Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

22 December 2022*

(Reference for a preliminary ruling – Directive 2003/96/EC – Taxation of energy products and electricity – Fourth indent of Article 5 – Differentiated rates of excise duty according to whether those products are for business or non-business use – Optional tax exemptions and reductions – Submission of an application for an optional tax reduction after the expiry of the period prescribed for that purpose but before the expiry of the period for assessment of the tax concerned – Principle of legal certainty – Principle of effectiveness – Principle of proportionality)

In Case C-553/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 8 June 2021, received at the Court on 8 September 2021, in the proceedings

Hauptzollamt Hamburg

v

Shell Deutschland Oil GmbH,

THE COURT (Eighth Chamber),

composed of N. Piçarra (Rapporteur), acting as President of the Chamber, N. Jääskinen and M. Gavalec, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Hauptzollamt Hamburg, by C. Schaade, acting as Agent,

– Shell Deutschland Oil GmbH, by J. Dengler, L. Freiherr von Rummel and R. Stein, Rechtsanwälte,

* Language of the case: German.

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

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the principle of proportionality, as a general principle of EU law, read in conjunction with the fourth indent of Article 5 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 the Hauptzollamt Hamburg (Principal Customs Office, Hamburg, Germany) ('the Customs Office') and Shell Deutschland Oil GmbH ('Shell') concerning the refusal by the Customs Office to grant Shell relief from the energy tax on energy products used by that company as heating fuel for business purposes.

Legal context

European Union law

3 Recitals 3, 17 and 21 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.

…

(17) It is necessary to establish different Community minimum levels of taxation according to the use of the energy products and electricity.

…

(21) Business use and non-business use of energy products and electricity may be treated differently for tax purposes.'

4 Article 5 of that directive reads as follows:

'Provided that they respect the minimum levels of taxation prescribed by this Directive and that they are compatible with Community 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 [heating fuels] and 10 [electricity].'

5 Under Article 6 of that directive:

‘Member States shall be free to give effect to the exemptions or reductions in the level of taxation prescribed by this Directive either:

…

(c) by refunding all or part of the amount of taxation.’

German law

6 Paragraph 54(1) of the Energiesteuergesetz (Law on Energy Tax) of 15 July 2006 (BGBl. 2006 I, p. 1534), in the version applicable to the dispute in the main proceedings (‘the EnergieStG’), provides:

‘Tax relief shall be granted upon application in respect of energy products which are shown to have been taxed in accordance with points 1 and 3 to 5 of the first sentence of Paragraph 2(3) and which have been used as heating fuel for business purposes or used in installations benefiting from preferential treatment, within the meaning of Paragraph 3, by an undertaking in the manufacturing sector, within the meaning of point 3 of Paragraph 2 of the Stromsteuergesetz [(Law on Electricity Tax) of 24 March 1999 (BGBl. 1999 I, p. 378)] … However, tax relief in respect of energy products which have been used to generate heat shall be granted only in so far as it is demonstrated that the heat generated has been used by an undertaking in the manufacturing sector …’

7 Paragraph 100 of the Verordnung zur Durchführung des Energiesteuergesetzes (Regulation implementing the Law on Energy Tax) of 31 July 2006 (BGBl. 2006 I, p. 1753; ‘the EnergieStV’), entitled ‘Tax relief for undertakings’, provides, in subparagraph 1:

‘An application for the tax relief provided for in Paragraph 54 of the EnergieStG must be made to the [customs office] which is competent for the applicant, using the official form required, in respect of all energy products used during the relevant period. The applicant must provide in its application all the information necessary for the purposes of calculating the relief and must make its own calculation of the amount of the relief. The tax relief shall be granted only if the application is lodged with the [customs office] at the latest by 31 December of the year following the calendar year during which the energy products were used.’

8 Paragraph 169 of the Abgabenordnung (Tax Code), entitled ‘Period for assessment’, is worded as follows:

‘(1) A tax assessment and its annulment or amendment shall no longer be admissible when the period for assessment has expired. …

(2) The period for assessment shall be:

1. one year in respect of excise duties and refunds of excise duties,

…’

9 Under Paragraph 170 of that code, the period for assessment is to begin on the expiry of the calendar year during which the tax liability arose.

10 Paragraph 171 of that code, entitled 'Extension of the period', provides, in subparagraph 4, that if a tax inspection has begun before the expiry of the period for assessment of the taxes to which that tax inspection relates, such a period is not to expire before the tax notices issued following that tax inspection have become final, without prejudice to an extension of that period under other provisions.

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

11 Shell submitted to the Customs Office, using the official form prescribed for that purpose, an application for tax relief under Paragraph 54(1) of the EnergieStG in respect of the energy products which it used for business purposes during the period from August to November 2010, in the form of a refund in part of the amount of taxation, as provided for in Article 6(c) of Directive 2003/96.

12 It is common ground that, as regards that period, all the conditions for Shell to be entitled to such a tax reduction under Paragraph 54(1) of the EnergieStG were met, with the exception of the lodging, within the period prescribed in Paragraph 100 of the EnergieStV, of an application for that purpose, which was received by the Customs Office in May 2012. It is also common ground that, in 2011, that company was the subject of a tax inspection relating to 2010.

13 The Customs Office rejected Shell's application and the objection lodged against that rejection decision, on 13 August 2012 and 27 February 2015 respectively, on the ground that that company had not submitted its application for a tax reduction within the period prescribed in Paragraph 100(1) of the EnergieStV.

14 By judgment of 1 February 2019, the Finanzgericht Hamburg (Finance Court, Hamburg, Germany) upheld the action brought by Shell, holding that the latter provision had been complied with, having regard to the circumstances of the case, and that, in any event, in the light of EU law, in particular the principle of proportionality, the Customs Office should have granted Shell's application.

15 The Customs Office subsequently brought an appeal on a point of law (*Revision*) against that judgment before the Bundesfinanzhof (Federal Finance Court, Germany), the referring court.

16 The referring court states that the outcome of the dispute in the main proceedings depends on whether, where an application for a tax reduction submitted under Paragraph 54(1) of the EnergieStG – a provision based on the fourth indent of Article 5 of Directive 2003/96 – is received by the Customs Office after the expiry of the period for submitting such an application, but within the period for assessment of the tax, which has been extended due to a tax inspection initiated vis-à-vis the applicant in accordance with Paragraph 171(4) of the Tax Code, the applicant's entitlement to that tax reduction is precluded by virtue of Paragraph 100(1) of the EnergieStV, or whether the principle of proportionality, as a general principle of EU law, precludes the competent national authorities from refusing such an entitlement solely because the former period was not complied with.

17 The referring court notes that, at the time when the application for a tax reduction was received by the Customs Office in May 2012, the period for assessment had not yet expired as a result of the tax inspection to which Shell had been subject in 2011. It observes that this is a limitation period which provides legal certainty and stability, as the Court of Justice has already held.

18 In addition, the referring court observes, first, that, according to the case-law of the Court of Justice resulting from the judgments of 2 June 2016, *Polihim-SS* (C-355/14, EU:C:2016:403), and of 7 November 2019, *Petrotel-Lukoil* (C-68/18, EU:C:2019:933), it is contrary to EU law and, in particular, to the principle of proportionality to penalise the infringement of formal requirements of national law by a refusal to grant a tax advantage provided for in Directive 2003/96 and, secondly, that, according to its own case-law, the application for relief from the energy tax is 'not a substantive condition but merely a formal requirement of the entitlement to tax relief'. According to the referring court, that could support an argument that an application submitted out of time does not preclude the taxation of an energy product according to its actual use, in this case as heating fuel for business purposes. In such a case, that court is inclined to take the view that, as long as the period for assessment prescribed in Paragraph 169 of the Tax Code has not expired, the entitlement to an exemption from or reduction of the energy tax may not be refused by the competent authority if the substantive conditions laid down for that purpose are met.

19 The referring court is uncertain, however, whether the case-law cited, which concerns mandatory tax relief prescribed by Directive 2003/96, also applies to the optional tax relief provided for by that directive, which is the subject of the case in the main proceedings.

20 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:

'Does the principle of proportionality[, as a general principle of EU law,] apply also to the optional tax reduction provided for in the fourth indent of Article 5 of Directive 2003/96, with the result that the Member State may not refuse to grant the tax reduction after the period for submitting an application under national law has expired, if the assessment of the tax has not yet been time-barred at the time when the application is received by the competent authority?'

Consideration of the question referred

21 By its question, the referring court asks, in essence, whether the principle of effectiveness and the principle of proportionality, as a general principle of EU law, must be interpreted, in the context of implementing a provision such as that in the fourth indent of Article 5 of Directive 2003/96 – which allows Member States to apply, under certain conditions, differentiated rates of taxation between business and non-business use, for energy products and electricity referred to in that directive – as precluding national legislation under which the competent authorities of a Member State are required to reject, automatically and without exception, an application for tax relief lodged within the period for assessment of the tax at issue as laid down in national law, on the sole ground that the applicant failed to comply with the period prescribed by that law for the submission of such an application.

22 As regards, in the first place, the substantive conditions for relief from excise duties with respect to energy products and electricity referred to in Directive 2003/96, it should be noted that the purpose of that directive, as is apparent from recital 3 thereof, is to lay down minimum levels of taxation for most energy products and electricity at EU level. Under the combined provisions of Articles 5 and 6 of that directive, read in the light of recitals 17 and 21 thereof, Member States may introduce differentiated rates of taxation, exemptions from taxation or tax reductions in

respect of excise duty, which form an integral part of the harmonised taxation system established by Directive 2003/96 (see, to that effect, judgment of 9 September 2021, *Hauptzollamt B (Optional tax reduction)*, C-100/20, EU:C:2021:716, paragraph 30).

23 Article 5 of Directive 2003/96 thus gives Member States the power to apply, in compliance with the minimum levels of taxation prescribed by that directive and in compliance with EU law, differentiated rates of taxation in certain cases set out in that article, including the case provided for in the fourth indent, relating to business or non-business use of energy products and electricity referred to in Articles 9 and 10 of that directive. That power forms an integral part of the harmonised taxation system established by Directive 2003/96 (see, to that effect, judgment of 9 September 2021, *Hauptzollamt B (Optional tax reduction)*, C-100/20, EU:C:2021:716, paragraph 30).

24 It follows that economic operators which are subject to a reduced rate of the tax concerned pursuant to a provision of national law implementing that power, where they are in a situation comparable to that of economic operators which are subject to the standard rate of that tax pursuant to a mandatory provision of Directive 2003/96, must not, in accordance with the principle of equal treatment, be treated differently from the latter operators, unless such treatment is objectively justified (see, to that effect, judgment of 9 September 2021, *Hauptzollamt B (Optional tax reduction)*, C-100/20, EU:C:2021:716, paragraphs 31 and 32).

25 In the second place, since the formal and procedural requirements relating to the submission of an application for relief from the tax on energy products or electricity, based on national legislation which implements the power provided for in the fourth indent of Article 5 of Directive 2003/96, are not defined either by that directive or by any other act of EU law, it is for the domestic legal system of each Member State to regulate those conditions, by virtue of the principle of procedural autonomy, provided, however, that such conditions are not less favourable than those governing comparable domestic situations (principle of equivalence) and do not make it impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (see, by analogy, judgment of 9 September 2021, *GE Auto Service Leasing*, C-294/20, EU:C:2021:723, paragraph 59).

26 The same applies as regards, in particular, the setting of periods for the exercise of those rights, inter alia limitation periods and time limits. It is settled case-law that the setting of reasonable limitation periods constitutes an application of the fundamental principle of legal certainty, which seeks to ensure that situations and legal relationships remain foreseeable and requires, in particular, that the situation of a taxable person, having regard to their rights and obligations vis-à-vis the tax authorities, should not be open to challenge indefinitely (see, to that effect, judgments of 21 June 2012, *Elsacom*, C-294/11, EU:C:2012:382, paragraph 29, and of 14 October 2021, *Finanzamt N and Finanzamt G (Communication of the allocation decision)*, C-45/20 and C-46/20, EU:C:2021:852, paragraph 59 and the case-law cited).

27 However, such periods must apply in the same way to rights in tax matters founded on domestic law and to those similar rights founded on EU law, in addition to the fact that they must not make it impossible in practice or excessively difficult to exercise the right concerned (see, to that effect, judgment of 30 April 2020, *CTT – Correios de Portugal*, C-661/18, EU:C:2020:335, paragraph 59 and the case-law cited).

28 Observance of the requirements flowing from the principles of equivalence and effectiveness with regard specifically to limitation periods and time limits must be examined by reference to the role of the national rules which prescribe those periods in the procedure viewed as a whole, to the conduct of that procedure and to the special features of those rules before the various national courts (see, to that effect, judgment of 14 October 2020, *Valoris*, C-677/19, EU:C:2020:825, paragraph 22 and the case-law cited).

29 In those circumstances, such periods are not by their nature liable to make it virtually impossible or excessively difficult to exercise the rights conferred by EU law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought (judgment of 21 October 2021, *Wilo Salmson France*, C-80/20, EU:C:2021:870, paragraph 95 and the case-law cited).

30 In the present case, the legislation at issue in the main proceedings provides, first, for a period of one year for the assessment of the energy tax, calculated as from the expiry of the calendar year during which the tax liability arose. In the case of a tax inspection, that period is not to expire until the date on which the tax notices issued following that inspection become final. Secondly, that legislation prescribes a period for submitting an application for tax relief to the competent national authorities, of the same duration and, prima facie, with the same starting point as the period for assessment. The expiry of the period for submitting an application entails automatically and without exception the rejection of that application, even though the period for assessment of the tax has not yet expired on account of any suspension, interruption or extension to which it may be subject.

31 However, the principle of effectiveness precludes the national legislation at issue in the main proceedings, if that legislation must be interpreted as meaning that failure to comply with the period for submitting an application for tax relief entails automatically and without exception the rejection of that application, including where the period for assessment of the tax concerned – which has the same duration and the same starting point as the period for submitting the application and which may be interrupted, suspended or extended – has not yet expired on account, inter alia, of a tax inspection to which the applicant is subject. In that situation, such legislation is liable to deprive a taxable person, irrespective of the circumstances of the case at issue, of their right to relief, while the Member State concerned has chosen to guarantee that right to economic operators in its territory.

32 Those considerations are borne out by the principle of proportionality, as a general principle of EU law, interpretation of which is sought by the referring court, and which national provisions implementing EU law must also observe (see, to that effect, judgments of 13 July 2017, *Vakarų Baltijos laivų statykla*, C-151/16, EU:C:2017:537, paragraph 45; of 9 September 2021, *Hauptzollamt B (Optional tax reduction)*, C-100/20, EU:C:2021:716, paragraph 31; and of 30 June 2022, *ARVI ir ko*, C-56/21, EU:C:2022:509, paragraph 34). That principle requires Member States to employ means which, while enabling them effectively to attain the objective pursued by national legislation, cause the least possible detriment to the principles laid down by EU legislation (see, to that effect, judgment of 14 October 2021, *Finanzamt N and Finanzamt G (Communication of the allocation decision)*, C-45/20 and C-46/20, EU:C:2021:852, paragraph 62 and the case-law cited).

33 The Court has already held that national legislation which, within a general limitation period of five years, prevents a taxable person who has failed to claim deduction of input value added tax (VAT) from correcting their VAT returns for periods that have already been the subject of a tax

inspection, by making them forfeit their right of deduction, appears, in view of the dominant position which the right of deduction has in the common system of VAT, disproportionate to the objective pursued by the national legislation, where no evasion or detriment to the budget of the State is ascertained (judgment of 26 April 2018, *Zabrus Siret*, C-81/17, EU:C:2018:283, paragraph 51). That assessment applies, *mutatis mutandis*, to legislation such as that at issue in the main proceedings.

34 Since it does not appear that, in circumstances such as those referred to in paragraph 30 above, accepting an application for a tax exemption or reduction lodged after the expiry of the period for submitting such an application, but within the period for assessment of the tax at issue, would be incompatible with the principle of legal certainty, and in view of the general scheme and the purpose of Directive 2003/96, which are based on the principle that energy products are taxed in accordance with their actual use (judgment of 2 June 2016, *ROZ-ŚWIT*, C-418/14, EU:C:2016:400, paragraph 33), it must be held that the principle of proportionality also precludes national legislation such as that at issue in the main proceedings, where the actual use of energy products is not in doubt.

35 In the light of all of the foregoing, the answer to the question referred is that the principle of effectiveness and the principle of proportionality, as a general principle of EU law, must be interpreted, in the context of implementing a provision such as that in the fourth indent of Article 5 of Directive 2003/96 – which allows Member States to apply, under certain conditions, differentiated rates of taxation between business and non-business use, for energy products and electricity referred to in that directive – as precluding national legislation under which the competent authorities of a Member State are required to reject, automatically and without exception, an application for tax relief lodged within the period for assessment of the tax at issue as laid down in national law, on the sole ground that the applicant failed to comply with the period prescribed by that law for the submission of such an application.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Eighth Chamber) hereby rules:

The principle of effectiveness and the principle of proportionality, as a general principle of EU law, must be interpreted, in the context of implementing a provision such as that in the fourth indent of Article 5 of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity – which allows Member States to apply, under certain conditions, differentiated rates of taxation between business and non-business use, for energy products and electricity referred to in that directive – as precluding national legislation under which the competent authorities of a Member State are required to reject, automatically and without exception, an application for tax relief lodged within the period for assessment of the tax at issue as laid down in national law, on the sole ground that the applicant failed to comply with the period prescribed by that law for the submission of such an application.

[Signatures]