JUDGMENT OF THE COURT (Third Chamber)

17 July 2008 *

In Case C-226/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht Düsseldorf (Germany), made by decision of 27 April 2007, received at the Court on 7 May 2007, in the proceedings

Flughafen Köln/Bonn GmbH

v

Hauptzollamt Köln,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, J. Klučka, A. Ó Caoimh (Rapporteur) and A. Arabadjiev, Judges,

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 10 April 2008,

after considering the observations submitted on behalf of:

— Flughafen Köln/Bonn GmbH, by D. Schiebold and A. Richter, Rechtsanwälte,

— the Hauptzollamt Köln, by O. Meyer, Oberregierungsrat, and K. Deutschmann, acting as Agent,

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

— the Commission of the European Communities, by W. Mölls, acting as Agent,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 14(1)(a) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

2 The reference was made in proceedings between Flughafen Köln/Bonn GmbH and the Hauptzollamt Köln (Principal Customs Office, Cologne) concerning the latter's refusal to refund the tax paid by Flughafen Köln/Bonn GmbH for 2004 on gas oil used to produce electricity.

Legal framework

Community legislation

3 Recitals 1 to 6 in the preamble to Directive 2003/96 read as follows:

'(1) The scope of 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)] and of 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] 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.

(4) Appreciable differences in the national levels of energy taxation applied by Member States could prove detrimental to the proper functioning of the internal market.

(5) The establishment of appropriate Community minimum levels of taxation may enable existing differences in the national levels of taxation to be reduced.

(6) In accordance with Article 6 of the [EC] Treaty, environmental protection requirements must be integrated into the definition and implementation of other Community policies.'

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

5 Article 2(1)(b) of Directive 2003/96, read in conjunction with Article 2(5) thereof, provides that, for the purposes of the 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, gas oil, which falls within heading 2710 of the Combined Nomenclature ('the CN').

6 According to Article 4(1) of Directive 2003/96, '[t]he levels of taxation which Member States shall apply to the energy products and electricity listed in Article 2 may not be less than the minimum levels of taxation prescribed by this Directive'.

7 Articles 7 to 10 of Directive 2003/96 provide that, as from 1 January 2004, the minimum levels of taxation applicable to motor fuels, to heating fuels and to electricity are to be fixed as set out in Annex I to that directive.

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

'In addition to the general provisions 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), as amended by Council Directive 2000/47/EC of 20 July 2000 (OJ 2000 L 193, p. 73)] 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. However, Member States may, for reasons of environmental policy, subject these products to taxation without having to respect the minimum levels of taxation laid down in this Directive. In such case, the taxation of these products shall not be taken into account for the purpose of satisfying the minimum level of taxation on electricity laid down in Article 10'.

9 The third subparagraph of Article 21(5) of Directive 2003/96 provides as follows:

'An entity producing electricity for its own use is regarded as a distributor. Notwithstanding Article 14(1)(a), Member States may exempt small producers of electricity provided that they tax the energy products used for the production of that electricity.'

10 Article 28(1), (2) and (3) 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.

3. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.'

11 According to Article 30 of the directive:

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

National legislation

12 The Mineralölsteuergesetz (Law on taxation of mineral oils) of 21 December 1992 (BGBl. 1992 I, p. 2185; 'the Law on taxation of mineral oils'), in the version in force

at the time of the facts in the main proceedings, contained, inter alia, the following provisions:

'*Paragraph 1 — Definitions*

(1) Mineral oils shall be subject, within the tax jurisdiction, to mineral oil tax …

(2) For the purposes of this Law, "mineral oils" means:

…

4. Goods falling within heading 2710 of the [CN]

Paragraph 2 — Standard rates of tax, definitions

(1) The tax to be charged

…

4. for 1 000 litres of gas oil coming within subheading 2710 00 69 of the [CN]

(a) with a sulphur content of more than 10 mg/kg, shall be EUR 485.70,

(b) with a maximum sulphur content of 10 mg/kg, shall be EUR 470.40 …'

13 The Stromsteuergesetz (Law on taxation of electricity) of 24 March 1999 (BGBl. 1999 I, p. 378), in the version in force at the time of the facts in the main proceedings, provided, in Paragraph 9(1)(3), that electricity produced in installations with a maximum nominal electrical power rating of two megawatts was, subject to compliance with certain conditions, exempt from that tax.

14 The Energiesteuergesetz (Law on taxation of energy) of 15 July 2006 (BGBl. 2006 I, p. 1534; 'the Law on taxation of energy'), which entered into force on 1 August 2006, repealed as from that date, with express reference to Directive 2003/96, the Law on taxation of mineral oils. It contains, inter alia, the following provisions:

'*Paragraph 1 — Tax jurisdiction, energy products*

(1) Energy products shall be subject, within the tax jurisdiction, to energy tax …

(2) Energy products for the purposes of this Law are:

…

2. goods falling within headings … 2704 to 2715 of the [CN]

…

Paragraph 2 — Rate of tax

(1) The tax to be charged

…

4. for 1 000 litres of gas oil falling within subheadings 2710 19 41 to 2710 19 49 of the [CN]

(a) with a sulphur content of more than 10 mg/kg, shall be EUR 485.70,

(b) with a maximum sulphur content of 10 mg/kg, shall be EUR 470.40.

…

(3) In derogation from subparagraphs 1 and 2, the tax to be charged

1. for 1 000 litres of lawfully marked gas oil falling within subheadings 2710 19 41 to 2710 19 49 of the [CN]

(a) with a sulphur content of more than 50 mg/kg,

until 31 December 2008, shall be EUR 61.35,

as from 1 January 2009, shall be EUR 76.35,

(b) with a maximum sulphur content of 50 mg/kg, shall be EUR 61.35,

…

when it is used as heating oil or for the propulsion of gas turbines and combustion engines in installations receiving preferential treatment within the meaning of Paragraphs 3 and 3a or when delivered for those purposes …

Paragraph 3 — Installations receiving preferential treatment

(1) Installations receiving preferential treatment are stationary installations

1. the mechanical energy of which is used exclusively to produce electricity

…

Paragraph 53 — Tax exemption for the production of electricity and the combined production of power and heat

(1) A tax exemption shall be granted on request, subject to subparagraph 2, for energy products on which tax is proved to have been paid … and which were used

1. to produce electricity in stationary installations

…

If, in the case referred to in point 1 of the first sentence, the mechanical energy produced in the installation is used for the production of electricity and also for other purposes, the tax exemption shall be granted only in respect of the proportion of the energy products used to produce electricity.

(2) Point 1 of the first sentence of subparagraph 1 shall apply only to installations with a nominal electrical power rating greater than two megawatts.

(3) The person entitled to the exemption is the user of the energy products.'

The main proceedings and the question referred for a preliminary ruling

15 The applicant in the main proceedings is the operator of Cologne-Bonn airport in Germany. In order to supply aircraft with onboard electricity, it uses ground power-generating units. For the production of such electricity, it used, in the course of the calendar year 2004, 585 642 litres of taxed gas oil.

16 On 30 December 2005, the applicant applied to the Hauptzollamt Köln for a refund of that tax on the basis of Article 14(1)(a) of Directive 2003/96.

17 On 18 January 2006, that application was rejected on the ground, first, that the Law on taxation of mineral oils did not provide for a refund of the tax in the case of taxed gas oil used to produce electricity and, second, that Article 14(1)(a) of Directive 2003/96 does not have direct effect.

18 Having exhausted administrative proceedings without success, the applicant in the main proceedings brought an action before the Finanzgericht (Finance Court) Düsseldorf.

19 In the order for reference, that court points out that, in Case C-346/97 *Braathens* [1999] ECR I-3419, paragraphs 29 to 31, the Court of Justice accepted that Article 8(1)(b) of Directive 92/81 has direct effect. The national court notes that the wording of the introductory paragraph of Article 8(1) of Directive 92/81 corresponds to that of the introductory paragraph of Article 14(1) of Directive 2003/96, and that Article 8(1)(b) of Directive 92/81, in the same way as the first sentence of Article 14(1)(a) of Directive 2003/96, lays down a clear and precise obligation to exempt.

20 The national court is, however, uncertain whether the unconditional and precise character of Article 14(1)(a) is affected by the fact that, according to the second sentence of that provision, Member States may tax energy products 'for reasons of environmental policy'. In that regard, the national court observes that, while those reasons, which are clearly not defined by Directive 2003/96, appear to confer on the national legislature a discretion with regard to which energy products it will or will not tax, it remains in any event possible to determine whether that legislature has made use of the power thus conferred on it by Article 14(1)(a). There is, in the legislation which subsequently amended the Law on taxation of mineral oils or in the related preparatory legislative materials, nothing to indicate that the legislature wished, for reasons of environmental policy, to continue to tax gas oil used to produce electricity. The national legislature thus quite simply remained inactive in that regard and did not transpose the provisions of Article 14(1)(a) of Directive 2003/96 within the prescribed period. That transposition occurred only on the adoption of the Law on taxation of energy, which entered into force on 1 August 2006.

21 In those circumstances, the Finanzgericht Düsseldorf decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 14(1)(a) of [Directive 2003/96] to be interpreted as meaning that an undertaking which used gas oil on which tax was paid, falling within heading 2710 of the [CN], in order to produce electricity, and which has applied for a refund of that tax, can rely directly on that provision?'

The question referred for a preliminary ruling

22 By its question, the national court asks whether Article 14(1)(a) of Directive 2003/96, in so far as it provides for the exemption from taxation under the directive of energy products used to produce electricity, has direct effect, with the consequence that it may be relied on by an individual before the national courts in proceedings, such as the main proceedings, between that individual and the national customs authorities, in order to disapply national legislation which is incompatible with that provision.

23 According to settled case-law of the Court, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 11; Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 25; and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 103).

24 It is not disputed that, at the time of the facts in the main proceedings, that is to say, after the expiry of the period for transposition of Directive 2003/96 laid down in Article 28(1) thereof, namely 31 December 2003, the Federal Republic of Germany had not adopted specific national measures in order to transpose that directive into German law. Such transposition measures were adopted only later, in the Law on taxation of energy, which entered into force on 1 August 2006.

25 It is also common ground that the Federal Republic of Germany had not, at the time of the facts in the main proceedings, exercised the option provided for in the second sentence of Article 14(1)(a) of Directive 2003/96, allowing it, in derogation from the exemption rules established under the first sentence of that provision, to impose taxation 'for reasons of environmental policy' on energy products, such as gas oil, used to produce electricity. It is not, in fact, disputed that the taxation rules then

in force in that Member State were not based on such reasons; rather, the Federal Republic of Germany limited itself to transposing into national law the taxation rules relating to mineral oils laid down previously by Directives 92/81 and 92/82.

26 At the hearing, the Italian Government nevertheless contended that the time-limit for transposition laid down in Article 28(1) of Directive 2003/96 did not apply to provisions which, like the second sentence of Article 14(1)(a) of the directive, provide the Member States with a choice.

27 That argument cannot, however, be accepted. Article 28(1) of Directive 2003/96 provides, in unambiguous wording, that the Member States are to adopt the national measures necessary to comply with the directive not later than 31 December 2003, without making any distinction as between its provisions. In addition, and in any event, it is not disputed that the Law on taxation of energy, which entered into force on 1 August 2006, with the aim of transposing into German law the provisions of Directive 2003/96, did not exercise the option provided for in the second sentence of Article 14(1)(a) of that directive, with the consequence that the question as to the amount of time given to the Member States to transpose that provision cannot have any bearing on the answers to be given to the national court.

28 In those circumstances, it is necessary to examine whether, as claimed by the applicant in the main proceedings and the Commission, Article 14(1)(a) of Directive 2003/96 is, from the point of view of its content, sufficiently precise and unconditional to be capable of being relied on directly by an individual against the authorities of the Member State in question in relation to a period of time during which that Member State was, following expiry of the period laid down in Article 28(1) of the directive, in default of its obligation to transpose that directive into its national law.

29 With regard to the first condition, it must be held that Article 14(1)(a) of Directive 2003/96, in so far as it imposes on Member States the obligation not to impose

taxation under the directive on energy products used to produce electricity, is sufficiently precise, since it lays down clearly the products covered by the exemption (see, by analogy, Case 8/81 *Becker* [1982] ECR 53, paragraph 27, and *Braathens*, paragraph 31).

30 With regard to the second condition, it follows from the case-law that the fact that a provision of a directive gives Member States a choice does not necessarily render it impossible to determine with sufficient precision, on the basis of the provisions of the directive alone, the content of the rights thus conferred on individuals (see, to that effect, *Francovich and Others*, paragraph 17, and Joined Cases C-253/96 to C-258/96 *Kampelmann and Others* [1997] ECR I-6907, paragraph 39).

31 Thus, it follows from settled case-law that the unconditional nature of an obligation to grant an exemption cannot be affected at all by the degree of latitude afforded to Member States by introductory wording such as that contained in Article 14(1) of Directive 2003/96, according to which exemptions are granted by those States '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 Member State may not rely, as against a taxpayer who is able to show that his tax position actually falls within one of the categories of exemption laid down in a directive, on its failure to adopt the very provisions which are intended to facilitate the application of that exemption (see, by analogy, *Becker*, paragraph 33; *Braathens*, paragraph 31; Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 52; Case C-45/01 *Dornier* [2003] ECR I-12911, paragraph 79; and Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraph 34).

32 Contrary to what is submitted by the defendant in the main proceedings and by the Italian Government, that finding is not invalidated by the fact that Member States may, under the second sentence of Article 14(1)(a) of Directive 2003/96, impose taxation on the products in question for reasons of environmental policy. That is merely a potential limitation to the exemption rule, and a Member State which has not exercised that option cannot rely on its own failure to do so in order to refuse a taxpayer the benefit of an exemption which he may legitimately claim under

Directive 2003/96 (see, by analogy, *Kügler*, paragraphs 59 and 60, and *Linneweber and Akritidis*, paragraph 35).

33 It follows that the obligation under Article 14(1)(a) of Directive 2003/96 to exempt from taxation under that directive energy products intended to produce electricity is sufficiently precise and unconditional to confer on individuals the right to rely on it in proceedings before national courts with a view to contesting national rules that are incompatible with it.

34 According to settled case-law, the right to obtain a refund of charges levied in a Member State in breach of rules of Community law is the consequence and the complement of the rights conferred on individuals by Community provisions as interpreted by the Court (see, inter alia, Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 23; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 84; and *Marks & Spencer*, paragraph 30).

35 It must also be pointed out that, at the hearing, the parties to the main proceedings explained, in reply to a request by the Court, that the electricity produced by the applicant in the main proceedings fell, at the time of the facts in issue, within the scope of Paragraph 9(1)(3) of the Law on taxation of electricity of 24 March 1999, in the version then in force, which provided essentially for the exemption of electricity produced by entities the installations of which did not exceed a certain threshold of rated electrical power.

36 Taking those explanations into account, the Commission and the defendant in the main proceedings therefore submitted, at that hearing, that it would be incompatible with Directive 2003/96 to exempt the energy products used by the applicant in the main proceedings to produce electricity, as the electricity produced was itself also exempted. While, pursuant to the third subparagraph of Article 21(5) of Directive 2003/96, Member States may, notwithstanding Article 14(1)(a) of the directive, exempt electricity produced by small producers of electricity, that is subject to the express proviso that the energy products used for that purpose are taxed.

The applicant in the main proceedings nevertheless claimed, on that point, that the legislation which transposed Directive 2003/96 during 2006 precisely introduced a specific rate of taxation which is substantially lower than the standard rate which applied at the time of the facts in the main proceedings.

37 In that regard, it must be stated that, by its question, the national court asked the Court of Justice only as to the interpretation of Article 14(1)(a) of Directive 2003/96 and that the abovementioned matters of fact and law, which were raised and discussed for the first time at the hearing before the Court, are not referred to either in the order for reference or in the written observations lodged by the interested parties. Moreover, the parties to the main proceedings confirmed, in response to a question put by the Court, that that aspect of the dispute was not addressed at any stage of the main proceedings.

38 In those circumstances, in the absence of more precise and detailed information on that point, the Court finds that the documents submitted to it do not indicate with sufficient clarity that those various matters may be relevant in resolving the case in the main proceedings and, therefore, of any use to the national court, which, as the court that must resolve the dispute, is best placed to determine the relevance of the questions referred to the Court in the light of the particular features of the case before it.

39 The answer to the question referred must therefore be that Article 14(1)(a) of Directive 2003/96, in so far as it provides for the exemption from taxation under that directive of energy products used to produce electricity, has direct effect in the sense that it may be relied upon by an individual before national courts — in relation to a period of time during which the Member State concerned was in default of its obligation to transpose that directive into its national law within the prescribed period — in a dispute, such as that in the main proceedings, between that individual and the customs authorities of that State, for the purpose of having national legislation which is incompatible with that provision disapplied and, consequently, obtaining a refund of tax which infringed that provision.

Costs

40 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:

Article 14(1)(a) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, in so far as it provides for the exemption from taxation under that directive of energy products used to produce electricity, has direct effect in the sense that it may be relied upon by an individual before national courts — in relation to a period of time during which the Member State concerned was in default of its obligation to transpose that directive into its national law within the prescribed period — in a dispute, such as that in the main proceedings, between that individual and the customs authorities of that State, for the purpose of having national legislation which is incompatible with that provision disapplied and, consequently, obtaining a refund of tax which infringed that provision.

[Signatures]