JUDGMENT OF THE COURT (Third Chamber)

18 December 2008 *

In Case C-517/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Chancery Division of the High Court of Justice of England and Wales (United Kingdom), made by decision of 6 August 2007, received at the Court on 22 November 2007, in the proceedings

Afton Chemical Limited

v

Commissioners for Her Majesty's Revenue and Customs,

THE COURT (Third Chamber),

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

* Language of the case: English.

Advocate General: Y. Bot,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 23 October 2008,

after considering the observations submitted on behalf of:

— Afton Chemical Ltd, by P. Lasok QC and V. Sloane, Barrister, instructed by E. Philpott, Solicitor,

— the United Kingdom Government, by I. Rao, acting as Agent, and M. Angiolini, Barrister,

— the German Government, by M. Lumma and C. Blaschke, acting as Agents,

— the Greek Government, by K. Georgiadis, I. Bakopoulos and V. Karra, acting as Agents,

— the Italian Government, by R. Adam, acting as Agent, assisted by P. Gentili, avvocato dello stato,

— the Commission of the European Communities, by R. Lyal and W. Mölls, acting as Agents,

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 3 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), the first subparagraph of Article 2(3) and Article 8(1)(a) 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 92/12' and 'Directive 92/81' respectively), and the second subparagraph of Article 2(3) and the first indent of Article 2(4)(b) 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 the context of a dispute between Afton Chemical Limited ('Afton') and the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners'), who are responsible, in the United Kingdom, for the management and collection of excise duties and taxes on energy products, concerning the payment of excise duty on motor fuel additives for the period from 19 November 2000 to 31 October 2004.

Legal context

Community legislation

Directive 92/12

3 Article 1 of Directive 92/12 states:

'1. This Directive lays down the arrangements for products subject to excise duties and other indirect taxes which are levied directly or indirectly on the consumption of such products, except for value added tax and taxes established by the Community.

2. The particular provisions relating to the structures and rates of duty on products subject to excise duty shall be set out in specific Directives.'

4 Article 3(1) and (2) and the first paragraph of Article 3(3) of that directive provide:

'1. This Directive shall apply at Community level to the following products as defined in the relevant Directives:

— mineral oils,

…

2. The products listed in paragraph 1 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.

3. Member States shall retain the right to introduce or maintain taxes which are levied on products other than those listed in paragraph 1 provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States.'

Directives 92/81 and 92/82/EEC

5 Article 1(1) of Directive 92/81 is in these terms:

‘Member States shall impose a harmonised excise duty on mineral oils in accordance with this Directive.’

6 Article 2 of Directive 92/81 provides:

‘1. For the purposes of this Directive “mineral oil” shall cover:

…

(k) products falling within [Combined Nomenclature code ('CN code')] 3811;

…

2. Mineral oils other than those for which a level of duty is specified in … Directive 92/82/EEC shall be subject to excise duty if intended for use, offered for sale or used as heating fuel or motor fuel. The rate of duty to be charged shall be fixed, according to use, at the rate for the equivalent heating fuel or motor fuel.

3. In addition to the taxable products listed in paragraph 1, any product intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels, shall be taxed as motor fuel. Any other hydrocarbon, except for coal, lignite, peat or other similar solid hydrocarbons or natural gas, intended for use, offered for sale or used for heating purposes shall be taxed at the rate for the equivalent mineral oil.

…

4. References in this Directive to codes of the [CN] shall be to those of the version of the [CN] in force on 1 October 1994.'

7 Article 8(1)(a) of Directive 92/81 states:

‘In addition to the general provisions set out in Directive 92/12 … 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:

(a) mineral oils used for purposes other than as motor fuels or as heating fuels’.

8 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 (‘Directive 92/82’), sets a minimum rate of excise duty for certain mineral oils. Article 2 lists the mineral oils covered by Directive 92/82, and products falling within CN code 3811 are not included.

Directive 2003/96

9 Recitals 1 to 3 in the preamble to Directive 2003/96 are worded as follows:

'(1) The scope of … Directive 92/81 … and of … Directive 92/82 … 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.'

10 In addition, recital 22 in the preamble to Directive 2003/96 states:

'Energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. To that extent, it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy products as well as mineralogical processes. Electricity used in similar ways should be treated on an equal footing.'

11 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.

12 Article 2 of that directive states:

‘1. For the purposes of this Directive, the term “energy products” shall apply to products:

…

(f) falling within CN code 3811;

…

3. 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.

In addition to the taxable products listed in paragraph 1, any product intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels, shall be taxed at the rate for the equivalent motor fuel.

In addition to the taxable products listed in paragraph 1, any other hydrocarbon, except for peat, intended for use, offered for sale or used for heating purposes shall be taxed at the rate for the equivalent energy product.

4. This Directive shall not apply to:

…

(b) the following uses of energy products and electricity:

— energy products used for purposes other than as motor fuels or as heating fuels,

…

5. References in this Directive to [CN] codes … shall be to those of 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)].'

13 Article 3 of Directive 2003/96 states:

‘References in Directive 92/12 … to “mineral oils” and “excise duty”, insofar as it applies to mineral oils, shall be interpreted as covering all energy products, electricity and national indirect taxes referred to respectively in Articles 2 and 4(2) of this Directive.’

14 Article 28(1) and (2) of Directive 2003/96 provides:

‘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.’

15 Under Article 30 of that directive:

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

Legislation relating to the CN

16 According to the versions of the CN referred to in Directives 92/81 and 2003/96, CN code 3811 includes '[a]nti-knock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils'.

National legislation

17 It is apparent from the written observations lodged by Afton, the United Kingdom of Great Britain and Northern Ireland and the Commission that Section 6A of the Hydrocarbon Oil Duties Act 1979 is worded as follows:

'1. A duty of excise shall be charged on the setting aside for a chargeable use by any person, or (where it has not already been charged under this section) on the chargeable use by any person, of any liquid which is not

(a) hydrocarbon oil,

(b) biodiesel,

(c) bioblend,

(d) bioethanol, or

(e) bioethanol blend.

2. In this section "chargeable use" in relation to any substance means the use of that substance —

(a) as fuel for any engine, motor or other machinery; or

(b) as an additive or extender in any substance so used.'

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

18 Afton makes various additives falling within CN code 3811, which are intended to be added to and mixed with motor fuels, usually in quantities of 1 to 1 000 or 1 to 2 000.

19 The decision making the reference states that the additives produced by Afton are not intended for use, offered for sale or used as motor fuel. In particular, none of the additives is designed to function as fuel as such, or to power vehicles. Instead, they include one or more of the following components: cleaning agent, anti-foam, demulsifier, carrier fluid, solvent, cetane and lubricity improver, as well as corrosion inhibitor. They are consumed in the engine as part of the combustion process.

20 Afton appealed to the VAT and Duties Tribunal against the Commissioners' refusal to repay excise duty paid on those additives for the period from 19 November 2000 to 31 October 2004, amounting to GBP 2 825 215.61.

21 By decision of 4 May 2007, the VAT and Duties Tribunal dismissed that appeal on the grounds that the first subparagraph of Article 2(3) of Directive 92/81 and the second subparagraph of Article 2(3) of Directive 2003/96 impose a charge on all additives in motor fuels, whether produced from mineral oils or from other substances, and that, since those additives are deemed to be fuels, they are not exempted by Article 8(1)(a) of Directive 92/81 or the first indent of Article 2(4)(b) of Directive 2003/96.

22 In those circumstances, the Chancery Division of the High Court of Justice of England and Wales, hearing the case on appeal, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Do fuel additives such as those at issue, which are not intended for use, offered for sale or used as motor fuel but which are added to motor fuel for purposes other

than powering the vehicle in which the fuel is used, fall to be taxed under Article 2(3) of Directive 92/81 …?

2. If the answer to the first question is affirmative, do such additives fall within the scope of the exemption under Article 8(1) of Directive 92/81 …?

3. Do fuel additives such as those at issue, which are not intended for use, offered for sale or used as motor fuel but which are added to motor fuel for purposes other than powering the vehicle in which the fuel is used, fall to be taxed under the second paragraph of Article 2(3) of Directive 2003/96 …?

4. If the answer to the third question is affirmative, are such additives excluded from the scope of Directive 2003/96 … by virtue of the first indent of Article [2(4)(b)] of that Directive?

5. Is the duty imposed by the UK on the above fuel additives precluded by Community law and in particular, by Article 3 of Directive 92/12 …?'

The questions referred

23 By its first four questions, which it is appropriate to examine together, the national court asks, in essence, whether, first, Articles 2(3) and 8(1) of Directive 92/81 and, second, Article 2(3) and (4) of Directive 2003/96 are to be interpreted as meaning that fuel additives, such as those at issue in the main proceedings, which are 'mineral oils' within the meaning of Article 2(1) of Directive 92/81 or 'energy products' within the meaning of Article 2(1) of Directive 2003/96, but which are not intended for use, offered for sale or used as motor fuel, must be made subject to the taxation regime imposed by those directives.

24 As is stated in the decision making the reference, those questions were raised in proceedings concerning the legality of excise duty on fuel additives paid, under the Hydrocarbon Oil Duties Act 1979, in respect of the period from 19 November 2000 to 31 October 2004.

25 In that regard, it must be recalled that, so far as concerns the period ending on 31 December 2003, the Member States were obliged, under Article 1(1) of Directive 92/81, to impose on 'mineral oils' within the meaning thereof a harmonised excise duty. From 1 January 2004, the Member States were thenceforth obliged, under Article 1 of Directive 2003/96, which repealed Directive 92/81, to tax 'energy products' within the meaning of Directive 2003/96, which is intended to impose, as stated in recitals 2 and 3 of its preamble, minimum levels of taxation at Community level for most of those energy products rather than for mineral oils alone (see, to that effect, Joined Cases C-145/06 and C-146/06 *Fendt Italiana* [2007] ECR I-5869, paragraph 32).

26 Under Article 2(1)(k), read in conjunction with Article 2(4), of Directive 92/81, and Article 2(1)(f), read in conjunction with Article 2(5), of Directive 2003/96, products, such as the fuel additives at issue in the main proceedings, which fall within CN code 3811, are 'mineral oils' or 'energy products', as the case may be, within the meaning of those directives.

27 Under Article 2(2) of Directive 92/81 and the first subparagraph of Article 2(3) of Directive 2003/96, mineral oils and energy products for which, like the fuel additives at issue in the main proceedings, a level of taxation is not laid down, either by Directive 92/82 as regards the former, or by Directive 2003/96 as regards the latter, must, if they are intended for use, offered for sale or used as heating fuel or motor fuel, be taxed according to their use at the rate for the equivalent heating fuel or motor fuel.

28 In this case, it is common ground, as recited in the first and third questions referred by the national court, that the additives at issue in the main proceedings, while they are intended to be added to motor fuels and, consequently, to be used in them, they are not intended for use, offered for sale or used as motor fuel. Accordingly, such additives are not within the charge imposed under Article 2(2) of Directive 92/81 or the first subparagraph of Article 2(3) of Directive 2003/96.

29 However, in the terms of the first sentence of the first subparagraph of Article 2(3) of Directive 92/81 and of the second subparagraph of Article 2(3) of Directive 2003/96, '[i]n addition to the taxable products listed in paragraph 1, any product intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels' is to be taxed at the rate for the equivalent motor fuel.

30 Afton submits that the additives at issue in the main proceedings are not, however, charged to duty under those provisions. According to Afton, it is apparent from their clear wording, in particular from the expression 'in addition to the taxable products listed in paragraph 1', that those provisions are residual and apply only to additional products which are not 'mineral oils' or 'energy products' listed respectively in Article 2(1) of those directives. Those provisions thus cover other products. An alternative interpretation, to the effect that those provisions include products already listed in Article 2(1), ignores the use of the prepositional phrase 'in addition to' and is incorrect because it would have the effect of requiring all products intended to be used as additives to be taxed, although that could have been achieved by a much simpler provision omitting the above introductory expression. Such an interpretation would also mean that those directives twice require mineral oils and energy products intended for use as motor fuel to be taxed. It would, moreover, be consistent with the objective pursued by the Community legislation if mineral oils and energy products were taxed only where they are used as motor fuel or heating fuel.

31 However, in the light of all the terms of the relevant provisions of Directives 92/81 and 2003/96 and of the general scheme and purpose of those directives, that construction cannot be upheld.

32 As regards, first, the wording of those provisions, it must indeed be admitted, as the Commission itself acknowledged at the hearing in reply to the Court's questions, that the wording of Article 2 of Directive 92/81 and Directive 2003/96 could be clearer and more precise, as provisions instituting a taxation regime intended, after transposition into national law, to impose obligations on individuals. In particular, since Article 2(2) of Directive 92/81 and the first subparagraph of Article 2(3) of Directive 2003/96 provide for the taxation of mineral oils and energy products, the taxation of fuel additives which, as in the main proceedings, match those descriptions, should, logically, be covered in those provisions. Yet, as follows from paragraph 28 of the present judgment, that is not the case.

33 However, it is sufficiently clear from the wording of the first sentence of the first subparagraph of Article 2(3) of Directive 92/81 and the second subparagraph of Article 2(3) of Directive 2003/96 that fuel additives such as those at issue in the main proceedings are covered by the taxation regime imposed by those provisions.

34 Indeed, contrary to Afton's submission, the expression '[i]n addition to the taxable products listed in paragraph 1' introducing each of those provisions cannot be understood as excluding from their scope products which are, respectively, 'mineral oils' or 'energy products' within the meaning of Article 2(1) of those directives.

35 On the contrary, the prepositional phrase 'in addition to' is not, in its ordinary meaning, used to exclude but rather, to include. That purpose is clear from a number of the language versions of the first sentence of the first subparagraph of Article 2(3) of Directive 92/81 and the second subparagraph of Article 2(3) of Directive 2003/96 (see, in addition to the English version, for example, the German ('[n]eben'), Spanish ('[a]demás'), Italian ('[o]ltre'), Dutch ('[n]aast'), Portuguese ('[p]ara além') and French ('[o]utre') versions).

36 It follows that, by the expression '[i]n addition to the taxable products listed in paragraph 1', the first sentence of the first subparagraph of Article 2(3) of Directive 92/81 and the second subparagraph of Article 2(3) of Directive 2003/96 are intended to enshrine, explicitly, the inclusion, in the scope of their provisions, of all products which are intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels, including products which are 'mineral oils' or 'energy products' within the meaning of those directives.

37 Such an interpretation based on the wording of Article 2 of those directives cannot be put in doubt by the fact that it leads, as regards mineral oils and energy products intended for use, offered for sale or used as motor fuel, to the repetition of the requirement for taxation already arising from Article 2(2) of Directive 92/81 and the first subparagraph of Article 2(3) of Directive 2003/96. In fact, such partial repetition in the provisions of those directives, regrettable as it may be, is explained by the residual nature of the first sentence of the first subparagraph of Article 2(3) of Directive 92/81 and the second subparagraph of Article 2(3) of Directive 2003/96, which are intended to make products of a different nature subject to the requirement for taxation.

38 So far as concerns, secondly, the general scheme and purpose of Directives 92/81 and 2003/96, they are intended, according to Article 1 thereof, to introduce a harmonised taxation regime for mineral oils and energy products.

39 The exclusion of fuel additives such as those at issue in the main proceedings from the scope of the first sentence of the first subparagraph of Article 2(3) of Directive 92/81 and the second subparagraph of Article 2(3) of Directive 2003/96 would lead to an inconsistent, even absurd, result, according to which those additives, which are mineral oils or energy products, would not be subject to the requirement for taxation imposed by those provisions, whereas it is not disputed that fuel additives which are not mineral oils or energy products are subject to that requirement under those provisions.

40 In actual fact, it is apparent, on the contrary, that the Community legislature intended to assimilate to motor fuels the additives added to them, whatever their nature, simply because they are added to those fuels, in order to make them subject to the same taxation regime as motor fuels.

41 In that regard, it is necessary also to point out, as did the Italian and United Kingdom Governments, that once an additive is added to motor fuel, it is no longer possible, without undertaking a detailed chemical analysis, to distinguish the motor fuel itself from the additive or extender mixed with it. In those circumstances, if, as Afton submits, fuel additives did not have to be taxed as motor fuel, there would be a risk of abuse since checks would, to say the least, be made difficult as, in each individual case, it would be necessary to analyse the content of the mixture in order to ascertain the ratio of motor fuel to additive contained in that mixture.

42 Consequently, it follows from the wording of the first sentence of the first subparagraph of Article 2(3) of Directive 92/81 and the second subparagraph of Article 2(3) of Directive 2003/96 and from the general scheme and purpose of those two directives that, as all the governments which submitted written observations to the Court as well as the Commission argued, those provisions are intended to cover any product used as an additive, whether or not it is a 'mineral oil' or 'energy product' within the meaning of those directives.

43 That conclusion cannot be undetermined by the provisions of Article 8(1)(a) of Directive 92/81 or Article 2(4)(b) of Directive 2003/96, according to which mineral oils and energy products, used for purposes other than as motor fuels or heating fuels, must, respectively, be exempted from the harmonised excise duty or excluded from the scope of Directive 2003/96. Indeed, to apply those provisions to fuel additives, such as those at issue in the main proceedings, which are subject to an express requirement for taxation under the first sentence of the first subparagraph of Article 2(3) of Directive 92/81 and the second subparagraph of Article 2(3) of Directive 2003/96 would deprive those provisions of any useful effect (see, by analogy, Case C-346/97 *Braathens* [1999] ECR I-3419, paragraphs 24 and 25, and Case C-437/01 *Commission* v *Italy* [2003] ECR I-9861, paragraphs 31 to 33).

44 Accordingly, the reply to the first four questions must be that Articles 2(3) and 8(1) of Directive 92/81, as regards the period ending on 31 December 2003, and Article 2(3) and (4) of Directive 2003/96, as regards the period from 1 January to 31 October 2004, are to be interpreted as meaning that fuel additives, such as those at issue in the main proceedings, which are 'mineral oils' within the meaning of Article 2(1) of Directive 92/81 or 'energy products' within the meaning of Article 2(1) of Directive 2003/96, but which are not intended for use, offered for sale or used as motor fuel, must be made subject to the taxation regime imposed by those directives.

45 In the light of that reply, there is no need to reply to the fifth question referred by the national court.

Costs

46 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 2(3) and Article 8(1) 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, as regards the period ending on 31 December 2003, and Article 2(3) and (4) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, as regards the period from 1 January to 31 October 2004, are to be interpreted as meaning that fuel additives, such as those at issue in the main proceedings, which are 'mineral oils' within the meaning of Article 2(1) of Directive 92/81 or 'energy products' within the meaning of Article 2(1) of Directive 2003/96, but which are not intended for use, offered for sale or used as motor fuel, must be made subject to the taxation regime imposed by those directives.

[Signatures]