JUDGMENT OF THE COURT (Third Chamber)

10 November 2011 *

In Case C-505/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Højesteret (Denmark), made by decision of 15 October 2010, received at the Court on 21 October 2010, in the proceedings

Partrederiet Sea Fighter

v

Skatteministeriet,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta (Rapporteur), G. Arestis and T. von Danwitz, Judges,

* Language of the case: Danish.

Advocate General: Y. Bot,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 13 September 2011,

after considering the observations submitted on behalf of:

— Partrederiet Sea Fighter, by N. Bjørnholm, advokat,

— the Danish Government, by S. Juul Jørgensen and K. Lundgaard Hansen, acting as Agents,

— the German Government, by T. Henze and J. Möller, acting as Agents,

— the European Commission, by W. Mölls and P. Dyrberg, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 8 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) ('Directive 92/81').

2 The reference has been made in the context of proceedings between Partrederiet Sea Fighter ('Sea Fighter') and the Skatteministeriet (Danish Ministry for Fiscal Affairs) concerning the latter's refusal to exempt from the excise duty on mineral oils which are fuels used by an excavator affixed to a vessel belonging to Sea Fighter.

Legal context

European Union legislation

3 Article 8 of Directive 92/81 states:

'1. 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)] on exempt uses of excisable products, and without prejudice to other Community provisions, Member States shall exempt the following from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

…

(c) mineral oils supplied for use as fuel for the purposes of navigation within Community waters (including fishing), other than in private pleasure craft.

For the purposes of this Directive, "private pleasure craft" shall mean any craft used by its owner or the natural or legal person who enjoys its use either through hire or through any other means, for other than commercial purposes and in particular other than for the carriage of passengers or goods or for the supply of services for consideration or for the purposes of public authorities;

…

2. Without prejudice to other Community provisions, Member States may apply total or partial exemptions or reductions in the rate of duty to mineral oils or to other products intended for the same uses which are used under fiscal control:

…

(b) for navigation on inland waterways other than for private pleasure craft;

…

(g) in respect of dredging operations in navigable waterways and in ports.

…'

National legislation

4 Article 8(1)(c) of Directive 92/81 has been implemented in Danish law by section 9(4) of the Law on the duty on mineral oils (Mineralolieafgiftsloven) and section 7(4) of the Law on the duty on carbon dioxide (Kuldioxidafgiftsloven).

5 The enabling provision in Article 8(2)(g) of Directive 92/81 has not been taken up in Danish law.

6 Paragraph 1 of section 9(4) of the Law on the duty on mineral oils reads as follows:

'Duty shall be reimbursed in respect of … goods used for rail or boat transport and for commercial navigation with vessels other than those referred to in paragraph 1(3), apart from private pleasure craft …'

7 Paragraph 1 of Article 7(4) of the Law on duties on carbon dioxide provides inter alia:

'Duty shall be repaid in respect of … goods subject to duty …. used by a business registered under the Law on value added tax for navigation with ships and fishing vessels.'

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

8 The *M/S Grete Fighter* is a purpose-built vessel operated by Sea Fighter for marine excavation and construction works. The vessel has permanently-affixed digging equipment on the deck of the vessel which operates with its own motor and its own fuel tank. The excavator operates independently of the vessel's propulsion engine. The fuel used to replenish the fuel tank of the excavator's motor comes from the vessel's main fuel tank. When the excavator is used for digging, the vessel is anchored, whereas it

is in motion when the excavated material is dumped at sea. Sea Fighter sought reimbursement of duties paid on mineral oils used on the *M/S Grete Fighter* in the period 1 January 2001 to 30 September 2003.

9 By decision of 19 February 2004 the ToldSkat Østjylland (East Jutland Customs and Tax Office) found that, for that period, Sea Fighter was not entitled to reimbursement of oil and carbon dioxide duties for diesel fuel used for the excavator. It noted in particular that the excavator ran independently of the vessel's engine.

10 The Landskatteretten (National Tax Appeals Commission) upheld that decision on 4 March 2005.

11 Sea Fighter appealed against that decision to the Vestre Landsret (Western Regional Court) which found in favour of the tax administration in a judgment of 29 February 2008.

12 That judgment was the subject of an appeal to the Højesteret (Supreme Court) which decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 8(1)(c) of Directive 92/81 … to be interpreted as meaning that mineral oils supplied for use in an excavator which is affixed to a vessel but which, because it has its own separate motor and fuel tank, operates independently of the vessel's propulsion engine, in circumstances such as those of the present case, are exempt from duty?'

Consideration of the question referred

13 It should be noted at the outset that, it is apparent from the third and fifth recitals in the preamble to Directive 92/81 that the latter is intended to render more precise a number of common definitions for mineral oil products which are to be subject to the general excise system and to lay down certain exemptions relating to those products which are obligatory at European Union level (see Case C-389/02 *Deutsche See-Bestattungs-Genossenschaft* [2004] ECR I-3537, paragraph 17, and Case C-391/05 *Jan De Nul* [2007] ECR I-1793, paragraph 21).

14 Therefore, the provisions concerning those exemptions should be interpreted independently on the basis of their wording and the purpose of Directive 92/81 (see *Deutsche See-Bestattungs-Genossenschaft*, paragraph 19, and *Jan De Nul*, paragraph 22).

15 As regards the first subparagraph of Article 8(1)(c) of Directive 92/81, under the terms of which mineral oils supplied for use as fuel for the purposes of navigation within European Union waters are exempted from the harmonised excise duty, it should be pointed out that that provision provides for one exception to the exemption system in providing that the exemption does not apply to mineral oils used for navigation 'in private pleasure craft'. The second subparagraph of that provision defines the notion of 'private pleasure craft' as being vessels used 'for other than commercial purposes' (see *Deutsche See-Bestattungs-Genossenschaft*, paragraph 22).

16 The Court therefore held, at paragraphs 23 and 25 of that judgment, that all navigation activity for commercial purposes comes within the scope of the exemption from the harmonised excise duty provided for in the first subparagraph of Article 8(1)(c) of Directive 92/81, without any distinction being made as to the purpose of the navigation referred to.

17 Thus, the purpose of a vessel's voyage within European Union waters is irrelevant for the application of the exemption of mineral oils from excise duties when that navigation involves the provision of services for consideration.

18 As regards the technical characteristics of such navigation, the Court stated, at paragraph 40 of *Jan De Nul*, that manoeuvres carried out by a hopper dredger during its pumping and discharge of materials, that is to say, movements inherent in the carrying out of dredging activities, come within the scope of the term 'navigation' as used in the first subparagraph of Article 8(1)(c) of Directive 92/81. Thus, that term requires that the provision of services for consideration be inherent in the vessel's movement.

19 On the other hand, that provision cannot be interpreted as meaning that it may be applied to all services provided from a vessel within European Union waters, that is to say, to the consumption of mineral oils which is not linked to a vessel's movement.

20 It is apparent from the wording of that provision that the exemption at issue is subject to the requirement that the mineral oils be used as fuel for the purposes of navigation within European Union waters.

21 Furthermore, it is evident from the purpose of Directive 92/81, namely that Member States are to impose a harmonised excise duty on mineral oils, that the directive does not seek to establish general exemptions.

22 As regards the case in the main proceedings, it is not disputed that the consumption of mineral oils by the excavator affixed to the vessel at issue is totally independent of the vessel's propulsion.

23 In those circumstances, that consumption cannot be considered to be inherent in the movement of the vessel to which the excavator is affixed.

24 Therefore, the answer to the question is that Article 8(1)(c) of Directive 92/81 must be interpreted as meaning that mineral oils supplied for use in an excavator which is affixed to a vessel but which, because it has its own separate motor and fuel tank, operates independently of the vessel's propulsion engine, are not exempt from excise duties.

Costs

25 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 8(1)(c) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils, as amended by

Council Directive 94/74/EC of 22 December 1994, must be interpreted as meaning that mineral oils supplied for use in an excavator which is affixed to a vessel but which, because it has its own separate motor and fuel tank, operates independently of the vessel's propulsion engine, are not exempt from excise duties.

[Signatures]