JUDGMENT OF THE COURT (First Chamber)

1 April 2004 *

In Case C-389/02,

REFERENCE to the Court under Article 234 EC by the Finanzgericht Hamburg (Germany) for a preliminary ruling in the proceedings pending before that court between

Deutsche See-Bestattungs-Genossenschaft eG,

and

Hauptzollamt Kiel,

on the interpretation of 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 (OJ 1992 L 316, p. 12),

* Language of the case: German.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Rosas, A. La Pergola, R. Silva de Lapuerta (Rapporteur) and K. Lenaerts, Judges,

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Deutsche See-Bestattungs-Genossenschaft eG, by M. Take, Rechtsanwalt,

— the Commission of the European Communities, by K. Gross, acting as Agent,

having regard to the Report of the Judge-Rapporteur,

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

gives the following

Judgment

1 By order of 16 October 2002, received at the Court on 5 November 2002, the Finanzgericht Hamburg referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of 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 (OJ 1992 L 316, p. 12).

2 That question was raised in proceedings between Deutsche See- Bestattungs-Genossenschaft eG ('Deutsche See') and Hauptzollamt Kiel regarding the excise duties applicable to mineral oils.

Relevant provisions

Community legislation

3 Article 8(1) of Directive 92/81 provides:

'In addition to the general provisions set out in Directive 92/12/EEC 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.'

National legislation

4 In Germany, the national provisions on the exempt use of mineral oils are to be found in the Mineralölsteuergesetz (law on mineral oils tax) of 21 December 1992 (BGBl. 1992 I, p. 2150 and 2185; 'MinöStG') and in the Mineralölsteuer-Durchführungsverordnung (Regulation on the implementation of the law on mineral oils tax) of 15 September 1993 (BGBl. 1993 I, p. 1602; 'MinöStV').

5 Paragraph 4(1)(4) of the MinöStG provides that, subject to Paragraph 12 of the MinöStG, mineral oils may be used on a tax-exempt basis as motor or heating fuel on vessels deployed exclusively for commercial navigation and associated ancillary activities such as pilotage, towing and other services, and for work purposes and on warships and public authority boats, sea rescue boats and dedicated fishing boats.

6 The term 'commercial navigation' has been interpreted by the Bundesfinanzhof (Germany) in settled case-law to refer only to navigation relating to the carriage of persons and goods by sea. Navigation therefore only constitutes commercial navigation within the meaning of Paragraph 4(1)(4) of the MinöStG if the navigation itself is the purpose of the commercial activity.

7 Thus, on the basis of the statutory power conferred by Paragraph 31(2)(5) of the MinöStG, the legislature excluded, in Paragraph 17(5) of the MinöStV, certain types of vessels from the definition of 'ship or boat' within the meaning of Paragraph 4(1)(4) of the MinöStG. Paragraph 17(5)(1) of the MinöStV provides, inter alia, that boats belonging to firms of undertakers and funeral directors and those used for similar purposes are not ships or boats within the meaning of Paragraph 4(1)(4) of the MinöStG, with the result that the fuel used to power and heat them cannot benefit from the tax exemption for mineral oils.

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

8 Deutsche See is a firm of undertakers and funeral directors. To perform burials on the high seas, it uses three vessels converted for that purpose, MS Mira, MS Aries and MS Pollux. By letter of 1 August 2000, it applied to the Hauptzollamt Kiel for permission to use mineral oils exempt from excise duties on its vessels.

9 The Hauptzollamt Kiel refused that application by decision of 21 August 2000, stating that, under Paragraph 17(5)(1) of the MinöStV, firms of undertakers and funeral directors do not enjoy the exemption from excise duties on mineral oils used as fuel on vessels.

10 Appealing against that decision, Deutsche See claims that by precluding firms of undertakers and funeral directors who perform burials at sea from the tax exemption for mineral oils, Paragraph 17(5) of the MinöStV is incompatible with Article 8(1)(c) of Directive 92/81. It noted that the directive only excludes from the exemption the use of mineral oils for the purposes of navigation in private pleasure craft. A firm of undertakers and funeral directors like Deutsche See, however, does not come within the meaning of navigation in private pleasure craft, since its vessels deployed to perform sea burials are used for commercial purposes, namely the carriage of passengers and the supply of services for consideration.

11 The Hauptzollamt Kiel dismissed that appeal by decision of 26 September 2000 on the grounds that Article 4(1)(4) of the MinöStV exempts only fuels used on vessels deployed in commercial navigation. An exemption could not be granted in this case, since Deutsche See's objects are not the commercial carriage of persons or goods, but the performance of burials at sea.

12 On 12 October 2000, Deutsche See brought an action against that decision before the Finanzgericht Hamburg, requesting, first, that the court set aside the decision of 26 September 2000 and the decision of 21 August 2000, and, second, that it order the Hauptzollamt Kiel to grant it permission to use mineral oils on its vessels on a tax-exempt basis.

13 According to the Finanzgericht Hamburg, in view of the provisions of national law, Deutsche See cannot enjoy the tax exemption for mineral oils used on the vessels which it deploys to carry out burials at sea. However, appraisal of the case in the light of Directive 92/81 would not provide a clear result given that the Community legislature did not define the term 'navigation within Community waters'. The second paragraph of Article 8(1)(c) of the directive contains only a definition of the term 'private pleasure craft'.

14 Having regard to the definition of 'private pleasure craft' in the second paragraph of Article 8(1)(c) of Directive 92/81, the Finanzgericht Hamburg takes the view that the term 'navigation within Community waters' in the first paragraph of that provision is broader than the term 'commercial navigation' in Article 4(1)(4) of the MinöStG, as interpreted in the case-law of the Bundesfinanzhof.

15 The Finanzgericht Hamburg point outs that the burials at sea organised by Deutsche See manifestly constitute supplies of services for consideration, and the ships it deploys for that purpose are clearly used for commercial purposes. Those ships therefore come within the scope of 'navigation within Community waters' within the meaning of Article 8(1)(c) of Directive 92/81.

16 It was in those circumstances that the Finanzgericht Hamburg decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Should trips on board vessels within Community waters for purposes other than pleasure be included in the term "navigation" within the meaning of the first paragraph of Article 8(1)(c) of Directive 92/81?'

The question referred for a preliminary ruling

17 In order to answer the question referred to the Court, it should be pointed out that it appears from the third and fifth recitals in the preamble to Directive 92/81 that the directive is intended to determine 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 Community level.

18 It is also apparent both from those recitals and from the title of Directive 92/81 that those common definitions and the exemptions laid down are intended to promote the proper functioning of the internal market and to set up a harmonised system in respect of the structures of excise duties on mineral oils at Community level.

19 Consequently, the definitions relating to the products governed by Directive 92/81 and the exemptions applicable to them should be interpreted independently on the basis of the wording of the provisions in question and on the purpose of the directive.

20 An independent interpretation of those exemptions is all the more essential because, as the Court held in Case C-346/97 *Braathens* [1999] ECR I-3419, paragraph 31, Article 8(1) of Directive 92/81 imposes on the Member States the obligation not to levy the harmonised excise duty on mineral oils supplied for use as fuel for a number of activities set out in that provision.

21 Any divergent interpretation at national level of those exemption obligations would not only undermine the objectives of the Community legislation and legal certainty, but could introduce unequal treatment between the economic operators concerned.

22 It is apparent from the first paragraph of Article 8(1)(c) that 'mineral oils supplied for use as fuel for the purposes of navigation within Community waters' are exempt from the harmonised excise duty. That provision provides for a sole exception, stating that the exemption does not apply to mineral oils used for the purposes of navigation 'in private pleasure craft'. The second paragraph of that provision defines the term 'private pleasure craft' as craft used 'for other than commercial purposes'.

23 It therefore follows that all navigation activity for commercial purposes comes within the scope of the exemption from the harmonised excise duty provided for in the first paragraph of Article 8(1)(c) of Directive 92/81.

24 Moreover, that interpretation is borne out by the wish of the Community legislature to define with care the meaning of private pleasure craft in the second paragraph of Article 8(1)(c) of Directive 92/81 and to make clear at the same time the scope of that term in relation to the use of vessels for the supply of services for consideration.

25 It should be noted in this respect that Article 8(1)(c) of the directive does not make any distinction as to the purpose of the navigation referred to. The distortions of

competition which the provisions of the directive are intended to avoid can arise whatever the type of commercial navigation at issue.

26 It is important to add that, if, in addition to navigation in private pleasure craft, the Community legislature had not intended certain types of commercial navigation to enjoy the exemption, it would have been necessary to set out such a limitation expressly in the first paragraph of Article 8(1)(c) of Directive 92/81.

27 Having regard to those points, it should be noted that the parenthesis 'including fishing' in that paragraph must be considered to be a simple clarification concerning the purpose of the exemption laid down for commercial navigation.

28 As regards the case in the main proceedings, it is not disputed that the navigation activity carried out by Deutsche See constitutes a supply of services for consideration. Because of its commercial nature, that navigation activity does not fall within the exception laid down for private pleasure craft with the result that it is covered by the exemption.

29 In those circumstances, the answer to the question referred must therefore be that Article 8(1)(c) of Directive 92/81 should be interpreted to mean that the term 'navigation within Community waters (including fishing), other than in private pleasure craft' includes all forms of navigation, irrespective of the purpose of the voyage, when it is made for commercial purposes.

Costs

30 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (First Chamber),

in answer to the question referred to it by the Finanzgericht Hamburg by order of 16 October 2002, 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 should be interpreted to mean that the term 'navigation within Community waters (including fishing), other than in private pleasure craft' includes all forms of navigation, irrespective of the purpose of the voyage, when that voyage is made for commercial purposes.

Jann Rosas La Pergola

Silva de Lapuerta Lenaerts

Delivered in open court in Luxembourg on 1 April 2004.

R. Grass

Registrar

P. Jann

President of the First Chamber