Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 23 April 2020[1]

Case C-44/19

Repsol Petróleo, SA
v
Administración General del Estado

(Request for a preliminary ruling
from the Tribunal Supremo (Supreme Court, Spain))

Reference for a preliminary ruling — Directive 2003/96/EC — Taxation of energy products and electricity — Article 21(3) — Exemption for energy products used in an establishment producing energy products — Simultaneous production of energy products and other products

Introduction

1. EU law harmonises the fundamental principles of taxation of energy products and also sets the minimum level of that taxation. However, the use of energy products for the production of other energy products is not subject to that taxation. The relevant provisions have already been the subject of several rulings by the Court.[2] However, neither these provisions nor the aforementioned case-law of the Court provides an answer to the question of how energy products used in the production of other energy products are to be treated when products which are not energy products are also obtained from such production. This is the problem with which the present case is concerned.

Legal framework

EU law

2. Article 21(1) and (3) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for taxation of energy products and electricity[3] provides:

‘1. In addition to the general provisions defining the chargeable event and the provisions for payment set out in [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)], the amount of taxation on energy products shall also become due on the occurrence of one of the chargeable events mentioned in Article 2(3).

1 Original language: Polish.

2 See, in particular, judgments of 6 June 2018, *Koppers Denmark* (C-49/17, EU:C:2018:395); 27 June 2018, *Turbogás* (C-90/17, EU:C:2018:498); and 7 November 2019, *Petrotel-Lukoil* (C-68/18, EU:C:2019:933).

3 OJ 2003 L 283, p. 51.

…

3. The consumption of energy products within the curtilage of an establishment producing energy products shall not be considered as a chargeable event giving rise to taxation, if the consumption consists of energy products produced within the curtilage of the establishment. Member States may also consider the consumption of electricity and other energy products not produced within the curtilage of such an establishment and the consumption of energy products and electricity within the curtilage of an establishment producing fuels to be used for generation of electricity as not giving rise to a chargeable event. Where the consumption is for purposes not related to the production of energy products and in particular for the propulsion of vehicles, this shall be considered a chargeable event, giving rise to taxation'.

Spanish law

3. Article 47(1)(b) of Ley 38/1992, de Impuestos Especiales (Law No 38/1992 on excise duties) of 28 December 1992 [4] provides:

'Self-consumption, including:

…

(b) the use of mineral oils as fuel in the process of producing mineral oils under an excise duty suspension arrangement

shall not be subject to taxation'.

Facts, procedure and the question referred

4. Repsol Petróleo SA, a company incorporated under Spanish law ('Repsol'), engages, inter alia, in the production of energy products in the process of refining crude oil. In that process, apart from energy products, a number of other products are produced, such as sulphur, heavy oil fractions and aromatic hydrocarbons, and steam. These products are then sold and used in the chemical industry and partly reused in the production process.

5. On 2 April 2012 the Spanish tax authorities issued a recovery notice against Repsol, ordering it to pay excise duty on mineral oils for the 2007 and 2008 tax years on account of the use by Repsol of mineral oils produced by that company as heating fuel in the production process, in so far as products which were not energy products were produced in that process. In the opinion of the tax authorities, mineral oils used in the production process should be taxed in proportion to the quantity of products other than energy products produced in that process.

6. Repsol's complaint against the recovery notice was dismissed in the administrative proceedings and in the judicial proceedings at first instance. Those rulings were based, in particular, on the settled case-law of the Tribunal Supremo (Supreme Court, Spain), according to which the self-consumption of energy products is not subject to taxation only in so far as it is for the production of other energy products. That case-law is based on the provisions transposing Directive 92/81. [5]

4 Boletín Oficial del Estado No 312 of 29 December 1992, p. 44305.

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). Directive repealed and replaced by Directive 2003/96.

7. Repsol brought an appeal on a point of law against the judgment at first instance before the referring court.

8. In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 21(3) of Directive 2003/96 be interpreted as meaning that it permits the self-consumption of energy products within the curtilage of the producer to be made subject to the excise duty on mineral oils in the proportion in which non-energy products are obtained?

Or, on the contrary, does the purpose of that provision, which is to exclude from taxation the use of energy products that is deemed necessary for obtaining final energy products, preclude the taxation of that self-consumption in so far as it results in the production of other non-energy products, even when such production is residual and occurs inevitably as a result of the production process itself?'

9. The request for a preliminary ruling was received by the Court on 24 January 2019. Written observations were submitted by Repsol, the Spanish and Czech Governments and the European Commission. Repsol, the Spanish Government and the Commission were represented at the hearing on 4 March 2020.

Analysis

10. By the question referred for a preliminary ruling in the present case, the referring court seeks to establish whether Article 21(3) of Directive 2003/96 is to be interpreted as meaning that where, in the process of producing energy products, products which are not energy products are also inevitably obtained, the consumption of energy products for the purposes of that production is not to be regarded as a chargeable event at all or is not to be regarded as a chargeable event only in proportion to the quantity of energy products obtained in that process, excluding the quantity of other products obtained.

11. It must be noted at the outset that Article 21(3) of Directive 2003/96 has a complex structure.

12. The first sentence of that provision stipulates that the self-consumption of energy products, that is, the consumption of energy products within the curtilage of the establishment which produced them, is not to be considered as a chargeable event giving rise to taxation.

13. The second sentence of that provision also allows Member States not to treat as a chargeable event the consumption, in an establishment producing energy products, of energy products (including electricity) which were not produced in that establishment.

14. Lastly, the third sentence stipulates that the above rules do not apply where the consumption of energy products is for purposes other than the production of such products, such as for the propulsion of vehicles.

15. It may be concluded — *a contrario* — from the third sentence of Article 21(3) of Directive 2003/96 that only the consumption of energy products for the purposes of the production of such products is not to be considered (or may not be considered) a chargeable event. This conclusion is also confirmed by the wording of the predecessor of the provision in question, namely Article 4(3) of Directive 92/81, which provided that the consumption of mineral oils within the curtilage of an establishment producing mineral oils is not to be considered a chargeable event giving rise to excise duty 'as long as the consumption is for the purpose of such production'. That provision also

contained an equivalent of the current third sentence of Article 21(3) of Directive 2003/96.[6]

16. However, as I have already mentioned in the introduction to this Opinion, Article 21(3) of Directive 2003/96 does not determine whether and to what extent the consumption of energy products for the purposes of a production process in which energy products and other products are simultaneously obtained should be regarded as a chargeable event.

17. It appears that two different lines of reasoning may be adopted here.

18. On the one hand, as the Czech Government rightly notes in its observations, a literal interpretation of Article 21(3) of Directive 2003/96 could lead to the conclusion that, in a situation such as that at issue in the main proceedings, that provision should apply to all energy products used in Repsol's production process.

19. This is because the provision merely refers to 'the consumption of energy products within the curtilage of an establishment producing energy products', while its third sentence precludes 'consumption … for purposes not related to the production of energy products'.

20. As is evident from the information contained in the order for reference and the parties' observations, in the process of refining crude oil, the energy products used to heat the oil to the required temperature are used entirely for the production of energy products. That products which are not energy products are simultaneously obtained is only a residual and inevitable result of that process. Obtaining those products is an integral part of the process of producing energy products, and it should therefore be recognised that all the energy products used in this technological process are used to produce energy products. The literal wording of Article 21(3) of Directive 2003/96 would therefore indicate that the aforementioned energy products, since they are used in their entirety for the purposes of the production of energy products, should likewise be covered in their entirety by the provision in question.

21. Moreover, as Repsol rightly notes, confirmation of such an interpretation of Article 21(3) of Directive 2003/96 may be found in the case-law of the Court, which has ruled that 'it may be inferred from the negative wording of the third sentence of that provision that it seeks merely to preclude the consumption of energy products *with no link whatsoever to the production of energy products* from benefiting from that exception' and that 'the consumption of energy products cannot, solely on account of its form, be deprived of the benefit of that exception, *provided that it contributes to the technological process of producing energy products*'.[7] It is difficult to deny that, in a situation such as that at issue in the main proceedings, it is not the case that the energy products used in the technological process have 'no link whatsoever to the production of energy products' or that they do not 'contribute to the technological process of producing energy products' in their entirety.

22. On the other hand, such an interpretation, although permissible in the light of the literal wording of the provision in question, does not sufficiently take into account the contextual aspects of the interpretation of that provision[8] and would lead to the unjustified non-taxation of energy products used in the production of products which are not energy products.

23. Where both energy products and products which are not energy products are obtained from a production process, that production process must be regarded as the simultaneous production of both those categories of products.

6 However, Directive 92/81 did not contain an authorisation for Member States similar to that in the current second sentence of Article 21(3) of Directive 2003/96.

7 Judgment of 7 November 2019, *Petrotel-Lukoil* (C-68/18, EU:C:2019:933, paragraph 30 (my emphasis)).

8 The Court's case-law requires that the contextual aspects of the interpretation of provisions of EU law be taken into account (see, in relation to Article 21(3) of Directive 2003/96, judgment of 6 June 2018, *Koppers Denmark*, C-49/17, EU:C:2018:395, paragraph 22).

24. Moreover, it is irrelevant that the production of products which are not energy products is, in a situation such as that at issue in the main proceedings, residual and inevitable, that is to say, it is not an end in itself, but an inevitable consequence of the production process. In so far as products obtained in the production process have a market value and can be sold by their producer, they become a commodity for that producer, that is, a potential source of income. It ceases to matter, therefore, whether they are produced intentionally or only as an inevitable result of the production of other products. From the point of view of taxation, both these situations must be treated in the same way. This is necessitated by the principle of equality and the need to ensure undistorted competition. It would be otherwise only if the other products obtained from the process of producing energy products had only a negligible market value or no market value and solely constituted a cost for their producer. I do not, therefore, share Repsol's view that the 'primary purpose' of the economic activity is decisive here. Economic activity is subject to the provisions of law, including tax law, not because of its intended purpose, but because of its actual nature and effects.

25. Article 21(3) of Directive 2003/96 makes it possible not to treat as a chargeable event the consumption of energy products only in so far as that consumption is for the production of final products which are subsequently subject to taxation under that directive as energy products intended for use as motor fuel or heating fuel. [9]

26. Conversely, the use of energy products as heating fuel in the production process is subject to taxation if the final product is not an energy product or is not intended to be used as motor fuel or heating fuel.

27. The lack of taxation of energy products in the latter situation would create a gap in the system of harmonised taxation established by Directive 2003/96, since energy products which are in principle subject to such taxation would not be subject to taxation. [10]

28. The lack of taxation of those products would not be offset by taxation of the final products produced from their use, as those final products would not be subject to taxation. [11]

29. The coherence of the taxation system established by Directive 2003/96 therefore requires the taxation of energy products used in the production process in so far as products which are not energy products are obtained in that process.

30. Admittedly, as I have pointed out in point 21 of this Opinion, the Court ruled in one of the cases concerning the interpretation of Article 21(3) of Directive 2003/96 that that provision does not apply only when the energy products are used for purposes entirely unrelated to the production of energy products. [12] The situation is different when both energy products and products which are not energy products are produced simultaneously within a single technological process.

31. However, account must be taken of the context in which the aforementioned Court judgment was delivered. The *Petrotel-Lukoil* case concerned the application of Article 21(3) of Directive 2003/96 to energy products used for the production of steam, which was in turn used, inter alia, in the process of producing energy products. It was in that context that the Court ruled that only those situations in which energy products are used for purposes not related to the production of such products are excluded from the application of that provision. However, if energy products are used for the production of intermediate products, which are in turn subsequently used for the production of energy products, then the provision is fully applicable. There was no doubt, however, that the final products in the production process at issue in the *Petrotel-Lukoil* case were energy products.

9 Judgment of 6 June 2018, *Koppers Denmark* (C-49/17, EU:C:2018:395, paragraph 32).

10 Judgment of 6 June 2018, *Koppers Denmark* (C-49/17, EU:C:2018:395, paragraph 29).

11 Judgment of 6 June 2018, *Koppers Denmark* (C-49/17, EU:C:2018:395, paragraph 30).

12 Judgment of 7 November 2019, *Petrotel-Lukoil* (C-68/18, EU:C:2019:933, paragraph 30).

32. There is a different situation at issue in the present case, namely a process simultaneously producing energy products and products which are not energy products. The Court's findings in the *Petrotel-Lukoil* case cannot therefore be automatically transferred to the present case.

33. A better analogy for the present case may be the *Cristal Union* case.[13] That case concerned the question of whether the exemption from taxation of energy products used for the purpose of producing electricity under Article 14(1)(a) of Directive 2003/96 also applied to energy products used in the simultaneous production of electricity and heat in the process known as cogeneration.

34. Although the Court did not interpret Article 21(3) of Directive 2003/96 in that case, it nevertheless provides a useful analogy for the present case, since it concerned the exemption from taxation of energy products used in the simultaneous production of energy giving rise to a right to such an exemption (that is to say, electricity) and energy not giving rise to such a right (heat). This analogy is all the more justified because the cogeneration mechanism is based on the idea of using, in a beneficial and economically viable way, energy generated in the process of producing another type of energy which, in classical production technology, was left unused and was lost. The same is true in the present case, which concerns products which are not energy products, which are produced as a residual and inevitable consequence of the production of energy products, and which have an economic use and therefore a market value.

35. In the *Cristal Union* case, the Court had no doubt that the compulsory exemption from taxation of energy products used for electricity generation applied to cogeneration.[14] The Court also had no doubt, however, that the exemption applied only to that portion of the energy products used in the cogeneration process which served to produce electricity, in proportion to the quantity of that electricity relative to the quantity of heat simultaneously obtained. The Court reached this conclusion despite the fact that in the technological process of cogeneration, all the energy products used in that process serve to produce both electricity and heat. It is impossible to distinguish here the specific quantities of those products that serve to produce one particular type of energy.[15]

36. The Court therefore adopted the principle that, in the case of the simultaneous production of products giving rise to a right to an exemption for the energy products used in that production and of products not giving rise to such a right, the exemption must be applied in proportion to the quantities of each category of final products obtained in that production process.

37. In my view, a similar principle should be adopted in the present case. As regards the simultaneous production of energy products and products which are not energy products, the consumption of energy products for the purposes of that production is not to be considered, pursuant to Article 21(3) of Directive 2003/96, to be a chargeable event, but only in respect of the proportion which corresponds to the proportion of energy products produced in that process.

38. It should be noted that a producer of energy products in a situation such as that of Repsol is in no way disadvantaged by the energy products it uses being taxed in a proportion corresponding to the proportion of non-energy products produced at the same time. In so far as energy products are used in the production of energy products, they benefit fully from the provisions of Article 21(3) of Directive 2003/96. As regards the production of products which are not energy products, the tax on the energy products used in the production of those products, as an indirect tax, may be fully offset in the price of those non-energy products which are sold on the market, as is the case with all other products for the production of which energy products are used.

13 Judgment of 7 March 2018, *Cristal Union* (C-31/17, EU:C:2018:168).

14 Judgment of 7 March 2018, *Cristal Union* (C-31/17, EU:C:2018:168, operative part).

15 See, in particular, judgment of 7 March 2018, *Cristal Union*, (C-31/17, EU:C:2018:168, paragraph 45), where the Court considers the possible practical difficulties in identifying the proportion of energy products used for each type of energy produced.

39. Such a solution is even necessary in order to maintain undistorted competition, as it could transpire that non-energy products produced simultaneously with energy products in a single technological process are in competition with similar products which are not produced in such a combined production process but for the production of which energy products are nevertheless used. Such energy products will be taxed under the general rules, and therefore energy products used in a combined production process should be treated in the same way. This concerns not only products actually produced in the technological process used by Repsol, but all products which currently or in the future are or may be produced simultaneously with any kind of energy products.

40. It is irrelevant that the production of products which are not energy products is a residual and inevitable result of the production of energy products, or that their production, such as the production of sulphur in the desulphurisation process, is enforced by legal regulations aimed at protecting the environment. Every entrepreneur, when undertaking economic activity in a particular sector, has to take into account the costs and limitations of that activity. The fact that, in the process of producing certain energy products, certain non-energy products are also inevitably obtained is a commonly known aspect of this type of activity, and the possibility of selling those non-energy products on the market is part of the economic calculation of that activity. Similarly, that calculation must include the taxation of energy products used for the purposes of production in a proportion corresponding to the proportion of non-energy products obtained.

41. Nor do I share Repsol's view that the change in the wording of Article 21(3) of Directive 2003/96 compared to the wording of Article 4(3) of Directive 92/81 requires a change in its interpretation.

42. The first subparagraph of Article 4(3) of Directive 92/81 provided that the consumption of mineral oils within the curtilage of an establishment producing such oils should not be considered a chargeable event giving rise to taxation 'as long as the consumption is for the purpose of such production'. The second subparagraph of that paragraph went on to specify that consumption for purposes not related to that production should be considered a chargeable event giving rise to taxation. The provision in question distinguished two cases of the consumption of mineral oils: for purposes related to the production of such oils and for purposes not related to that production. These categories were at once separable and exhaustive: neither situations belonging to both categories nor situations not belonging to either category were envisaged.

43. The wording of Article 21(3) of Directive 2003/96 does not alter this. It is true that the first sentence of that paragraph, which corresponds to the first subparagraph of Article 4(3) of Directive 92/81, omits the reservation that the consumption is to be for purposes related to the production of energy products. However, that reservation remains in the paragraph's third sentence, which is the equivalent of the second subparagraph of Article 4(3) of Directive 92/81 and is identical in substance. The Union legislature clearly — rightly, in my view — considered it unnecessary to repeat the same reservation in both sentences. Since the third sentence excludes cases of consumption of energy products for purposes not related to production, this inevitably means that the first sentence refers only to cases of consumption related to that production. The legislative content of the first and third sentences of Article 21(3) of Directive 2003/96 is therefore the same as that of Article 4(3) of Directive 92/81.[16] Nor does anything change here on account of the addition of the second sentence to Article 21(3) of Directive 2003/96, which merely extends the list of cases of consumption of energy products which are not to be considered a chargeable event. This does not change the fact that this consumption must be for the purposes of producing such products.

16 Except, of course, as regards extending the range of products covered by Directive 2003/96.

44. Hence, there is no change of logic here, as referred to by Repsol in its observations. According to those observations, under Article 4(3) of Directive 92/81, taxing the self-consumption of mineral oils was to be the rule, and not taxing them was to be the exception. By contrast, under Article 21(3) of Directive 2003/96, not taxing the self-consumption of energy products is to be the rule, and taxing them — where such consumption is not related to the production of energy products — is to be the exception.

45. It is difficult to agree with this position. The same logic underpins both Directive 92/81 and Directive 2003/96, namely that the principle is to tax, respectively, mineral oils or energy products, and that not taxing the self-consumption of those products constitutes an exception, the application of which depends on a condition being satisfied: that that consumption is for purposes related to the production of such products.

46. The above considerations, and in particular the coherence of the system of taxation of energy products established by Directive 2003/96 and the need to protect undistorted competition on the market for goods in the production of which energy products are used, require, in my view, an interpretation of Article 21(3) of that directive that goes beyond the conclusions which might be drawn from the literal wording of that provision alone. It should be noted, moreover, that that wording does not provide an unequivocal answer to the question of how properly to tax energy products used for the simultaneous production of energy products and products which are not energy products. Thus, there is no question of a *contra legem* interpretation here. The point is merely to supplement the conclusions resulting from a literal interpretation with elements of a contextual interpretation.

47. Consequently, Article 21(3) of Directive 2003/96 must be interpreted as meaning that where, in the process of producing energy products, products which are not energy products are also inevitably obtained, the consumption of energy products for the purposes of that production is not to be regarded as a chargeable event in respect of the proportion of those products which corresponds to the proportion of energy products produced.

48. It should also be noted that Article 21(3) of the directive applies only to energy products used for the production of energy products intended for use as motor fuels or heating fuels. Excluded from its application, therefore, are energy products used not only for the production of products which are not energy products within the meaning of Article 2(1) of that directive, but also for the production of products which admittedly correspond to the definition contained therein but to which Directive 2003/96 does not apply, in accordance with the first indent of Article 2(4)(b) thereof, on the ground that they are not intended for use as motor fuels or heating fuels. This clearly follows from the case-law of the Court.[17] Therefore, energy products should be understood to mean only those products covered by the taxation system established by Directive 2003/96.

49. In the absence of any provisions in Directive 2003/96 regarding the method of determining the proportion of energy products subject to the provisions of Article 21(3) of Directive 2003/96, this remains a matter for the national law of the Member States.[18] However, this issue was discussed at the hearing and the following observations should therefore be made.

50. Firstly, in so far as non-energy products obtained in the process of producing energy products are subsequently reused in that production process (as steam, for instance), they constitute an intermediate product, the production of which provides a basis for the application of Article 21(3) of Directive 2003/96.[19]

17 Judgment of 6 June 2018, *Koppers Denmark* (C-49/17, EU:C:2018:395, operative part).

18 See, to that effect, judgment of 7 March 2018, *Cristal Union* (C-31/17, EU:C:2018:168, paragraph 45).

19 See judgment of 7 November 2019, *Petrotel-Lukoil* (C-68/18, EU:C:2019:933, paragraph 28 and point 1 of the operative part).

51. Secondly, I share the Commission's view that the most appropriate way of calculating the proportion of energy products benefiting from Article 21(3) of Directive 2003/96 is by reference to the quantity of final products produced in each category and not, for instance, by reference to their market value.

52. In my view, however, this is not because, as the Commission argues, the tax on energy products is calculated on the quantity of those products, since that tax applies to energy products used as heating fuels in the production process and not to the final products of that process.

53. A method based on the quantitative proportions of individual categories of final products, on the other hand, allows the share of energy products in the production process of each category of final products to be reflected to the fullest extent. This is because the quantity of energy products needed is related to the quantity of individual final products rather than to their value.

54. Therefore, while it is not possible, as Repsol rightly notes, to calculate precisely the quantity of energy products consumed for each category of final products because, in the process of refining crude oil, individual final products are obtained at different temperatures, in my view the quantitative method allows for a reasonable approximation of the proportions of energy products necessary to obtain the individual categories of final products.

55. This method does not preclude the application in national law of a specific *de minimis* threshold, below which the quantity of products obtained in the production process which are not energy products becomes so insignificant that it may be disregarded, and all the energy products used in that process may be covered by Article 21(3) of Directive 2003/96. However, a *de minimis* threshold does not solve the problem of how to calculate the proportion of energy products subject to that provision when the quantity of products obtained which are not energy products exceeds that threshold.

Conclusion

56. In the light of all the foregoing, I propose that the Court's answer to the question referred to it for a preliminary ruling by the Tribunal Supremo (Supreme Court, Spain) should be as follows:

Article 21(3) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity must be interpreted as meaning that where, in the process of producing energy products, products which are not energy products are also inevitably obtained, the consumption of energy products for the purposes of that production is not to be regarded as a chargeable event in respect of the proportion of those products which corresponds to the proportion of energy products produced.