Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

5 March 2015 *

(Reference for a preliminary ruling — Indirect taxation — Excise duties — Directive 2008/118/EC — Article 1(2) — Liquid fuel subject to excise duty — Sales tax — Concept of 'specific purpose' — Predetermined allocation — Organisation of public transport within the territory of a city)

In Case C-553/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tallinna ringkonnakohus (Estonia), made by decision of 15 October 2013, received at the Court on 16 October 2013, in the proceedings

Tallinna Ettevõtlusamet

v

Statoil Fuel & Retail Eesti AS,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh, C. Toader, E. Jarašiūnas (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Tallinna Ettevõtlusamet, by T. Pikamäe, advokaat,

— Statoil Fuel & Retail Eesti AS, by C. Ginter and V. Puolakainen, advokaadid,

— the Greek Government, by I. Bakopoulos, acting as Agent,

— the European Commission, by L. Grønfeldt and L. Naaber-Kivisoo, acting as Agents,

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

gives the following

* Language of the case: Estonian.

Judgment

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).

2 The request was submitted in the context of a dispute between Tallinna Ettevõtlusamet (Tallinn Enterprise Office — 'the Ettevõtlusamet') and Statoil Fuel & Retail Eesti AS ('Statoil') concerning the reimbursement of a sales tax paid by that company in 2010 and 2011.

Legal context

EU 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 [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. 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 ('VAT') 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.

...'

4 The first subparagraph of Article 47(1) of Directive 2008/118 provides that '[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)] is repealed with effect from 1 April 2010'.

5 Article 3(2) of Directive 92/12 provided:

'The products [subject to excise] 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.'

Estonian law

6 In the version applicable for the purpose of the main proceedings, the Kohalike maksude seadus (Law on local taxes) of 21 September 1994 permitted local authorities in particular to institute a tax subject to the conditions enumerated in Paragraph 8 thereof. That paragraph, entitled 'Sales tax', provided:

'(1) Sales tax shall be paid by sole traders and legal persons having a trading or service licence within the territory of a municipality or city. A trader within the meaning of the Kaubandustegevuse seadus (Law on commercial activity) shall pay sales tax according to his place of activity if he is registered in the register of economic activity and operates in the field of retailing, catering or provision of services.

(2) Sales tax shall be charged on the value, in the sale price, of the goods and services sold in the territory of the municipality or city by the taxpayer. The sale price of the goods and services within the meaning of the present law is the taxable value, without sales tax, of the taxable turnover laid down in the Käibemaksuseadus (Law on VAT).

(3) The amount of the sales tax shall be established by the municipal or city council, but not more than 1% of the value, in the sale price, of the goods and services laid down in subparagraph 2 of this paragraph.

...

(6) The executive of the municipality or city shall be entitled to grant abatements and exemptions from the sales tax on the conditions and in the cases determined by the council.'

7 Paragraph 8 was repealed with effect from 1 January 2012, since which date no sales tax has been provided for in legislation.

8 On 17 December 2009, the Tallinna Linnavolikogu (Tallinn City Council) adopted Regulation No 45 on the Tallinn city sales tax (müügimaks Tallinnas). This regulation was amended by Regulation No 22 of the Tallinna Linnavolikogu of 8 April 2010 ('Regulation No 45').

9 Paragraph 1 of Regulation No 45, entitled 'Name and subject of the tax', provided:

'(1) The sales tax of the city of Tallinn is established by the present decision.

(2) Sales tax shall be charged on the goods sold and services supplied in the field of retailing, catering and provision of services to a natural person (excluding to a sole trader for the needs of his business) at or through a place of business in the territory of the city of Tallinn by a taxpayer satisfying the conditions of Paragraph 2 of the regulation.'

10 Paragraph 2 of that regulation, entitled 'Taxpayer', provided:

'A taxpayer is a trader within the meaning of the Law [of 11 February 2004] on commercial activity … who satisfies all the following conditions:

(1) the trader is registered in the register of economic activity;

(2) the trader's place of business is in the territory of the city of Tallinn, according to the data in the register of economic activity;

(3) the trader operates in the field of retailing, catering or provision of services.'

11 Paragraph 4 of Regulation No 45 set the rate of sales tax at 1% of the taxable value of the goods and services referred to in Paragraph 1(2) of that regulation.

12 Paragraph 5 of the Regulation, entitled 'Tax exemptions', provided:

'Goods and services of the following nature shall not be subject to sales tax:

(1) goods and services sold by means of e-commerce;

(2) electricity and thermal energy sold through the distribution network, natural gas and water;

(3) goods and services sold during a journey by boat, aircraft, train or bus, where the journey begins or ends outside the territory of the city of Tallinn or where the boat, aircraft, train or bus remains outside the territory of the city of Tallinn throughout the journey;

(4) any medicine, contraceptive, health and hygiene product, medical device and medical accessory figuring in the list established by Regulation No 63 of the Minister for Social Affairs of 4 December 2006 ...;

(5) bread without the addition of honey, eggs, cheese or fruit ...;

(6) milk, cream, buttermilk, curdled milk and cream, yoghurts, kephir and other fermented or acidified milk or cream ..., except in powder form, in granules or in other solid forms ...;

(7) puréed (homogenised) preparations intended for use as food for young children ..., special milk for babies ..., preparations for feeding young children packaged for retail sale in powder or liquid form ... and food for young children containing milk and milk products ...;

(8) babies' nappies ...;

(9) boats, yachts and speedboats with a length of between 4 and 12 metres which are subject to technical inspection.'

13 In addition, the municipality of Tallinn announced by letter that sales of cigarettes were likewise exempt from sales tax.

14 Paragraph 13 of Regulation No 45 provided that the latter was applicable with effect from 1 June 2010.

15 On 22 June 2010, the Tallinna Linnavolikogu adopted Regulation No 39 amending the budget of the City of Tallinn for 2010 and enacting the first additional budget (Tallinna linna 2010. aasta eelarve muutmine ja esimene lisaeelarve). This regulation, which entered into force on 25 June 2010, amended Regulation No 45 by inserting the following Paragraph 9^1:

'Sales tax shall be collected for the organisation of public transport, as specified in paragraph 6(1) of the Law on the organisation of local authorities [(kohaliku omavalitsuse korralduse seadus) of 2 June 1993 ('Law on local authorities')], in the territory of the city of Tallinn. The revenue from the sales tax shall be allocated, as a special purpose, to achieve that objective.'

16 On 9 September 2010, the Tallinna Linnavolikogu adopted Regulation No 46 on the budget of the City of Tallinn for 2011 (Tallinna Linna 2011. aasta eelarve). Paragraph 10 of that regulation took over the wording of Paragraph 9^1.

17 On 15 December 2011, the Tallinna Linnavolikogu adopted Regulation No 43 amending Regulation No 45, stating that the last period in which the tax would apply was to be the fourth quarter of 2011. Since 31 December 2011, there has no longer been a tax on sales in the city of Tallinn, in accordance with the amendment to the Law on local taxes of 21 September 1994.

18 Paragraph 6(1) of the Law on local authorities provides:

'Local authorities shall have the task of organising, within the territory of the municipality or of the city ... public transport within the municipality or city ... unless the performance of these tasks has been entrusted to somebody else.'

19 Paragraph 3(2)(2) of the Law on public transport (ühistranspordi seadus) of 26 January 2000 provides:

'(2) The aim of the planning and organisation of public transport shall be to:

...

2) promote the use of public transport in preference to cars and other individual vehicles, thus reducing the adverse impact of transport on the environment and the damage to health which they cause, while helping to prevent road accidents and traffic congestion.'

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

20 As indicated by the decision to refer, Statoil's operations include the retail sale of liquid fuel, a product subject to excise duty. On 20 July 2010, 20 October 2010 and 25 January 2011, it declared the turnover which it had achieved through the sale of goods and services subject to sales tax in the month of June 2010 and in the third and fourth quarters of the same year.

21 On 22 September 2010, 26 October 2010 and 7 February 2011 respectively, Statoil submitted corrected declarations, deducting from its previously declared turnover its turnover from the sale of products subject to excise duty. On 22 September 2010, 28 October 2010 and 9 February 2011 respectively, Statoil submitted to the Ettevõtlusamet applications for reimbursement.

22 By decisions of 19 October 2010, 9 November 2010 and 4 March 2011, the Ettevõtlusamet rejected those applications. In addition, by the latter decision, the Ettevõtlusamet ruled that, for the fourth quarter of 2010, an additional sum had to be paid by Statoil.

23 On 19 November 2010, Statoil lodged with the Tallinna halduskohus (Tallinn Administrative Court) an application seeking, in substance, the annulment of the decisions of the Ettevõtlusamet of 19 October and 9 November 2010 and asking the court to order a review of the applications for reimbursement of 22 September and 28 October 2010 or the immediate reimbursement of the overpayment indicated in those applications for reimbursement. In its application, Statoil submitted in particular that Paragraph 1(2) of Regulation No 45 infringed EU law, because it required payment of a tax on retail sales of goods and services without providing for any exception for sales of excise goods. On 5 April 2011, Statoil lodged a similar application with the same court relating to the decision of the Ettevõtlusamet of 4 March 2011. The Tallinna halduskohus joined those applications.

24 By decision of 19 October 2011, the Tallinna halduskohus annulled the three aforementioned decisions of the Ettevõtlusamet and ordered it to review the applications for reimbursement at issue. In support of its decision, the Tallinna halduskohus held, in substance, that the sales tax cannot be regarded as having a specific purpose within the meaning of Article 1(2) of Directive 2008/118.

25 The Ettevõtlusamet lodged an appeal against this decision with the Tallinna ringkonnakohus (Tallinn court of appeal), claiming in particular that the sales tax is collected for a specific purpose, namely to promote public transport and thus reduce the density of road traffic and its adverse impact on the environment; that the city of Tallinn is using the revenue from this tax to improve the quality of public transport, and that the tax is intended both to penalise the consumption of certain goods and services which can cause social costs or produce negative external effects and to fund services in the public interest.

26 Statoil contends that the appeal should be dismissed, arguing in particular that the purpose stated in the applicable rules is the organisation of public transport, not its promotion, as the Ettevõtlusamet claims.

27 The Tallinna ringkonnakohus considers that, in order to prove that the tax on excise goods was used in accordance with the specific purpose indicated, the Ettevõtlusamet did not have to adduce any evidence other than what appears from the city budget. It indicates that, in the case at issue, there is no reason to suppose that the revenue derived from the sales tax was not used for this specific purpose.

28 The Tallinna ringkonnakohus considers that taxes with a specific purpose are usually used to penalise the consumption of certain goods or services which can cause social costs or produce negative external effects (for instance, effects which are harmful to the environment), or to fund services in the public interest (such as the promotion of tourism, sport or culture). That kind of tax is therefore a means which the authorities use to influence the behaviour of consumers, by encouraging them to avoid the use of certain goods by applying such taxes to expenditure of which they do not approve.

29 However, according to the Tallinna ringkonnakohus, on the date of its decision to refer, the case-law of the Court of Justice did not give a clear answer to the question whether for the purposes of Article 1(2) of Directive 2008/118 an indirect tax has a specific purpose if the tax is collected to fund a specific public service which the local authority is required by law to provide and where such a public service is funded even if the tax with the specific purpose is not collected. In this context, the referring court observes that all the resources obtained from sales tax were allocated to the organisation of public transport, which might be accompanied by a reduction of pollution and increase public well-being.

30 The referring court wonders whether the charging of this tax was lawful in the period during which no specific purpose for the use of the revenue from the tax was expressly stated in a legal act, and it observes in this context that it was only during the period of taxation which is the subject of the proceedings at issue, that is, with effect from 25 June 2010, that Paragraph 9^1 was incorporated into Regulation No 45.

31 In those circumstances the Tallinna ringkonnakohus decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. May the funding of the organisation of public transport within the territory of a local authority be regarded as a specific purpose within the meaning of Article 1(2) of Directive [2008/118] if the performance and funding of such a task is an obligation of the local authority?

2. If the answer to the preceding question is in the affirmative, must Article 1(2) of Directive [2008/118] be interpreted as meaning that making provision in national law for an indirect tax which is charged on the sale of excise goods to the final consumer and is used solely for the organisation of public transport is consistent with that provision, if the organisation of public transport is an obligation of the local authority receiving the tax which must be fulfilled regardless of the existence of such an indirect tax, and the level of funding of the organisation of public transport ultimately does not depend automatically on the amount of tax collected, because the amount of the sum allocated to the organisation of public transport is calculated precisely in

such a way that if the indirect tax being collected produces more income, the allocation of other funds by the public authorities to the organisation of public transport is reduced to that extent and, conversely, if the sales tax produces less income, the local authority has to increase other funds to that extent for the organisation of public transport, it being possible, however, in the event of the revenue differing from that forecast to change the amount of expenditure on the organisation of public transport by amending the local authority's budget?

3. If the answer to the preceding question is in the affirmative, must Article 1(2) of Directive [2008/118] then be interpreted as meaning that the additional taxation of excise goods by an indirect tax, the particular objective of using which is determined after the time of coming into being of the obligation to pay such an indirect tax, is consistent with that provision?'

Consideration of the questions referred

The first and second questions

32 By its first and second questions, which should be considered together, the referring court asks, in essence, whether Article 1(2) of Directive 2008/118 must be interpreted as permitting a tax such as that at issue in the main proceedings, in so far as it is levied on retail sales of liquid fuel subject to excise duty, to be regarded as having a specific purpose within the meaning of that provision where that tax is intended to finance the organisation of public transport within the territory of the local authority imposing the tax, where this authority is required to undertake and finance such transport irrespective of the existence of the tax, and where the revenue from the tax has been used solely for the purpose of performing that activity.

33 At the outset, it may be observed that it is apparent from the decision to refer that the main proceedings, which concern the sales tax only to the extent that it was levied on retail sales of liquid fuel, are based on the uncontested premiss that this product falls within the category of 'excise goods' within the meaning of Article 1(1) of Directive 2008/118. It is for the referring court to determine that matter, if necessary. In any event, since it is for the Court of Justice to give a ruling in the light of the factual and legal considerations set out in the order for reference (see judgments in *B.*, C-306/09, EU:C:2010:626, paragraph 47, and *Kastrati*, C-620/10, EU:C:2012:265, paragraph 38), the Court will accept the same premiss in the case at issue for the purposes of its analysis.

34 While Directive 2008/118, which alone is applicable *ratione temporis* to the dispute in the main proceedings, repealed and replaced Directive 92/12 with effect from 1 April 2010, it is clear from the wording of Article 1(2) of Directive 2008/118 and Article 3(2) of Directive 92/12 that the content of these provisions is not essentially different. It follows that the case-law of the Court pertaining to the latter provision remains applicable in relation to Article 1(2) of Directive 2008/118.

35 If paragraphs 1 and 2 of Article 1 of the latter directive are read in conjunction, it is clear that goods which are subject to excise duty by virtue of that directive may be subjected to indirect taxes other than the excise duty instituted by that directive if, first, such a tax is levied for one or more specific purposes and, secondly, it complies with the EU tax rules applicable to excise duty and VAT as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, not including the provisions on exemptions.

36 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 the same directive (see, by analogy, judgment in *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, paragraph 22 and the case-law cited).

37 As regards the first of those conditions — the only one to which the questions referred relate — it is apparent from the case-law of the Court that a specific purpose within the meaning of Article 1(2) of Directive 2008/118 is a purpose other than a purely budgetary purpose (see, by analogy, judgments in *Commission* v *France*, C-434/97, EU:C:2000:98, paragraph 19, and *Transportes Jordi Besora*, EU:C:2014:108, paragraph 23 and the case-law cited).

38 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 (see, by analogy, judgment in *Transportes Jordi Besora*, EU:C:2014:108, paragraph 27 and the case-law cited).

39 Thus, while the predetermined allocation of the proceeds of a tax to the financing by local authorities 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 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 (see, by analogy, judgment in *Transportes Jordi Besora*, EU:C:2014:108, paragraphs 28 and 29 and the case-law cited).

40 It follows that the existence of a specific purpose within the meaning of that provision cannot be established purely by the allocation of revenue from the tax at issue to the financing of general expenditure that is incumbent upon the public authority in a given field. Otherwise, the supposed specific purpose could not be distinguished from a purely budgetary purpose.

41 In order for the predetermined allocation of the revenue from a tax on excise goods to be regarded as indicating that the tax pursues a specific purpose within the meaning of the same provision, the tax in question must itself be directed at achieving the specific purpose referred to, so that there is a direct link between the use of the revenue and the specific purpose (see, to that effect, judgment in *Transportes Jordi Besora*, EU:C:2014:108, paragraph 30).

42 In the absence of such a mechanism for the predetermined allocation of revenue, a tax 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 (see, to that effect, judgment in *Transportes Jordi Besora*, EU:C:2014:108, paragraph 32).

43 In the case at issue, it is apparent from the decision to refer that the revenue from the sales tax, which is moreover levied on most goods and services sold to final consumers within the territory of the city of Tallinn, was allocated by the city of Tallinn for financing exercise of its power to organise public transport within its territory, a power assigned to it by Paragraph 6(1) of the Law on local authorities, and was used solely for that purpose.

44 While this circumstance might indeed constitute a factor to be taken into account for the purpose of establishing the existence of a specific purpose within the meaning of Article 1(2) of Directive 2008/118, in accordance with the case-law of the Court referred to in paragraph 39 above, that allocation, none the less, relates to general expenditure which is incumbent on the city of Tallinn irrespective of the existence of the tax at issue in the main proceedings. Such general expenditure may

be financed by the proceeds of all kinds of taxes. Accordingly, the stated specific purpose, namely financing the organisation of public transport within the territory of the city of Tallinn, cannot be distinguished from a purely budgetary purpose.

45 Even if it were accepted as established, first, as contended by the Ettevõtlusamet and the Greek Government that, in substance, the sales tax, in so far as it is levied on liquid fuel subject to excise duty, has the purpose, by organising public transport efficiently, of protecting the environment and public health, and, secondly, that expenditure for this purpose is not merely general expenditure which might be financed by means of revenue from taxes of any kind (see, to that effect, with regard to health expenditure in general, judgment in *Transportes Jordi Besora*, EU:C:2014:108, paragraph 31), it should be noted that the national legislation at issue in the main proceedings does not provide for any method of predetermined allocation of the revenue from that tax, in so far as it is levied on liquid fuel subject to excise duty, for such environmental or public health purposes. The mere allocation of the revenue at issue in the main proceedings for the organisation of public transport cannot be regarded as enabling a direct link, within the meaning of the case-law referred to in paragraph 41 of this judgment, to be established between the use of the revenue from the tax concerned and those environmental and public health purposes.

46 Furthermore, it is not apparent from the documents before the Court, nor has it been contended in the written submissions received by the Court, that the sales tax, in so far as it is levied on liquid fuel subject to excise duty, meets the conditions referred to in paragraph 42 above, namely that it was designed, so far as its structure is concerned, in such a way as to deter taxpayers from using this fuel or to encourage them to adopt a behaviour whose impact would be less damaging to the environment or public health than that which they would adopt in the absence of the tax.

47 It follows from all of the above considerations that the answer to the first and second questions is that Article 1(2) of Directive 2008/118 must be interpreted as not permitting a tax such as that at issue in the main proceedings, in so far as it is levied on retail sales of liquid fuel subject to excise duty, to be regarded as having a specific purpose within the meaning of that provision where that tax is intended to finance the organisation of public transport within the territory of the authority imposing the tax and where that authority is required to undertake and finance such transport irrespective of the existence of that tax, even if the revenue from that tax has been used solely for the purpose of performing that activity. The provision in question must therefore be interpreted as precluding national rules such as those at issue in the main proceedings instituting such a tax on retail sales of liquid fuel subject to excise duty.

The third question

48 In view of the answer given to the first and second questions, there is no need to answer the third.

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 (Third Chamber) hereby rules:

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 not permitting a tax such as that at issue in the main proceedings, in so far as it is levied on retail sales of liquid fuel subject to excise duty, to be regarded as having a specific purpose within the

meaning of that provision where that tax is intended to finance the organisation of public transport within the territory of the authority imposing the tax and where that authority is required to undertake and finance such transport irrespective of the existence of that tax, even if the revenue from that tax has been used solely for the purpose of performing that activity. The provision in question must therefore be interpreted as precluding national rules such as those at issue in the main proceedings instituting such a tax on retail sales of liquid fuel subject to excise duty.

[Signatures]