Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

2 June 2016*

(Reference for a preliminary ruling — Excise duties — Directive 2003/96/EC — Differentiated rates of excise duty for motor fuels and heating fuels — Condition for the application of the rate for heating fuels — Submission of a monthly list of statements that the products purchased are for heating purposes — Application of the rate of excise duty laid down for motor fuels where that list is not submitted — Principle of proportionality)

In Case C-418/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland), made by decision of 4 June 2014, received at the Court on 5 September 2014, in the proceedings

ROZ-ŚWIT Zakład Produkcyjno-Handlowo-Usługowy Henryk Ciurko, Adam Pawłowski spółka jawna

v

Dyrektor Izby Celnej we Wrocławiu,

THE COURT (Ninth Chamber),

composed of C. Lycourgos, President of the Chamber, E. Juhász and C. Vajda (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 28 October 2015,

after considering the observations submitted on behalf of:

— ROZ-ŚWIT Zakład Produkcyjno-Handlowo-Usługowy Henryk Ciurko, Adam Pawłowski spółka jawna, by K. Kocowski and S. Bogdański, adwokaci, and D. Kocowska-Dzik, counsel,

— the Dyrektor Izby Celnej we Wrocławiu, by W. Bronicki and E. Białas-Giejbatow and D. Kowalik, acting as Agents, and by J. Kaute, radca prawny,

— the Polish Government, by B. Majczyna and K. Maćkowska, acting as Agents,

— the European Commission, by M. Owsiany-Hornung and F. Tomat, acting as Agents,

* Language of the case: Polish.

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2(3), 5 and 21(4) 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 195, p. 31) ('Directive 2003/96') and the principle of proportionality.

2 The request has been made in proceedings between the company ROZ-ŚWIT Zakład Produkcyjno-Handlowo-Usługowy Henryk Ciurko, Adam Pawłowski spółka jawna ('ROZ-ŚWIT') and the Dyrektor Izby Celnej we Wrocławiu (Director of the Wrocław Customs Chamber) ('the DICW') concerning the refusal of the DICW to grant ROZ-ŚWIT the benefit of the rate of excise duty applicable to heating fuel because of its failure to submit within the specified period a list of statements that the fuel purchased was for heating purposes ('the list of statements from purchasers').

Legal context

EU law

3 Recitals 3, 4, 9, 17 and 18 of Directive 2003/96 state:

'(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.

…

(9) Member States should be given the flexibility necessary to define and implement policies appropriate to their national circumstances.

…

(17) It is necessary to establish different Community minimum levels of taxation according to the use of the energy products and electricity.

(18) Energy products used as a motor fuel for certain industrial and commercial purposes and those used as heating fuel are normally taxed at lower levels than those applicable to energy products used as a propellant.'

4 The first subparagraph of Article 2(3) of that directive provides:

'When intended for use, offered for sale or used as motor fuel or heating fuel, energy products other than those for which a level of taxation is specified in this Directive shall be taxed according to use, at the rate for the equivalent heating fuel or motor fuel.'

5 Article 4(1) of that directive is worded as follows:

‘The 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.’

6 Article 5 of that directive provides:

‘Provided that they respect the minimum levels of taxation prescribed by this Directive and that they are compatible with Community law, differentiated rates of taxation may be applied by Member States, under fiscal control, in the following cases:

— when the differentiated rates are directly linked to product quality;

— when the differentiated rates depend on quantitative consumption levels for electricity and energy products used for heating purposes;

— for the following uses: local public passenger transport (including taxis), waste collection, armed forces and public administration, disabled people, ambulances;

— between business and non-business use, for energy products and electricity referred to in Articles 9 and 10.’

7 Articles 7 to 9 of Directive 2003/96 provide that the minimum levels of taxation applicable respectively to motor fuel, products used as motor fuel for specific industrial and commercial purposes and heating fuel are fixed in accordance with Annex I, Tables A to C of that directive.

8 Articles 14 to 19 of that directive refer to total or partial exemptions or reductions in the level of taxation that the Member States or, certain Member States, may or must apply subject to the conditions set out in that directive.

9 Under Article 21(4) of that directive:

‘Member States may also provide that taxation on energy products and electricity shall become due when it is established that a final use condition laid down in national rules for the purpose of a reduced level of taxation or exemption is not, or is no longer, fulfilled.’

Polish law

10 Article 89(1), (4), (5) and (14) to (16) of the Ustawa o podatku akcyzowym (Law on excise duty) of 6 December 2008, as amended (Dz. U. of 2009, No 3, position 11) (‘the Law on excise duty’) is worded as follows:

‘1. Excise rates for energy products shall be as follows:

…

(10) for fuel oils falling within CN codes 2710 19 51 to 2710 19 69:
(a) those where 30% or more by volume distils at 350°C or whose density is less than 890 kilograms per cubic metre, which are coloured red and marked in accordance with specific provisions — at PLN 232.00 per 1 000 litres.
(b) the others, which are not subject to the colouring and marking requirements in accordance with specific provisions — at PLN [64.00] per 1 000 kilograms.

…

4. In circumstances where:

(1) the products referred to in paragraph 1, under … (10) … are used to fuel combustion engines, if they are used without complying with the labelling and colouring requirements set out in the specific provisions and stored in a tank linked to a fuel dispenser or sold from such a tank, the rate of PLN 1822.00 per 1 000 litres applies and, if their density at 15°C is less than or equal to 890 kilograms per cubic metre, the rate of PLN 2047.00 per 1000 kilograms.

…

5. The seller of products subject to excise duty not exempted on the basis of their intended use, referred to in paragraph 1, under … (10) …, shall, where there is a sale:

(1) to legal persons, organisational entities without legal personality or natural persons engaged in a commercial activity, obtain from the purchaser a statement that the products purchased are for heating purposes or will be sold for heating purposes, allowing the application of the excise duty rates set out in paragraph 1, under … (10) …;

(2) to natural persons not engaged in a commercial activity, obtain from the purchaser a statement that the products purchased are for heating purposes, allowing the application of the excise duty rates set out in paragraph 1, under … (10) …; that statement must be attached to the copy of the receipt or the copy of any other sale document sent to the purchaser; failing that, the seller shall enter on the statement the number and the date of issue of the document establishing that sale.

…

14. The seller of products subject to the excise duty referred to in paragraph 1, under … (10) … compiles and sends to the competent customs office, at the latest on the 25th day of the month following that in which the sale was made, the monthly list of statements referred to in paragraph 5; the originals of the statements are to be retained by the seller for a period of five years from the end of the calendar year in which they are compiled and must be available for inspection.

15. The monthly list of statements shall contain:

(1) in respect of the seller referred to in paragraph 14:
   (a) the name and address of the principal place of business or address for service of the entity which supplied the list,
   (b) the quantity, the nature and the intended use of the products covered by the statement,
   (c) the date of the statement.
   (d) the date and place of the compilation of the list and the legible signature of the person compiling the list,
   (e) the number of heating installations which the purchasers have, according to their statements,
   (f) the place (address) where the heating installations mentioned in the statement are situated,

…

16. If the conditions set out in paragraphs 5 to 15 are not fulfilled, the rate referred to in paragraph 4(1) shall apply.’

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

11 By decision of 23 February 2011, the Naczelnik Urzędu Celnego we Wrocławiu (Head of the Wrocław Customs Office, Poland) issued a notice of additional assessment in respect of excise duty in relation to the tax debt incurred by ROZ-ŚWIT.

12 It is apparent from that decision that the proceedings brought by the tax authorities established that, during the period from 1 March to 31 December 2009, ROZ-ŚWIT made a series of heating fuel sales consisting of amounts of light fuel oil. It was found that those sales had been confirmed and that there was no doubt that the purchasers had confirmed the purchase and consumption of that fuel for heating purposes. However, ROZ-ŚWIT had not submitted, within the specified period, a list of statements from the purchasers as provided for in Article 89(14) of the Law on excise duty. Consequently, the motor fuel rate laid down in Article 89(4)(1) of that law was applied in accordance with paragraph 16 of that article.

13 ROZ-ŚWIT brought an appeal against that decision before the DICW arguing that the failure to present lists of statements from purchasers constituted merely a formal error, while the actual intended use of the fuel in question for heating purposes was not in doubt.

14 That appeal having been dismissed, ROZ-ŚWIT brought an action before the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland).

15 The referring court asks whether, where a Member State makes use of the right provided for in Directive 2003/96 to differentiate the excise duty rates relating to products within the scope of application of that directive according to their use, the provision in Article 89(16) of the Law on excise duty is contrary to that directive in so far as it leads, because of the failure to submit the list of statements from purchasers, to an excise duty rate for motor fuel being applied to a product used as heating fuel.

16 Moreover, that court harbours doubts as to whether the requirement to compile and submit such a list is proportionate in the light of the objective pursued, namely the prevention of tax avoidance and evasion. It takes the view that that requirement is of a formal and secondary nature allowing only a preliminary analysis of the intended use of the products concerned. In that regard, it refers to the case-law of the Court on value added tax according to which, on the one hand, the deduction of input tax must be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements (see judgment of 12 July 2012 in *EMS-Bulgaria Transport*, C-284/11, EU:C:2012:458, paragraphs 61 and 62) and, on the other hand, national law making export exemptions subject to a time limit for dispatch without allowing, on the basis of failure to comply with the time limit, the reimbursement of value added tax already paid even if the taxable person provided evidence that the goods had left the customs territory of the European Union, which goes beyond what is necessary in order to attain the objective of combating tax avoidance and evasion (see judgment of 19 December 2013 in *BDV Hungary Trading*, C-563/12, EU:C:2013:854, paragraph 39).

17 The referring court also seeks to ascertain whether the penalty laid down in Article 89(16) of the Law on excise duty, which consists of imposing excise duty rates reserved for motor fuel in situations of non-compliance with the requirement to submit a list of statements from purchasers within the time limit, is consistent with the principle of proportionality. Concerning, in particular, the seriousness of the infringement, it takes the view that that penalty does not have the objective of preventing tax evasion but covers only non-compliance with that requirement and, moreover, amounts to a considerable sum.

18 In those circumstances the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 5, read in conjunction with Articles 2(3) and 21(4) of Directive 2003/96, be interpreted as precluding the national rules laid down in Article 89(16) of the Law on excise duty, which require that the rate of excise duty laid down in respect of motor fuels be applied to heating oil if the taxable person fails to fulfil the formal condition laid down in Article 89(14) and (15) of the Law on excise duty?

(2) Does the principle of proportionality preclude the formal requirement laid down in Article 89(14) and (15) of the Law on excise duty, which makes application of the reduced rate of excise duty laid down for heating oil contingent on the drawing-up and submission of a list of statements from purchasers within a statutory period, regardless of whether the substantive condition requiring the sale of fuel for heating purposes is fulfilled?

(3) Is the penalty laid down Article 89(16) of the Law on excise duty, which consists, as in the circumstances of the present case, in imposing on the seller, in relation to heating oil, excise duty calculated at the rate laid down for motor fuels (Article 89(4)(1) of the Law on excise duty) because the formal condition laid down in Article 89(14) and (15) of the Law on excise duty is not fulfilled, consistent with the principle of proportionality?'

Consideration of the questions referred

19 By its questions, which should be considered together, the referring court asks, in essence, whether Directive 2003/96 and the principle of proportionality must be interpreted as precluding national legislation under which, first, sellers of heating fuel are required to submit, within a prescribed time limit, a monthly list of statements from purchasers that the products purchased are for heating purposes and, secondly, where such a list is not submitted within the prescribed time limit, the excise duty rate laid down for motor fuel is applied to the heating fuel sold even though it has been established that the intended use of that product for heating purposes is not in doubt.

20 In the first place, it must be recalled that general principles of law, which include the principle of proportionality, form part of the EU legal order. They must accordingly be observed not only by the EU institutions but also by Member States in the exercise of the powers conferred on them by EU directives (see, to that effect, inter alia, judgments of 21 February 2008 in *Netto Supermarkt*, C-271/06, EU:C:2008:105, paragraph 18, and of 10 September 2009 in *Plantanol*, C-201/08, EU:C:2009:539, paragraph 43).

21 It follows that national rules, such as those at issue in the main proceedings, which are intended, inter alia, to transpose the provisions of Directive 2003/96 into the domestic legal order of the Member State concerned must be consistent with the principle of proportionality.

The requirement to submit a list of statements from purchasers

22 It is apparent from the order for reference that the list of statements from purchasers, the compilation and forwarding of which to the Customs Office are provided for in Article 89(14) and (15) of the Law on excise duty, constitutes a control measure aimed at preventing tax avoidance and evasion.

23 Since Directive 2003/96 does not specify any particular control mechanism for the use of heating fuel nor measures to combat tax evasion connected with the sale of heating fuel, it is for Member States to provide such mechanisms and such measures in their national legislation, in conformity with EU law. In that regard, it follows from recital 9 of that directive that the Member States have discretion in the definition and implementation of policies appropriate to their national circumstances.

24 Concerning the proportionality of the requirement to submit a list of statements from purchasers, the national court refers to decisions of the Trybunał Konstytucyjny (Constitutional Court) and of a number of Polish administrative courts according to which such a list informs the tax authority of the preferential sale of heating fuel and the place and the type of use stipulated. It allows, furthermore, a preliminary analysis of the information that it contains and, therefore, the identification and detection of tax evasion.

25 Having regard to the discretion which Member States have as to the measures and mechanisms to adopt in order to prevent tax avoidance and evasion connected with the sale of heating fuels and since a requirement to submit to the competent authorities a list of statements from purchasers is not manifestly disproportionate, it must be held that such a requirement is an appropriate measure to achieve such an objective and does not go beyond what is necessary to attain it.

26 Consequently, Directive 2003/96 and the principle of proportionality must be interpreted as not precluding national legislation under which sellers of heating fuel are required to submit, within a prescribed time limit, a list of statements from purchasers that the products purchased are intended for heating purposes.

The application of the excise duty rate for motor fuel in the event of non-compliance with the requirement to submit a list of statements from purchasers

27 In accordance with Article 89(16) of the Law on excise duty, non-compliance with the requirement to compile and send a list of statements from purchasers within the prescribed time limits leads to the application of the excise duty rate for motor fuel to heating fuel sold, whatever the actual use of that fuel.

28 As regards, in the first place, the compliance of such a consequence with Directive 2003/96, it should be noted at the outset that the provisions of that directive cited by the national court in its first question are not directly relevant to the dispute in the main proceedings. First, Article 2(3), first paragraph, of the directive refers to 'energy products other than those for which a level of taxation is specified in this Directive', whereas it is apparent from the order for reference that the level of taxation of the product at issue in the main proceedings is specified in Directive 2003/96.

29 Next, Article 5 of that directive provides differentiated rates of taxation in certain cases exhaustively listed in that article, namely, where they are linked to product quality, where they depend on quantitative consumption, where the products are used in certain public domains or where that rate differentiates between business and non-business use. That article, therefore, does not concern the difference in use between motor fuel and heating fuel.

30 Lastly, Article 21(4) of Directive 2003/96 concerns the conditions associated with the application of the reduced rates and exemptions laid down in Articles 14 to 19 of that directive.

31 On the other hand, the Court has already held that the scheme of Directive 2003/96 is founded on a clear distinction between motor fuels and heating fuels on the basis, in particular, of the criterion of use. The distinction between motor fuels and heating fuels, introduced in recitals 17 and 18 of that directive, is applied, inter alia, by Articles 7 to 9 of the directive, relating to the detailed rules for setting the minimum levels of taxation applicable, on the one hand, to heating fuels and, on the other,

to motor fuels and to products used as motor fuels for specific industrial and commercial purposes (see, to that effect, judgment of 3 April 2014 in *Kronos Titan and Rhein-Ruhr Beschichtungs-Service*, C-43/13 and C-44/13, EU:C:2014:216, paragraph 28).

32 Furthermore, recitals 3 and 4 of that directive state that the proper functioning of the internal market requires minimum levels of taxation to be laid down at EU level for most energy products and that appreciable differences in the national levels of energy taxation applied by Member States could prove detrimental to such functioning. It follows that the setting of minimum levels of taxation of products according to their use as either motor fuel or heating fuel contributes to the proper functioning of the internal market by precluding any distortion of competition between products used for the same purposes.

33 It follows that both the general scheme and the purpose of Directive 2003/96 are based on the principle that energy products are taxed in accordance with their actual use.

34 Consequently, a provision of national law, such as Article 89(16) of the Law on excise duty, under which, in the event of failure to submit a list of statements from purchasers within the time limit, the excise duty applicable for motor fuels is automatically applied to heating fuels even if, as was found in the dispute in the main proceedings, those fuels are used as such, runs counter to the general scheme and purpose of Directive 2003/96.

35 In the second place, such an automatic application of the excise duty applicable to motor fuels in the case of non-compliance with the requirement to submit such a list infringes the principle of proportionality.

36 It is apparent from the order for reference that in the case in the main proceedings it was held that the sales of heating fuel made by ROZ-ŚWIT have been verified and that there was no doubt that the purchasers had confirmed the purchase and the use of that fuel for heating purposes. Furthermore, nothing in the file indicates that those sales were made in order to benefit fraudulently from the preferential duty rates accorded to fuels intended for heating purposes.

37 However, despite that finding, the competent authorities, in accordance with Article 89(16) of the Law on excise duty, applied to heating fuels that have been sold the excise duty rate provided for motor fuels.

38 In that regard, it is apparent from the order for reference that, in Poland, the rate of excise duty applicable to motor fuels may be more than eight times greater than that on heating fuels.

39 In those circumstances, the application of the rate of excise duty provided for motor fuels to the heating fuels at issue in the main proceedings because of the infringement of the requirement imposed by national law to submit a list of statements from purchasers within the time limits set, where it has been held that there was no doubt as to the intended use of those products, goes further than is necessary to prevent tax avoidance and evasion (see, by analogy, judgment of 27 September 2007 in *Collée*, C-146/05, EU:C:2007:549, paragraph 29).

40 In that context, it should be pointed out that there is nothing to prevent a Member State from providing for the imposition of a fine for the infringement of a requirement such as that of submitting to the competent authorities a list of statements from purchasers of heating fuel sold. The power which a Member State has to impose such a penalty must be exercised in accordance with EU law and its general principles, including the principle of proportionality. In order to assess whether that penalty is consistent with that principle, it is for the national courts to take into account, inter alia, the nature and degree of seriousness of the infringement which that penalty seeks to sanction and also the means of establishing its amount (see, by analogy, judgment of 19 July 2012 in *Rēdlihs*, C-263/11, EU:C:2012:497, paragraphs 44 to 47).

41 Consequently, Directive 2003/96 and the principle of proportionality must be interpreted as precluding national legislation under which, in the event of failure to submit a list of statements from purchasers within a prescribed time limit, the excise duty applicable for motor fuels is applied to heating fuels even though it has been found that the intended use of that product for heating purposes is not in doubt.

42 In the light of the foregoing considerations, the answer to the questions referred is that Directive 2003/96 and the principle of proportionality must be interpreted as:

— not precluding national legislation under which sellers of heating fuel are required to submit, within a prescribed time limit, a list of statements from purchasers that the products purchased are for heating purposes, and

— precluding national legislation under which, if a list of statements from purchasers is not submitted within a prescribed time limit, the excise duty applicable for motor fuels is applied to the heating fuel sold, even though it has been found that the intended use of that product for heating purposes is not in doubt.

Costs

43 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 (Ninth 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, and the principle of proportionality must be interpreted as:

— **not precluding national legislation under which sellers of heating fuel are required to submit, within a prescribed time limit, a monthly list of statements from purchasers that the products purchased are for heating purposes, and**

— **precluding national legislation under which, if a list of statements from purchasers is not submitted within a prescribed time limit, the excise duty applicable for motor fuels is applied to the heating fuel sold, even though it has been found that the intended use of that product for heating purposes is not in doubt.**

[Signatures]