JUDGMENT OF THE COURT (Third Chamber)

5 July 2007 *

In Joined Cases C-145/06 and C-146/06,

REFERENCES for a preliminary ruling under Article 234 EC from the Commissione tributaria di secondo grado di Trento (Italy), made by decisions of 6 March 2006 and 23 December 2005 respectively, received at the Court on 17 March 2006, in the proceedings

Fendt Italiana Srl

v

Agenzia Dogane — Ufficio Dogane di Trento,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Klučka, U. Lõhmus, A. Ó Caoimh (Rapporteur) and P. Lindh, Judges,

* Language of the case: Italian.

Advocate General: E. Sharpston,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 February 2007,

after considering the observations submitted on behalf of:

— Fendt Italiana Srl, by G. Maisto, avvocato, and A. Parolini, dottore commercialista,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Aiello, avvocato dello Stato,

— the Cypriot Government, by N. Charalambidou, acting as Agent,

— the Commission of the European Communities, by L. Pignataro and W. Moells, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 April 2007, gives the following

Judgment

1 The references for a preliminary ruling concern the interpretation 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) as amended by Council Directive 2004/75/EC of 29 April 2004 (OJ 2004 L 157, p. 100) ('Directive 2003/96').

2 Those references were submitted in the course of proceedings between Fendt Italiana Srl ('Fendt') and the Agenzia Dogane — Ufficio Dogane di Trento (Customs Office of Trento) regarding the failure of that company to pay, in respect of the year 2004, tax on the consumption of lubricating oils laid down by national law.

Legal context

Community legislation

Directive 92/12/EEC

3 Article 1 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1) provides:

'1. This Directive lays down the arrangements for products subject to excise duties and other indirect taxes which are levied directly or indirectly on the consumption of such products, except for value added tax and taxes established by the Community.

2. The particular provisions relating to the structures and rates of duty on products subject to excise duty shall be set out in specific Directives.'

4 Article 3 of that directive provides:

'1. This Directive shall apply at Community level to the following products as defined in the relevant Directives:

— mineral oils,

...

2. The products listed in paragraph 1 may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.

3. Member States shall retain the right to introduce or maintain taxes which are levied on products other than those listed in paragraph 1 provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States.

...'

Directives 92/81/EEC and 92/82/EEC

5 Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12), as amended by Council Directive 94/74/EC of 22 December 1994 (OJ 1994 L 365, p. 46) ('Directive 92/81') provides, in Article 2(1)(d) thereof, read in conjunction with Article 2(4) thereof, that 'products falling within CN code 2710', in the version of the Combined Nomenclature (the 'CN') in force on 1 October 1994 — that is to say, lubricating oils in particular — are mineral oils for the purposes of that directive.

6 Under Article 2(2) of Directive 92/81, '[m]ineral oils other than those for which a level of duty is specified in ... Directive 92/82/EEC shall be subject to excise duty if intended for use, offered for sale or used as heating fuel or motor fuel. ...'

7 Article 8(1)(a) of Directive 92/81 provides:

'1. In addition to the general provisions set out in Directive 92/12/EEC on exempt uses of excisable products, and without prejudice to other Community provisions,

Member States shall exempt the following from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

(a) mineral oils used for purposes other than as motor fuels or as heating fuels;

...'

8 Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils (OJ 1992 L 316, p. 19), as amended by Directive 94/74 ('Directive 92/82') sets a minimum rate of excise duty for certain mineral oils. Article 2 lists the mineral oils covered by Directive 92/82, and lubricating oils are not referred to.

Directive 2003/96

9 Recitals 1 to 3 and 7 of Directive 2003/96 are worded as follows:

'(1) The scope of ... Directive 92/81/EEC ... and of ... Directive 92/82/EEC ... is restricted to mineral oils.

(2) The absence of Community provisions imposing a minimum rate of taxation on electricity and energy products other than mineral oils may adversely affect the proper functioning of the internal market.

(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.

...

(7) As a party to the United Nations Framework Convention on Climate Change, the Community has ratified the Kyoto Protocol. The taxation of energy products and, where appropriate, electricity is one of the instruments available for achieving the Kyoto Protocol objectives.'

10 Furthermore, recital 22 of Directive 2003/96 states:

'Energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. To that extent, it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy products as well as mineralogical processes. Electricity used in similar ways should be treated on an equal footing.'

11 Article 1 of Directive 2003/96 provides that Member States are to impose taxation on energy products and electricity in accordance with that directive.

12 Article 2(1)(b) of Directive 2003/96, read in conjunction with Article 2(5) thereof, provides that for the purposes of that directive, the term 'energy products' is to apply to products 'falling within CN codes 2701, 2702 and 2704 to 2715', as referred to in Commission Regulation (EC) No 2031/2001 of 6 August 2001 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2001 L 279, p. 1), that is, inter alia, to the mineral oils falling under heading 2710 of the CN.

13 Article 2(4)(b) of Directive 2003/96 is worded as follows:

'4. This Directive shall not apply to:

...

(b) the following uses of energy products and electricity:

— energy products used for purposes other than as motor fuels or as heating fuels,

— dual use of energy products.

An energy product has a dual use when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel. The use of energy products for chemical reduction and in electrolytic and metallurgical processes shall be regarded as dual use,

...'

14 Article 3 of Directive 2003/96 provides:

'References in Directive 92/12/EEC to "mineral oils" and "excise duty", insofar as it applies to mineral oils, shall be interpreted as covering all energy products, electricity and national indirect taxes referred to respectively in Articles 2 and 4(2) of this Directive.'

15 Article 14(1) of Directive 2003/96 provides:

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

(a) energy products and electricity used to produce electricity and electricity used to maintain the ability to produce electricity. ...

(b) energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying.

...

(c) energy products supplied for use as fuel for the purposes of navigation within Community waters (including fishing), other than private pleasure craft, and electricity produced on board a craft.

...'

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

17 Article 28(1) and (2) of Directive 2003/96 states:

'1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive not later than 31 December 2003. They shall forthwith inform the Commission thereof.

2. They shall apply these provisions from 1 January 2004, except the provisions laid down in Articles 16 and 18(1), which may be applied by the Member States from 1 January 2003.'

18 Under Article 30 of that directive:

'Notwithstanding Article 28(2), Directives 92/81/EEC and 92/82/EEC shall be repealed as from 31 December 2003.

References to the repealed directives shall be construed as references to this Directive.'

National legislation

19 Article 21(2) of Legislative Decree No 504, entitled 'Consolidated Text of Legislative Provisions relating to duties on production and consumption and related criminal and administrative penalties' (Decreto legislativo No 504 'Testo unico delle disposizioni legislative concernenti le imposte sulla produzione e sui consumi e relative sanzioni penali e amministrative'), of 26 October 1995 (GURI No 279 of 29 +-November 1995, Ordinary Supplement) ('Legislative Decree No 504/95') makes products falling within CN heading 2710 (lubricating oils), where used as heating fuel or motor fuel, subject to an excise duty fixed at the same rate as that for the equivalent motor fuel or heating fuel.

20 Article 62(1) of Legislative Decree No 504/95 states that:

'Without prejudice to the duty set out in Article 21(2), lubricating oils (CN codes 27 10 00 87 to 27 10 00 98) are subject to a duty on consumption if intended for use, offered for sale or used other than as heating fuel or motor fuel.'

21 The rate of that duty on consumption is different from the rate of excise duty referred to in Article 21(2) of Legislative Decree No 504/95.

22 In Case C-437/01 *Commission* v *Italy* [2003] ECR I-9861, the Court ruled that the Italian Republic had failed to fulfil its obligations under Article 3(2) of Directive 92/12 and Article 8(1)(a) of Directive 92/81 by maintaining in force Article 62(1) of Legislative Decree No 504/95.

23 In paragraph 30 of *Commission* v *Italy*, the Court held that, under Article 8(1)(a) and Article 2(2) of Directive 92/81, in conjunction with Article 2 of Directive 92/82, lubricating oils may be subject to excise duty only if intended for use, offered for sale or used as motor fuel or heating fuel whereas, in other cases, they must be exempted from the harmonised excise duty. In this connection, the Court pointed out in paragraphs 31 and 32 of that judgment that to allow the Member States to levy another indirect tax on products which must be exempted from harmonised excise duty would deprive Article 8(1)(a) of Directive 92/81 of all useful effect.

24 It is common ground that, at the material time, Article 62(1) of Legislative Decree No 504/95 had not been repealed by the Italian authorities.

The main proceedings and the questions referred for a preliminary ruling

25 The Agenzia Dogane — Ufficio Dogane di Trento sent Fendt two separate notifications regarding that company's failure to pay, in respect of the year 2004, the tax on the consumption of lubricating oil provided for in Article 62(1) of Legislative Decree No 504/95.

26 The action brought by Fendt against those acts was dismissed by the Commissione tributaria provinciale di Trento (Provincial Tax Court of Trento). According to that court, energy products other than those usable as heating fuel or motor fuel do not fall within the limited scope of Directive 2003/96. The taxation arrangement for other products, including mineral oils, is thus exclusively governed by Article 62(1) of Legislative Decree No 504/95. That directive changed the arrangements in this respect by allowing the Member States to establish an autonomous framework for the taxation of lubricating oils.

27 Seised on appeal, the Commissione tributaria di secondo grado di Trento (Tax Court of Second Instance of Trento) points out in its orders for reference that, contrary to the assumption made by the competent customs authorities, Directive 2003/96 does not expressly authorise the Member States to provide for the taxation of products used for purposes other than as motor fuels or heating fuels. However, it is apparent

both from *Commission* v *Italy*, as well as from the rationale and purpose of that directive, that oils which are not used as motor fuels or heating oils are excluded from the Community tax arrangements.

28 In those circumstances, the Commissione tributaria di secondo grado di Trento has decided, in both the cases before it, to stay the proceedings and to refer the following question, which is drafted in identical terms in both cases, to the Court for a preliminary ruling:

'Are the taxation arrangements laid down in Article 62 of Legislative Decree No 504/95 compatible with Directive 2003/96 ... ?'

29 By order of the President of the Court of 10 May 2006, Cases C-145/06 and C-146/06 were joined for the purposes of the written and oral procedure and the judgment.

The questions referred

30 As the Commission has rightly pointed out, it is not for the Court, in the context of the procedure provided for in Article 234 EC, to determine whether national provisions are compatible with Community law. However, the Court may provide the national court with all the criteria for the interpretation of Community law which may enable it to assess whether those provisions are so compatible in order to give judgment in the proceedings before it (see, inter alia, Case C-346/97 *Braathens* [1999] ECR I-3419, paragraph 14).

31 In those circumstances, the question should be interpreted as meaning that the referring court is essentially asking whether Directive 2003/96 precludes national legislation, such as that at issue in the main proceedings, which provides for the levying of a tax on the consumption of lubricating oils where they are intended for use, offered for sale or used other than as motor fuels or as heating fuels.

32 Pursuant to Article 1 of Directive 2003/96, Member States are to impose taxation on energy products and electricity in accordance with that directive, which seeks to impose, as is apparent from recitals 2 and 3 thereof, minimum levels of taxation at Community level for most energy products.

33 Under Article 2(1)(b) of Directive 2003/96, read in conjunction with Article 2(5) thereof, the products under heading 2710 of the CN — that is, inter alia, lubricating oils — are energy products within the meaning of that directive.

34 However, it follows from the express wording of Article 2(4)(b), first indent, of that directive that it 'shall not apply to' energy products used for purposes other than as motor fuels or as heating fuels.

35 According to recital 22 of Directive 2003/96, energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel and it is thus in the nature and the logic of the tax system to exclude from the scope of the framework non-fuel uses of energy products.

36 In contrast to Article 8(1)(a) of Directive 92/81, which provided that Member States were to exempt mineral oils used for purposes other than as motor fuels or as heating fuels, Article 14 of Directive 2003/96, which sets out an exhaustive list of the exemptions which the Member States must apply, does not refer to energy products used other than as motor fuels or as heating fuels. By the same token, neither Article 15 nor Article 16 of Directive 2003/96, which provide for certain optional exemptions for the Member States, refers to such products.

37 If follows that, as the Advocate General observed in essence in point 37 of her Opinion, although mineral oils used other than as motor fuel or heating fuel fell within the scope of Directive 92/81 — since, as the Court held in paragraphs 30 and 33 of *Commission* v *Italy*, it was compulsory for those products to be exempted from the harmonised excise duty — it was the intention of the Community legislature, on the occasion of the adoption of Directive 2003/96, to change that arrangement by excluding such products from the scope of that directive. That fact, moreover, was acknowledged by Fendt itself at the hearing.

38 Therefore, as the Italian and Cypriot Governments and the Commission submit, since 1 January 2004 — the date from which Directive 92/81 has been repealed, in accordance with Article 30 of Directive 2003/96 — Member States have been able to tax energy products, such as lubricating oils, used other than as motor fuels or as heating fuels.

39 At the hearing, Fendt none the less claimed that only such provisions of Directive 92/81 as fall within the scope of Directive 2003/96 can be repealed by that latter directive. As a result, since Directive 2003/96 applies only to energy products used as motor fuel or heating fuel, the provisions of Directive 92/81 which, in accordance with Article 8(1)(a) thereof, concern non-fuel uses of energy products, are not repealed by Directive 2003/96 and therefore remain in force. That interpretation, it

submits, is borne out by the objective of Directive 2003/96. Since Directive 2003/96 was intended to help achieve the objectives set by the Kyoto Protocol, it cannot re-open the possibility for Member States to tax energy products used other than as motor fuels or as heating fuels since those products are not a source of pollution.

40 That line of argument must be rejected. Article 30 of Directive 2003/96 provides, in wholly unambiguous terms, that Directive 92/81 is to be repealed as from 31 December 2003. Therefore, if the operation of Article 30 is not to be radically changed, contrary to the clearly demonstrated intention of the Community legislature, neither the fact that Directive 92/81 and Directive 2003/96 differ in scope nor the objective of Directive 2003/96 can justify interpreting that article as meaning that some provisions of Directive 92/81 have remained in force.

41 Nevertheless, while the Member States are competent to tax energy products, such as lubricating oils, used other than as motor fuels or as heating fuels, they must exercise their competence in that field consistently with Community law (see, to that effect, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21, and Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraph 21 and the case-law cited).

42 Specifically, Member States must comply not only with the provisions of the EC Treaty, in particular Articles 25 EC and 90 EC, but also — as the Cypriot Government and the Commission rightly point out — with the first subparagraph of Article 3(3) of Directive 92/12.

43 Even though lubricating oils used other than as motor fuels or as heating fuels fall within the definition of 'energy products' for the purposes of Article 2(1)(b) of Directive 2003/96, they are explicitly excluded from the scope of that directive by the first indent of Article 2(4)(b) thereof and therefore are not covered by the harmonised excise duty arrangements.

44 In those circumstances it should be held that the lubricating oils in question, which are not subject to harmonised excise duty, are products other than those referred to in the first indent of Article 3(1) of Directive 92/12 (see, to that effect, *Braathens*, paragraphs 24 and 25, and *Commission* v *Italy*, paragraphs 31 and 33) so that, in accordance with the first subparagraph of Article 3(3) thereof, Member States are to retain the right to introduce or maintain taxes which are levied on those products provided that those taxes do not give rise to border-crossing formalities in trade between Member States.

45 In the light of the foregoing, the answer to the question referred is that Directive 2003/96 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides for the levying of a tax on the consumption of lubricating oils, where they are intended for use, offered for sale or used other than as motor fuels or as heating fuels.

Costs

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

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

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, as amended by Council Directive 2004/75/EC of 29 April 2004, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides for the levying of a tax on the consumption of lubricating oils, where they are intended for use, offered for sale or used other than as motor fuels or as heating fuels.

[Signatures]