery is used by the user of the car to propel the car, and the user of the car is at the same time the user of the battery. The user of the battery is therefore also the end user of the electricity, so that the supply of that electricity in order to charge the battery constitutes the supply of electricity to the end user, that is to say, a chargeable event in accordance with the first subparagraph of Article 21(5) of Directive 2003/96. Conversely, XY is not the end user of the electricity it draws from the distribution network in order to charge the batteries and then to supply electricity to its customers. There is therefore no analogy with the situation to which that decision relates.

32. It follows that, in order to ensure that the objectives of Directive 2003/96 with regard to the taxation of electricity are achieved, XY must be considered a redistributor of electricity in line with the observations presented by the German Government. I agree with the Commission, however, that the German Government misjudges the effect of such a classification in the circumstances of the main proceedings.

33. The German Government concludes from its observations that the electricity drawn by XY and subsequently stored in batteries for use by its customers should not be subject to the reduced rate of electricity tax, but rather to the standard rate. Therefore, there should be no reimbursement of overpaid tax or interest.

34. However, the German Government disregards the fact that, if XY is to be regarded as a redistributor, the electricity should be taxed only at the time when it is supplied by that company to its customers. On the other hand, when electricity is drawn by XY from the distribution network, tax should not be levied, either at the standard or at the reduced rate. Consequently, the tax levied by the tax authorities in the main proceedings must be regarded as having been levied in its entirety in breach of Directive 2003/96, and it must therefore be reimbursed in full with interest in accordance with the Court's settled case-law. [18]

Electricity stored in batteries as energy used to produce electricity

35. The Court also asked the parties whether, if the view of the referring court were to be accepted that XY consumes for its operational purposes the electricity which it draws from the distribution network in order to charge batteries, that electricity should be exempt from taxation under Article 14(1)(a) of Directive 2003/96 as electricity used to produce electricity.

[16] See, by analogy, judgment of 12 February 2009, *Commission* v *Poland* (C-475/07, not published, EU:C:2009:86, paragraphs 53 and 56).

[17] Council Implementing Decision (EU) of 6 December 2016 authorising the Netherlands to apply a reduced rate of taxation to electricity supplied to charging stations for electric vehicles (OJ 2016 L 342, p. 30).

[18] See, most recently, judgment of 11 September 2019, *Călin* (C-676/17, EU:C:2019:700, paragraph 25 and the case-law cited).

36. XY, the German Government and the Commission have all firmly rejected this possibility. They agree that XY merely stores electricity drawn from the distribution network in batteries, whereas the exemption provided for in Article 14(1)(a) of Directive 2003/96 concerns the production of 'new' electricity.

37. In my view, however, this position is based on two incorrect premisses.

38. First, when talking about the storage of electricity in batteries, the above parties appear to confuse the concept of electricity with the concept of energy in general. In the current state of technological development, there are no methods for storing electricity as such that can be used on an industrial scale.[19] The storage of electricity requires its conversion to another form of energy that can be stored and then its conversion back to electricity. In the case of batteries, energy is stored in the form of chemical energy, that is to say, the (potential) energy of electrochemical reactions that take place in the chemical compounds contained within the battery when current flows. The reactions are reversible, allowing the battery to be charged and discharged multiple times.[20]

39. It follows that the concept of electricity storage is something of a simplification. Essentially, what happens is that electricity is converted into another form of energy, and this is then converted back into electricity.

40. This brings us to the second incorrect premiss on which the parties' argument rests, namely the categorical distinction between the storage and production of electricity.

41. From a physical point of view, there is no such thing as the production of energy. This is stated in one of the basic principles of physics, which is the principle of the conservation of energy. As in the case of energy storage, the 'production of energy', including electricity, is merely the conversion of one form of energy into another. In the case of electricity production, this can be the conversion of the chemical energy contained in fossil fuels[21] through combustion, the conversion of kinetic energy in wind and hydropower technologies or the conversion of nuclear energy during nuclear fission.

42. The production of electricity often requires multiple conversions of different forms of energy: for instance, in thermal power stations (those based on fossil fuels or nuclear energy), the primary energy stored in fuel (or nuclear fuel) is converted into thermal energy, which in turn is converted into kinetic energy, which is finally converted into electricity. The various forms of energy require specific energy carriers. For instance, the energy carrier in power stations is usually steam, just as the chemical energy carrier in a battery is the electrolyte.

43. Therefore, there is no fundamental and clear boundary between the production of electricity and its storage or, more precisely, the recovery of electricity stored as another form of energy. Pumped-storage power plants are the best example of this. They work on the principle of pumping water from a reservoir located at a lower level to a reservoir located at a higher level using electricity, and then using the kinetic energy of the water falling back down to drive a power

[19] Technologies for electricity storage in the form of electricity, for example based on supercapacitors, are only at an early stage of development and are not yet widely available.

[20] This issue is not in dispute in the main proceedings. As far as I understand, it is precisely this conversion to chemical energy that provides the basis for the referring court's position that XY *consumes* electricity.

[21] It is no coincidence that these fuels are referred to as 'energy products' in Directive 2003/96.

generator.[22] Such a plant does not produce any 'new' electricity; on the contrary, it consumes more energy than it produces. Therefore, pumped-storage power plants are considered to provide a method of storing, rather than producing, electricity. In fact, nowadays this is, by far, the predominant method of energy storage in terms of capacity.[23] It involves converting electricity into the potential kinetic energy of water, and then converting that kinetic energy back into electricity. This does not change the fact that, during that process, electricity is used to pump water and is then produced anew in exactly the same manner as in ordinary hydropower plants, which use the natural flow of water without the need to pump it first.

44. Technically, energy storage in batteries also involves the consumption of *electricity* in order to convert it into another form of *energy*, and then convert it back into electricity. Therefore, I see no fundamental obstacles to electricity intended for conversion in a battery being regarded as electricity used to produce electricity within the meaning of Article 14(1)(a) of Directive 2003/96.

45. I accept, however, that other considerations militate in favour of treating the storage of electricity, for the purposes of the application of Directive 2003/96, as a distribution stage rather than as a production stage, in line with the German Government's and the Commission's position. However, this rules out the argument of the referring court, which is also defended by XY, that XY consumes electricity for its operational purposes, as this would mean that XY consumes electricity and stores it at the same time, which is impossible, just as one cannot have one's cake and eat it. This would also mean that the electricity supplied to XY's customers should be taxed, that is to say, it would be taxed twice – first, when it is drawn from the distribution network, and then again, when it is delivered to end users. The referring court was right to hold that such double taxation must be avoided. The way to avoid it, however, is not by omitting, contrary to the first subparagraph of Article 21(5) of Directive 2003/96, to tax the supply of electricity by XY to its customers, but rather by means of appropriate tax treatment of the electricity drawn by that company from the distribution network.

Final remarks and conclusions pertaining to this part of the discussion

46. In its reply to the Court's additional questions, XY disputes the validity of the German Government's observations concerning the premisses on which the referring court bases the question referred for a preliminary ruling in the present case, premisses which are incorrect in the German Government's view. According to XY, the matter concerns findings of fact, which only the referring court has jurisdiction to make. The Court of Justice should rely on those findings and confine itself to answering the question referred for a preliminary ruling.

47. However, in my view, XY's objections are unfounded. The facts of the main proceedings are not in dispute. They are that XY draws electricity from the distribution network, stores it in batteries as chemical energy and then supplies it to its customers as part of a comprehensive service, which also includes other services. What remains in question is the classification of such activities in terms of Directive 2003/96, and this belongs to the sphere of interpretation of those provisions and thus falls within the Court's jurisdiction.

[22] The point of this operation is that water is pumped upwards during periods of low electricity demand, and then released back, which allows electricity to be produced, during periods of peak demand. This balances the distribution network's load, and, at the same time, the enterprise's profitability is ensured by variations in the price of electricity according to demand.

[23] Revesz, R.L. and Unel, B., 'Managing the future of the electricity grid: Energy storage and greenhouse gas emissions', *Harvard Environmental Law Review*, No 42/2018, pp. 139-196.

48. In accordance with the classification of XY's activities proposed by the referring court, the electricity drawn by that company from the distribution network for the purpose of charging batteries is subject to a reduced rate of electricity tax. However, as follows from the above considerations, [24] that electricity should not have been taxed at all at the stage when it was drawn from the distribution network by XY, either as electricity intended for further distribution pursuant to the first subparagraph of Article 21(5) of Directive 2003/96 or as electricity used to produce electricity pursuant to Article 14(1)(a) of that directive.

49. Consequently, the electricity tax at issue in the main proceedings must be considered to have been levied in its entirety in breach of EU law and, in accordance with the settled case-law of the Court of Justice, [25] must in principle be reimbursed in full with interest. [26] That would render the question referred devoid of purpose.

50. The referring court finds, however, that its ruling on the legal classification of XY's activities in proceedings concerning the 2006 tax year has acquired the force of *res judicata*. The referring court does not state whether the same applies to the proceedings concerning the 2010 tax year, in respect of which it has submitted a request for a preliminary ruling to the Court of Justice in the present case. However, it states that the tax authorities' decision to apply a reduced rate of electricity tax to XY has become final.

51. According to the settled case-law of the Court of Justice, EU law does not require the national court automatically to go back on a decision having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court. This also applies to the reimbursement of taxes levied in breach of EU law. [27]

52. Accordingly, I propose that the Court answer the question referred for a preliminary ruling in the present case. However, I am of the view that the Court should make it clear in its judgment that the fact that this question has been answered does not mean that the Court accepts the way in which the referring court classified XY's activities for the purposes of Directive 2003/96. Indeed, the tax treatment of electricity storage should be the subject of discussion at EU level, if necessary in the context of proceedings for that purpose before the Court of Justice. Such a discussion is desirable if only owing to the importance of electricity storage for the transition of the economy of the European Union to renewable energy sources. [28]

[24] Points 34 and 45.

[25] See, most recently, judgment of 11 September 2019, *Călin* (C-676/17, EU:C:2019:700, paragraph 25 and the case-law cited).

[26] However, account must also be taken of the Court's case-law according to which the reimbursement of overpaid tax should not result in unjust enrichment, in particular where the taxpayer has passed on the financial burden of that tax to the purchaser (see, in particular, judgment of 20 October 2011, *Danfoss and Sauer-Danfoss*, C-94/10, EU:C:2011:674, paragraphs 21 and 22).

[27] See, most recently, judgment of 11 September 2019, *Călin* (C-676/17, EU:C:2019:700, paragraph 28 and the case-law cited).

[28] See the European Parliament resolution of 10 July 2020 on a comprehensive European approach to energy storage (P9 TA(2020)0198).

Consideration of the question referred

The formulation of the question

53. By its question in the present case, the referring court seeks to establish whether EU law requires tax which has been wrongly levied to be reimbursed together with interest where the incorrect assessment of the tax has resulted from the tax authorities' failure to apply a reduced tax rate to which the taxpayer was entitled and which was provided for in national law on the basis of the option granted to the Member States by Article 17(1)(a) of Directive 2003/96.

54. The German Government observes, however, that the reduction in the rate of electricity tax at issue in the main proceedings does not result from the transposition of Article 17(1)(a) of Directive 2003/96 into German law, but rather from the entitlement to differentiate rates of taxation according to business or non-business use of electricity, which is laid down for Member States by the fourth indent of Article 5 of that directive. In support of its argument, the German Government cites the decision of the Commission to approve the State aid resulting from that differentiation of tax rates.[29] That decision expressly mentions Article 5 of Directive 2003/96 as the basis for the reduction in the rate of taxation. XY also proposes extending the scope of the question referred for a preliminary ruling to encompass provisions of Directive 2003/96 other than just Article 17(1)(a), including the fourth indent of Article 5.

55. In addition, it should be noted that Paragraph 9(3) of the StromStG makes no reference to energy-intensive business, to which Article 17(1)(a) of Directive 2003/96 relates. The reduction in the rate of taxation granted by Paragraph 9(3) of the StromStG applies generally to undertakings in the manufacturing sector as well as to agricultural and forestry undertakings.

56. That, however, does not render the question referred for a preliminary ruling pointless, since both the tax reduction for energy-intensive businesses, provided for in Article 17(1)(a) of Directive 2003/96, and the differentiation of 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 referred for a preliminary ruling may therefore be relevant for the outcome of the main proceedings irrespective of the basis on which the German legislature introduced the differentiation of the rates of taxation that is at issue.

57. I propose, therefore, that the referring court should be regarded as seeking to establish whether EU law requires tax which has been wrongly levied to be reimbursed together with interest where the incorrect assessment of the tax has resulted from the tax authorities' failure to apply a reduced tax rate to which the taxpayer was entitled and which was provided for in national law on the basis of an option granted to the Member States by one of the provisions of Directive 2003/96.

Obligation to reimburse taxes levied contrary to EU law together with interest

58. To recap: XY was taxed at the standard rate of the tax on electricity. However, it was established during the court proceedings that XY had been entitled to the reduced rate pursuant to Paragraph 9(3) of the StromStG, which, in turn, is based, as the German Government contends,

[29] C (2007) 2416 final, State aid N 775/2005 – Germany.

on the fourth indent of Article 5 of Directive 2003/96. That being so, the tax authorities reimbursed the overpaid electricity tax, but without interest, since national law does not provide for an obligation to pay interest in such a situation. However, XY demands the payment of interest, invoking the principle of EU law according to which taxes levied in breach of EU law must be reimbursed with interest.

59. The legal question therefore arises as to whether that principle also applies where the tax has been levied in breach not so much of EU law as of national legislation, which, in transposing a directive, provides for a tax reduction on the basis of an option granted to the Member States in the directive. The ambiguity of the situation lies in the fact that, on the one hand, the imposition of higher taxation does not directly infringe EU law, since the tax reduction in question is not mandatory under EU law, but, on the other hand, provisions of national law adopted in order to transpose the directive have been infringed.

60. It should be pointed out that, although the dispute in the main proceedings concerns not the reimbursement of the wrongly levied tax itself, but rather interest, the answer to the above question will concern both the payment of interest and the obligation to reimburse the tax itself, since the obligation to reimburse tax and the obligation to pay interest have the same basis in EU law.

61. The right to reimbursement, with interest, of taxes levied by a Member State in breach of EU law is based on the Court's settled case-law. It is the consequence and complement of the rights conferred on legal entities by the provisions of EU law prohibiting such taxes.[30] The obligation to reimburse tax applies not only to the amount of the tax levied in breach of EU law itself, but also to any amount paid to or withheld by a Member State which is connected with that tax. This also includes losses constituted by the unavailability of sums of money as a result of the wrongly levied tax. Those losses are compensated for by the payment of interest on the amount of tax wrongly levied.[31]

62. As follows from the Court's judgments underlying that case-law, the rights of which the obligation to reimburse taxes levied in breach of EU law is the consequence and complement are the rights which legal entities derive from provisions of EU law having direct effect.[32] It is such rights that the national courts are obliged to protect by ruling, if necessary, that the tax wrongly levied must be refunded.

63. It is settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the Member State concerned where that State has failed to transpose the directive into national law within the time limit or has transposed it incorrectly.[33] In my view, incorrect application of the national provisions transposing a directive which also results in a breach of the directive must be equated with incorrect transposition of that directive, since from the point of view of the person concerned, it is irrelevant whether his or her

[30] See, most recently, judgment of 11 September 2019, *Călin* (C-676/17, EU:C:2019:700, paragraph 25 and the case-law cited).

[31] See, in particular, judgment of 19 July 2012, *Littlewoods Retail and Others* (C-591/10, EU:C:2012:478, paragraphs 25 and 26).

[32] See, in particular, judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral* (33/76, EU:C:1976:188, paragraph 5, first and second subparagraphs); of 27 March 1980, *Denkavit italiana* (61/79, EU:C:1980:100, point 1(a) of the operative part); and of 9 November 1983, *San Giorgio* (199/82, EU:C:1983:318, paragraph 12).

[33] See, most recently, judgment of 14 January 2021, *RTS infra and Aannemingsbedrijf Norré-Behaegel* (C-387/19, EU:C:2021:13, paragraph 44).

rights under EU law are infringed as a result of legislative failings of a Member State or of incorrect administrative practice. In both cases, his or her rights are infringed and he or she is entitled to similar protection.

64. A provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States and, second, sufficiently precise to be relied on by a legal entity and applied by a court where it sets out an obligation in unequivocal terms. [34]

65. The Court has also held that, even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it. [35]

66. As far as Directive 2003/96 is concerned, it establishes the minimum level of taxation applicable to energy products and electricity. [36] Above that level, Member States are free to set the level of taxation. The directive also provides for a number of powers for Member States to vary the level of taxation, including to grant exemptions. Those powers are provided for in particular in Article 5, Article 7(2) and (4), Articles 15, 16 and 17 and, for individual Member States, in Articles 18, 18a and 18b of the directive. In addition, pursuant to Article 19 of the directive, the Council may authorise a Member State to introduce further exemptions or reductions in taxation. Directive 2003/96 also contains a number of mandatory exemptions. These are listed in Article 14.

67. The differentiation of taxation according to non-business or business use of electricity, provided for in the fourth indent of Article 5 of Directive 2003/96, is one of those powers granted to the Member States. [37] While it is true that Table C of Annex I to Directive 2003/96 sets differentiated minimum rates of taxation for electricity according to its business or non-business use, Article 5 of that directive expressly states that Member States *may* apply such differentiation. Therefore, they may also apply a single rate of taxation, which will have to respect the minimum taxation level laid down in Directive 2003/96 for non-business use, which is higher.

68. It is worth noting that the level of taxation applicable in Germany during the period covered by the main proceedings was a number of times higher than the minimum levels laid down in the directive, both for energy used for business purposes and for energy used for non-business purposes. Although those minimum levels were EUR 0.50 and EUR 1 per megawatt-hour, respectively, the rates set by the StromStG were EUR 12.30 and EUR 20.50 per megawatt-hour.

69. Provisions granting an option, such as the fourth indent of Article 5 of Directive 2003/96, [38] are not unconditional as their application depends on the decisions made by individual Member States, which are not bound in this regard by any obligation arising from EU law. Therefore, the

[34] Judgment of 14 January 2021, *RTS infra and Aannemingsbedrijf Norré-Behaegel* (C-387/19, EU:C:2021:13, paragraph 46).

[35] Judgment of 14 January 2021, *RTS infra and Aannemingsbedrijf Norré-Behaegel* (C-387/19, EU:C:2021:13, paragraph 47).

[36] Article 4 of Directive 2003/96.

[37] The same applies to the ability to grant tax reductions to energy-intensive businesses, provided for in Article 17(1)(a) of that directive, which is mentioned in the question referred for a preliminary ruling, but which does not actually appear to be relevant to the main proceedings.

[38] Or Article 17(1)(a) of the directive.

tax reductions provided for in those provisions do not create rights with direct effect which could be enforced by taxpayers before the national courts. [39] As a result, there is no right on the part of taxpayers under EU law and, consequently, the obligation arising from the case-law of the Court of Justice to reimburse taxes levied in breach of EU law with interest does not apply either.

70. In consequence, it should be held that, in principle, EU law does not require tax which has been wrongly levied to be reimbursed, together with interest, where the incorrect assessment of the tax has resulted from the tax authorities' failure to apply a reduced tax rate to which the taxpayer was entitled and which was provided for in national law on the basis of an option granted to the Member States by one of the provisions of Directive 2003/96.

71. However, this does not, in my view, exhaust the analysis of the legal issue at hand.

Principles of equal treatment and fiscal neutrality

72. The fact that an option contained in a directive for Member States to reduce the level of taxation does not give rise to rights under EU law which taxpayers could enforce before the courts does not mean that actions taken by Member States on the basis of such an option fall outside the scope of the directive in question and, more generally, of the scope of EU law. On the contrary, when acting on the basis of the option contained in a directive, Member States clearly act on the basis of that directive and thus in an area covered by EU law. The optional nature of this action changes nothing in that regard.

73. Consequently, when Member States make use of the option contained in Directive 2003/96 to apply differentiated taxation levels to electricity, they must act in accordance with EU law. This is, indeed, expressly stated in Article 5 of the directive, under which these differentiated rates of taxation may be applied 'provided that they … are compatible with [EU] law'.

74. This means that, when making use of the option contained in a directive, such as those set out in the fourth indent of Article 5 of Directive 2003/96, Member States are obliged to observe, inter alia, the general principles of EU law. In a situation such as that in the main proceedings, the principles of fiscal neutrality and equal treatment may in particular be relevant. Infringement of those principles may, in itself, give rise to a right on the part of the taxpayer to a refund, together with interest, of the tax overpaid, even where such a right cannot be founded on the provision of the directive on which the Member State's action is founded because the provision has no direct effect.

75. The Court has ruled similarly on the tax exemptions maintained by Member States on the basis of an option contained in the directive on the common system of value added tax (VAT). It has found that, while those exemptions do not confer on taxpayers any rights under EU law, the general principles of EU law, including the principle of fiscal neutrality, give taxpayers the right to recover the sums wrongly levied on the basis of an incorrect interpretation of the national provisions establishing those exemptions. [40]

[39] See, by analogy, judgment of 10 April 2008, *Marks & Spencer* (C-309/06, EU:C:2008:211, paragraph 28).

[40] Judgment of 10 April 2008, *Marks & Spencer* (C-309/06, EU:C:2008:211, points 1 and 2 of the operative part).

76. As regards the principle of fiscal neutrality, the case-law of the Court regards it as reflecting, in EU tax law and, in particular, in matters relating to VAT, the principle of equal treatment. [41] That statement is of course true in principle. However, it should be borne in mind that the concept of fiscal neutrality has its own particular significance in the theory of taxation and is therefore used in the field of tax law alongside, and sometimes in place of, the concept of equal treatment. Its purpose is to ensure that the tax system is designed in such a manner that differences in the tax treatment of similar goods, services or types of activities do not affect the economic decisions of market operators, as these decisions should be made exclusively on the basis of economic criteria. [42]

77. The principle of fiscal neutrality understood in this way refers, therefore, primarily to provisions of tax law, since those provisions, owing to their predictability, have the ability to shape the behaviour of economic operators. On the other hand, it is more difficult to suppose that such behaviour is shaped by the incidental decisions of authorities that apply tax law, especially when those decisions are of a consequential nature, that is to say, when they concern the taxation of transactions already carried out by taxpayers. [43] Consequently, I do not consider that the misapplication of German tax provisions at issue in the main proceedings can be regarded as infringing the principle of fiscal neutrality.

78. This does not alter the fact that, when acting in the context of the transposition of Directive 2003/96, both the German legislature and the German tax authorities are obliged to comply with the principle of equal treatment as a general principle of EU law.

79. A possible infringement of that principle in the main proceedings was not examined in the reference for a preliminary ruling, nor was it the subject of discussion between the interested parties in the present proceedings. Thus, the Court is not sufficiently informed to decide the issue. Moreover, an examination of whether the principle of equal treatment has been breached in a situation such as that in the main proceedings requires an analysis of the facts of the particular case and of the situation of the individual entity concerned. It is therefore for the referring court to determine whether incorrect application of the provisions of the StromStG has placed XY in a less favourable position in relation to entities in a similar situation so as to constitute an infringement of the principle of equal treatment. This primarily concerns entities which engage in activities similar to those of that company, and which may therefore be its competitors.

80. Should the referring court conclude that there has been an infringement of the principle of equal treatment, that would in itself constitute a ground under EU law for XY to claim reimbursement together with interest of the amount of the electricity tax wrongly levied.

41 See, most recently, judgment of 17 December 2020, *WEG Tevesstraße* (C-449/19, EU:C:2020:1038, paragraph 48).

42 See OECD International VAT/GST Guidelines: Guidelines on Neutrality (https://www.oecd.org/ctp/consumption/guidelinesneutrality2011.pdf), and also Maitrot de la Motte, A., *Droit fiscal de l'Union européenne*, Bruylant, Bruxelles, 2016, pp. 393 and 394.

43 However, established administrative practice, such as that in the case which gave rise to the judgment of 10 April 2008, *Marks & Spencer*, C-309/06, EU:C:2008:211, where the misinterpretation of tax laws continued from 1973 to 1994 (see paragraph 9 of that judgment), may shape the conduct of market operators in a manner similar to legislation and potentially infringe the principle of fiscal neutrality.

81. Of course, in such a situation, the conditions under which such reimbursement is made will be subject to the principles of equivalence and effectiveness. This means that those conditions may not be less favourable than those governing similar domestic measures and may not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order. [44]

Right to property

82. The right to property is protected under EU law, including in particular under Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter'). Pursuant to Article 51 of the Charter, its provisions are addressed to the Member States when they are implementing EU law. This is clearly the case when a Member State transposes a directive, including when it makes use of the options contained in that directive. Where an administrative authority applies provisions of national law which transpose a directive, this should also be considered to be the application of EU law by a Member State.

83. Article 52(3) of the Charter provides that, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, concluded in Rome on 4 November 1950 ('the ECHR'), the meaning and scope of those rights are to be the same as those laid down by the said Convention. As regards Article 17 of the Charter, according to the explanations relating to the Charter of Fundamental Rights [45] it corresponds to Article 1 of Protocol No 1 to the ECHR. Therefore, Article 17 of the Charter must be interpreted in the light of the case-law of the European Court of Human Rights ('the ECtHR') relating to the latter provision. [46]

84. With regard to the issue of recovery of wrongly levied taxes, the ECtHR takes the view that a debt can be a 'possession' within the meaning of Article 1 of Protocol No 1 to the ECHR if it is sufficiently established. The right to reimbursement of overpaid tax granted by the administrative authorities constitutes such a debt. [47] According to the ECtHR, in the light of Article 1 of Protocol No 1 to the ECHR, the payment of interest makes it possible to compensate for the loss that results for the entity concerned from the period during which the amounts wrongly levied by the administrative authorities were not available to it. Indeed, the conditions for the reimbursement of tax wrongly paid must not be such as to place an excessive burden on the entity concerned or fundamentally interfere with its financial security. [48] Where the reimbursement of the tax wrongly paid takes place after a long period of time, failure to pay interest on the amount of tax overpaid may thus upset the balance between the general interest and the individual interest and, therefore, violate Article 1 of Protocol No 1 to the ECHR. [49]

85. In the light of the above case-law, it must be held that failure to pay interest on the amount of tax wrongly levied may constitute an infringement of Article 17 of the Charter if the Member State levied that tax in the context of the application of EU law. This is particularly the case where the failure to pay interest places a disproportionate financial burden on the taxpayer concerned, for

44 Judgment of 14 October 2020, *Valoris* (C-677/19, EU:C:2020:825, paragraph 21).

45 OJ 2007 C 303, p. 17.

46 See judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraph 72).

47 ECtHR, 9 March 2006, *Eko-Elda Avee v. Greece* (CE:ECHR:2006:0309JUD001016202, §§ 26 and 27 and the case-law cited).

48 ECtHR, 9 March 2006, *Eko-Elda Avee v. Greece* (CE:ECHR:2006:0309JUD001016202, §§ 29 and 30 and the case-law cited).

49 ECtHR, 9 March 2006, *Eko-Elda Avee v. Greece* (CE:ECHR:2006:0309JUD001016202, § 31).

example because of the long period of time during which the amount overpaid was not available to him or her. Determining the existence of such an infringement of Article 17 requires the national courts to assess the circumstances of the particular case.

86. Such an infringement, if established, in itself constitutes a basis, under EU law, for the taxpayer to claim interest on the amount of tax overpaid.

Proposed answer

87. In the light of the foregoing, I propose that the question referred for a preliminary ruling be answered by stating that EU law does not require tax which has been wrongly paid to be reimbursed together with interest where the incorrect assessment of the tax has resulted from the tax authorities' failure to apply a reduced tax rate to which the taxpayer was entitled and which was provided for in national law on the basis of an option granted to the Member States by one of the provisions of Directive 2003/96, except where failure to effect such reimbursement would result in an infringement of the principle of equal treatment or of Article 17 of the Charter, a matter which is for the national court to determine in the light of the circumstances of the particular case.

Conclusions

88. In the light of all the above considerations, I propose that the following answer should be given to the question referred for a preliminary ruling by the Bundesfinanzhof (Federal Finance Court, Germany):

EU law does not require tax which has been wrongly paid to be reimbursed together with interest where the incorrect assessment of the tax has resulted from the tax authorities' failure to apply a reduced tax rate to which the taxpayer was entitled and which was provided for in national law on the basis of an option granted to the Member States by 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, except where failure to effect such reimbursement would result in an infringement of the principle of equal treatment or of Article 17 of the Charter of Fundamental Rights of the European Union, a matter which is for the national court to determine in the light of the circumstances of the particular case.