Reports of Cases

ORDER OF THE COURT (Eighth Chamber)

7 February 2022*

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court – Excise duties – Directive 2008/118/EC – Article 1(2) – Levying, for specific purposes, of other indirect taxes – 'Specific purposes' – Definition – Financing of a public undertaking holding the concession contract in respect of the national road network – Objectives of environmental sustainability and reducing accidents – Purely budgetary purpose – Refusal to reimburse a tax based on unjust enrichment – Conditions)

In Case C-460/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal), made by decision of 12 July 2021, received at the Court on 26 July 2021, in the proceedings

Vapo Atlantic SA

v

Autoridade Tributária e Aduaneira,

THE COURT (Eighth Chamber),

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

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

* Language of the case: Portuguese.

Order

1 This request for a preliminary ruling concerns the interpretation of Article 1(2) of 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), and of the general EU law principles of legality and legal certainty.

2 The request has been made in proceedings between Vapo Atlantic SA and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal; 'the tax authorities') concerning the reimbursement of the road network user charge ('the CSR') which that company paid in respect of the year 2016.

Legal context

European Union law

3 Article 1 of Directive 2008/118 provides:

'1. This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter "excise goods"):

(a) energy products and electricity covered by 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. Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions.

…'

Portuguese law

Law No 55/2007

4 The Lei nº 55/2007, que regula o financiamento da rede rodoviária nacional a cargo da EP – Estradas de Portugal, E.P.E. (Law No 55/2007 governing the financing of the national road network operated by EP – Estradas de Portugal, EPE) of 31 August 2007 (*Diário da República* No 168/2007, Series I, of 31 August 2007), lays down the legal rules governing the CSR.

5 Article 3 of that law, entitled 'Contribution for road services', provides, in paragraph 1, that the CSR constitutes payment for use of the national road network, which is reflected in fuel consumption. Paragraph 2 states that the CSR is a source of funding for the national road network operated by EP – Estradas de Portugal, EPE ('EP').

6 Under Article 4(1) of that law, the CSR is levied on petrol and diesel subject to tax on petroleum and energy products which are not exempt from that tax.

7 Article 6 of that law provides that the CSR constitutes EP's own revenue.

Decree-Law No 380/2007

8 The legal regime in respect of the award of the national road network concession contract to EP is governed by Decreto-Lei nº 380/2007, que atribui à EP – Estradas de Portugal, SA, a concessão do financiamento, concepção, projecto, construção, conservação, exploração, requalificação e alargamento da rede rodoviária nacional e aprova as bases da concessão (Decree-Law No 380/2007 awarding to [EP] the concession contract for the financing, design, planning, construction, conservation, operation, modernisation and extension of the national road network and approving the bases for the concession contract) of 13 November 2007 (*Diário da República* No 218/2007, Series I, of 13 November 2007).

9 The bases for that concession, approved by that decree-law, provide, inter alia, that the CSR constitutes EP's own revenue and state that the concessionaire must pursue, in the course of its activity, objectives of environmental sustainability and reducing accidents, in other words, reducing the number of accidents.

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

10 Vapo Atlantic is a company whose corporate purpose is, inter alia, the operation of service stations and the wholesale marketing of petroleum products. On the basis of that company's declarations of release for consumption, the tax authorities issued joint assessment notices in respect of the tax on petroleum and energy products, the CSR and other tax levies for 2016, in the total sum of EUR 21 016 425.44, including EUR 4 873 427.68 in respect of the CSR.

11 On 10 February 2020, Vapo Atlantic submitted a request for an administrative review of those assessment notices, which was rejected by a decision of the Director of Customs of Braga (Portugal) of 23 July 2020. That decision found that the CSR is compatible with Directive 2008/118 and that, in view of the fact that that levy is borne by taxpayers when purchasing fuel, Vapo Atlantic would be unjustly enriched if its claim for reimbursement were upheld.

12 Vapo Atlantic brought an action against that rejection decision before the referring court, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal).

13 In support of its action, Vapo Atlantic argues that the CSR was created for purely budgetary reasons in order to finance the public undertaking holding the concession contract in respect of the national road network, which infringes Article 1(2) of Directive 2008/118.

14 The tax authority replies, first, that Decree-Law No 380/2007, which awarded the concession contract for the national road network to EP, which has since become Infraestruturas de Portugal SA ('IP'), assigns to the latter an objective of reducing accidents, and an objective of environmental sustainability, both of which constitute the CSR's specific purpose within the meaning of Article 1(2) of Directive 2008/118. Furthermore, the CSR is IP's own revenue. That undertaking is thus financed by the users of the national road network and only in the alternative by the State.

Secondly, although there is no formal mechanism for passing on the CSR, the specific tax structure of that charge shows that it is passed on in the retail price, with the result that a reimbursement of the sums paid in that regard by a taxable person would amount to a situation of unjust enrichment.

15 The referring court asks whether the CSR pursues a specific purpose within the meaning of Article 1(2) of Directive 2008/118 and observes that the Court of Justice has not expressly ruled on that point. In that regard, the referring court states that, according to Law No 55/2007, the CSR is aimed at ensuring, through the users of the national road network and, in the alternative, the Portuguese State, the financing of the design, planning, construction, maintenance, operation, modernisation and extension of that network, activities which were awarded to IP. That charge thus constitutes the concessionaire's own revenue and that concessionaire must pursue 'objectives of environmental sustainability and reducing accidents'.

16 It is that context that the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should Article 1(2) of Directive [2008/118], in particular the requirement relating to the existence of "specific purposes" be interpreted as meaning that the purpose of a charge is purely budgetary when it was set up in order to finance the public undertaking holding the concession contract for the national road network at the time of the renewal of the concession contract, the revenues generated by that charge are allocated to it in a generic manner, and the structure of the charge does not indicate an intent to discourage any consumption?

(2) Do EU law and the principles of legality and legal certainty permit national authorities to refuse, based on unjust enrichment of the taxable person, to reimburse indirect taxes which are contrary to Directive [2008/118], in the absence of specific legal provisions of national law that provide for this?

(3) Is it permissible under EU law for national authorities, when giving reasons for their refusal to reimburse indirect taxes which are contrary to Directive [2008/118], to assume that the tax has been passed on and that the taxable person has been unjustly enriched, by requiring the taxable person to prove that those indirect taxes do not exist?'

Consideration of the questions referred for a preliminary ruling

The first question

17 Under Article 99 of the Rules of Procedure of the Court of Justice, where the reply to a question referred for a preliminary ruling may be clearly deduced from existing case-law or where the answer to such a question admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

18 It is appropriate to apply that provision in the present reference for a preliminary ruling.

19 By its first question, the referring court asks, in essence, whether Article 1(2) of Directive 2008/118 must be interpreted as meaning that a charge, the revenue from which is allocated, in a generic manner, to a public undertaking holding the concession contract for the national road network and the structure of that charge does not indicate an intention to discourage the consumption of the main road fuels, pursues 'specific purposes' within the meaning of that provision.

20 It should be noted at the outset that that provision, which seeks to take due account of the Member States' different fiscal traditions in this regard and the frequent recourse to indirect taxation for the implementation of non-budgetary policies, allows Member States to introduce, in addition to minimum excise duty, other indirect taxes having a specific purpose (judgments of 4 June 2015, *Kernkraftwerke Lippe-Ems*, C-5/14, EU:C:2015:354, paragraph 58, and of 3 March 2021, *Promociones Oliva Park*, C-220/19, EU:C:2021:163, paragraph 48).

21 In accordance with that provision, Member States may levy other indirect taxes on excise goods, subject to two conditions. First, such taxes must be levied for specific purposes and, second, those taxes must comply with the EU tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions.

22 Those two conditions, which are intended to prevent additional indirect taxes from improperly obstructing trade, are cumulative, as is apparent from the very wording of Article 1(2) of Directive 2008/118 (see judgment of 5 March 2015, *Statoil Fuel & Retail*, C-553/13, EU:C:2015:149, point 36, and, by analogy, judgment of 25 July 2018, *Messer France*, C-103/17, EU:C:2018:587, paragraph 36).

23 As regards the first of those conditions, the only one to which the first question referred for a preliminary ruling relates, it is apparent from the case-law of the Court that a specific purpose within the meaning of that provision is a purpose other than a purely budgetary purpose (judgment of 5 March 2015, *Statoil Fuel & Retail*, C-553/13, EU:C:2015:149, paragraph 37).

24 However, since every tax necessarily pursues a budgetary purpose, the mere fact that a tax is intended to achieve a budgetary objective cannot, in itself, suffice, if Article 1(2) of Directive 2008/118 is not to be rendered meaningless, to preclude that tax from being regarded as having, in addition, a specific purpose within the meaning of that provision (judgment of 5 March 2015, *Statoil Fuel & Retail*, C-553/13, EU:C:2015:149, paragraph 38 and the case-law cited).

25 Thus, in order to be regarded as pursuing a specific purpose within the meaning of that provision, a tax must itself be directed at achieving the specific purpose stated, so that there is a direct link between the use of the revenue and the purpose of the tax in question (see, to that effect, judgments of 5 March 2015, *Statoil Fuel & Retail*, C-553/13, EU:C:2015:149, paragraph 41, and of 25 July 2018, *Messer France*, C-103/17, EU:C:2018:587, paragraph 38).

26 Furthermore, while the predetermined allocation of the proceeds of a tax to the financing of the exercise, by the authorities of a Member State, of powers transferred to them can constitute a factor to be taken into account for the purpose of establishing the existence of a specific purpose, such an allocation, which is merely a matter of internal organisation of the budget of a Member State, cannot, in itself, constitute a sufficient condition, since any Member State may decide to lay down, irrespective of the purpose pursued, that the proceeds of a tax are [to] be allocated to financing particular expenditure. Otherwise, any purpose could be considered to be specific within the meaning of Article 1(2) of Directive 2008/118, which would deprive the harmonised

excise duty established by that directive of all practical effect and be contrary to the principle that a derogating provision such as Article 1(2) must be interpreted strictly (judgment of 5 March 2015, *Statoil Fuel & Retail*, C-553/13, EU:C:2015:149, paragraph 39 and the case-law cited).

27 Lastly, in the absence of such a mechanism for the predetermined allocation of revenue, a levy on excise goods can be regarded as pursuing a specific purpose within the meaning of Article 1(2) of Directive 2008/118 only if it is designed, so far as its structure is concerned, and particularly the taxable item or the rate of tax, in such a way as to guide the behaviour of taxpayers in a direction which facilitates the achievement of the stated specific purpose, for example by taxing the goods in question heavily in order to discourage their consumption (judgment of 5 March 2015, *Statoil Fuel & Retail*, C-553/13, EU:C:2015:149, paragraph 42 and the case-law cited).

28 When the Court is requested to give a preliminary ruling in order to determine whether a tax established by a Member State pursues a specific purpose within the meaning of Article 1(2) of Directive 2008/118, its task is to provide the national court with guidance on the criteria which will enable the latter to determine whether that tax actually pursues such a purpose, rather than to carry out that assessment itself, a fortiori since the Court does not necessarily have available to it all the information which is essential in that regard (see, by analogy, judgments of 7 November 2002, *Lohmann and Medi Bayreuth*, C-260/00 to C-263/00, EU:C:2002:637, paragraph 26, and of 16 February 2006, *Proxxon*, C-500/04, EU:C:2006:111, paragraph 23).

29 In the present case, it is important to note, first, as follows from the case-law referred to in paragraph 26 of the present order, that, although the predetermined allocation of the proceeds of the CSR to the financing, by the concessionaire of the national road network, of the general powers transferred to it can constitute a factor to be taken into account in order to identify the existence of a specific purpose, within the meaning of Article 1(2) of Directive 2008/118, such an allocation cannot, in itself, constitute a sufficient condition.

30 Secondly, in order to be regarded as pursuing a specific purpose within the meaning of that provision, the CSR would itself have to be directed at achieving the objectives of environmental sustainability and reducing accidents, which were assigned to the concessionaire of the national road network. That would be the case, in particular, where the proceeds of that charge had to be used for the purpose of reducing the social and environmental costs specifically linked to the use of that network on which that charge is imposed. There would then be a direct link between the use of the revenue and the purpose of the tax in question (see, to that effect, judgments of 27 February 2014, *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, paragraph 30, and of 25 July 2018, *Messer France*, C-103/17, EU:C:2018:587, paragraph 38).

31 Thirdly, it is true that, as follows from paragraph 14 of the present order, the tax authorities maintain that there is a link between the allocation of revenue generated by the CSR and the specific purpose which led to the introduction of that charge, since the Decree-Law awarding the concession contract for the national road network to IP requires the latter to work towards achieving the reduction of accidents on that network, on the one hand, and environmental sustainability, on the other.

32 However, as noted in paragraph 15 of the present order, it is apparent from the order for reference that the proceeds from the charge in question in the main proceedings are not allocated exclusively to the financing of operations which are supposed to lead to the achievement of the

two objectives referred in the preceding paragraph of this order. The revenue from the CSR is intended, more broadly, to finance the design, planning, construction, maintenance, operation, modernisation and extension of that network.

33 Fourthly, the two objectives assigned to the concessionaire of the Portuguese national road network are set out in very general terms and do not demonstrate, prima facie, an actual desire to discourage the use of either that network or the main road fuels such as petrol, diesel or automotive liquefied petroleum gas (LPG). In that regard, it is significant that the referring court emphasises, in the wording of its first question referred for a preliminary ruling, that the revenue generated by the charge is allocated in a generic manner to the concessionaire of the national road network and that the structure of that charge does not indicate an intention to discourage any consumption of those fuels.

34 Fifthly, there is nothing in the request for a preliminary ruling to suggest that the CSR, in so far as it affects users of the national road network, is designed, as regards its structure, in such a way that it discourages taxable persons from using that network or encourages them to adopt behaviour, the effects of which would be less harmful to the environment and capable of reducing accidents.

35 Therefore, and subject to the verifications which it will be for the referring court to carry out in the light of the information set out in paragraphs 29 to 34 of the present order, the two specific purposes relied on by the tax authorities in order to demonstrate that the CSR pursues a specific purpose within the meaning of Article 1(2) of Directive 2008/118, cannot be distinguished from a purely budgetary purpose (see, by analogy, judgment of 27 February 2014, *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, paragraphs 31 to 35).

36 In the light of the foregoing considerations, the answer to the first question is that Article 1(2) of Directive 2008/118 must be interpreted as meaning that a charge, the revenue from which is allocated, in a generic manner, to a public undertaking holding the concession contract for the national road network and the structure of that charge does not indicate an intention to discourage the consumption of the main road fuels, does not pursue 'specific purposes' within the meaning of that provision.

The second and third questions

37 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether EU law must be interpreted as precluding national authorities from being able to justify their refusal to reimburse an indirect charge that is contrary to Directive 2008/118 by assuming that that charge has been passed on to third parties and, as a result, that the taxable person has been unjustly enriched.

38 As follows from settled case-law, the right to a refund of taxes levied in a Member State in breach of EU provisions is the consequence and complement of the rights conferred on individuals by those provisions as interpreted by the Court. A Member State is thus in principle required to repay taxes levied in breach of EU law, in accordance with the applicable national procedural rules and with due regard for the principles of equivalence and effectiveness (see, to that effect, inter alia, judgments of 9 November 1983, *San Giorgio*, 199/82, EU:C:1983:318, paragraph 12, and of 1 March 2018, *Petrotel-Lukoil and Georgescu*, C-76/17, EU:C:2018:139, paragraph 32).

39 There is only one exception to the obligation to reimburse taxes levied in a Member State in breach of EU provisions. So as not to lead to the unjust enrichment of the persons concerned, the protection of the rights so guaranteed by the EU legal order excludes, as a matter of principle, the repayment of taxes, charges and duties levied in breach of EU law where it is established that the person required to pay such charges has actually passed them on to other persons (see, to that effect, judgments of 14 January 1997, *Comateb and Others*, C-192/95 to C-218/95, EU:C:1997:12, paragraph 21, and of 1 March 2018, *Petrotel-Lukoil and Georgescu*, C-76/17, EU:C:2018:139, paragraph 33).

40 It is therefore for the national authorities and courts to ensure observance of the principle prohibiting unjust enrichment, including where national law is silent.

41 In circumstances such as those referred to in paragraph 39 of the present order, the burden of the charge levied though not due is borne not by the trader who is subject to it but by the purchaser to whom it has been passed on. Therefore, to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him or her twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge (see, to that effect, judgments of 14 January 1997, *Comateb and Others*, C-192/95 to C-218/95, EU:C:1997:12, paragraph 22, and of 1 March 2018, *Petrotel-Lukoil and Georgescu*, C-76/17, EU:C:2018:139, paragraph 34).

42 A Member State may, therefore, in the light of EU law, resist repayment of a charge levied though not due only where it is established by the national authorities that the charge has been borne in its entirety by someone other than the taxable person and that reimbursement of the charge would constitute unjust enrichment of the latter. It follows that, if the burden of the charge has been passed on only in part, the national authorities are required to repay only the amount not passed on (see, to that effect, inter alia, judgments of 9 November 1983, *San Giorgio*, 199/82, EU:C:1983:318, paragraph 13; of 14 January 1997, *Comateb and Others*, C-192/95 to C-218/95, EU:C:1997:12, paragraphs 27 and 28; and of 2 October 2003, *Weber's Wine World and Others*, C-147/01, EU:C:2003:533, paragraph 94).

43 As that exception to the principle of reimbursement of taxes which are incompatible with EU law is a restriction of a subjective right derived from the EU legal order, it must be interpreted restrictively, taking account in particular of the fact that passing on a charge to the consumer does not necessarily neutralise the economic effects of the tax on the taxable person (see, to that effect, judgments of 2 October 2003, *Weber's Wine World and Others*, C-147/01, EU:C:2003:533, paragraph 95, and of 1 March 2018, *Petrotel-Lukoil and Georgescu*, C-76/17, EU:C:2018:139, paragraph 35).

44 Even though indirect taxes are designed in national law to be passed on to the final consumer and in commerce are normally passed on in whole or in part, it cannot be generally assumed that the charge is actually passed on in every case. The actual passing on of such taxes, either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts. Consequently, the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court, which is free to assess the evidence adduced before it (see, to that effect, judgments of 25 February 1988, *Les Fils de Jules Bianco and Girard*, 331/85, 376/85 and 378/85, EU:C:1988:97, paragraph 17, and of 2 October 2003, *Weber's Wine World and Others*, C-147/01, EU:C:2003:533, paragraph 96).

45 However, in the case of indirect taxes, it may not be assumed that there is a presumption that they have been passed on and that it is for the taxpayer to prove the contrary. The same applies where the taxpayer has been obliged by the relevant national legislation to incorporate the charge in the cost price of the product concerned. Such a legal obligation does not mean that there is a presumption that the entire charge has been passed on, even where failure to comply with that obligation carries a penalty (judgment of 14 January 1997, *Comateb and Others*, C-192/95 to C-218/95, EU:C:1997:12, paragraphs 25 and 26).

46 EU law thus precludes any presumption or rule of evidence intended to shift to the trader concerned the burden of proving that the charges unduly paid have not been passed on to other persons and to prevent him or her from adducing evidence in order to refute any allegation that the charges have been passed on (judgment of 21 September 2000, *Michaïlidis*, C-441/98 and C-442/98, EU:C:2000:479, paragraph 42).

47 Furthermore, even where it is established that the burden of the charge levied though not due has been passed on to third parties, repayment to the trader of the amount thus passed on does not necessarily entail his or her unjust enrichment, since even where the charge is wholly incorporated in the price, the taxable person may suffer as a result of a fall in the volume of his or her sales (see, to that effect, judgments of 14 January 1997, *Comateb and Others*, C-192/95 to C-218/95, EU:C:1997:12, paragraphs 29 to 32, and of 6 September 2011, *Lady and Kid and Others*, C-398/09, EU:C:2011:540, paragraph 21).

48 In those circumstances, the answer to the second and third questions is that EU law must be interpreted as precluding national authorities from being able to justify their refusal to reimburse an indirect charge that is contrary to Directive 2008/118 by assuming that that charge has been passed on to third parties and, as a result, that the taxable person has been unjustly enriched.

Costs

49 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:

1. **Article 1(2) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC must be interpreted as meaning that a charge, the revenue from which is allocated, in a generic manner, to a public undertaking holding the concession contract for the national road network and the structure of that charge does not indicate an intention to discourage the consumption of the main road fuels, does not pursue 'specific purposes' within the meaning of that provision.**

2. **EU law must be interpreted as precluding national authorities from being able to justify their refusal to reimburse an indirect charge that is contrary to Directive 2008/118 by assuming that that charge has been passed on to third parties and, as a result, that the taxable person has been unjustly enriched.**

[Signatures]