Case C-100/20

Request for a preliminary ruling

Date lodged:

26 February 2020

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

19 November 2019

Applicant and appellant in the appeal on a point of law:

XY

Defendant and respondent in the appeal on a point of law:

Hauptzollamt B

[…]

BUNDESFINANZHOF (FEDERAL FINANCE COURT)

ORDER

In the case of

XY

applicant and appellant in the appeal on a point of law

represented by:

A

v

Hauptzollamt B

defendant and respondent in the appeal on a point of law

concerning electricity tax — interest on sums reimbursed

the Seventh Chamber

made the following order at the sitting of 19 November 2019:

O p e r a t i v e P a r t

1. The following question is referred to the Court of Justice of the European Union for a preliminary ruling: **[Or. 2]**

Is interest payable under EU law in respect of an entitlement to a refund of incorrectly assessed electricity tax if the assessment of the electricity tax in a lower amount was based on the optional tax reduction pursuant to Article 17(1)(a) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (Directive 2003/96) and the tax assessment in too high an amount was based solely on an error in the application of the national provision adopted to transpose Article 17(1)(a) of Directive 2003/96?

2. […].

G r o u n d s

I.

1 The applicant and appellant in the appeal on a point of law (the applicant), a company in manufacturing industry, drew untaxed alternating current from the supply network and fed it into batteries. In its electricity tax declaration for 2010, it declared this quantity of electricity as ‘own consumption’ and selected the reduced tax rate pursuant to Paragraph 9(3) of the Stromsteuergesetz (Law on electricity tax), as amended on 19 December 2008 (‘the StromStG’; *Bundesgesetzblatt* I 2008, 2794). However, the defendant and respondent in the appeal on a point of law (the Hauptzollamt (Principal Customs Office); ‘the HZA’) taxed this quantity of electricity at the standard tax rate and issued an electricity tax assessment which differed from the tax declaration. The applicant filed an objection to this. The applicant made monthly advance payments on the electricity tax for 2010.

2 After it was found, in court proceedings concerning the year 2006, that the reduced tax rate pursuant to Paragraph 9(3) of the StromStG was applicable, the HZA also changed the electricity tax assessment for 2010 and likewise taxed the quantity of electricity fed into the batteries in 2010 at the reduced rate.

3 In December 2014, the applicant requested that interest be determined with regard to the refunded electricity tax for the 2010 calendar year, but the HZA refused the request.

4 The Finanzgericht (Finance Court) ruled that the applicant was not entitled to the requested interest under either national law or EU law. Interest was not payable on the refunded electricity tax under EU law because the consumption of electricity for the purpose of charging batteries did not fall within the scope of Council Directive 2003/96/EC **[Or. 3]** 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 amending Directive 2003/96/EC as regards the possibility [for Cyprus] to apply, in respect of energy products and electricity, temporary exemptions or reductions in the levels of taxation (OJ 2004 L 157, p. 100)). The Finance Court stated that, aside from this, the applicant was wrongly denied a tax reduction, which was merely optional under EU law and for which EU law did not lay down any mandatory requirements.

5 The applicant filed an appeal on a point of law against that judgment. It takes the view that, according to the case-law of the Court of Justice of the European Union ('the Court of Justice'), it is necessary not only to refund tax charged contrary to EU law, but also to compensate for any lost interest, and this is also the case when applying optional tax reductions. Aside from that, the charging of a battery is a reversible process which is not comparable to an electrolytic manufacturing process as required in the third indent of Article 2(4)(b) of Directive 2003/96 and point 1 of Paragraph 9a(1) of the StromStG.

II.

6 The Chamber has stayed the appeal on a point of law before it […] and refers the following question to the Court of Justice for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union:

7 Is interest payable under EU law in respect of an entitlement to a refund of incorrectly assessed electricity tax if the assessment of the electricity tax in a lower amount was based on the optional tax reduction pursuant to Article 17(1)(a) of Directive 2003/96 and the tax assessment in too high an amount was based solely on an error in the application of the national provision adopted to transpose Article 17(1)(a) of Directive 2003/96?

III.

8 The Chamber takes the view that the resolution of the dispute hinges on the provisions of Directive 2003/96. There are doubts surrounding the interpretation of this directive, which are material to the decision in the case.

9 Applicable EU law:

Article 2 of Directive 2003/96: **[Or. 4]**

1. …

2. This Directive shall also apply to:

Electricity falling within CN code 2716.

3. …

4. This Directive shall not apply to:

(a) …

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

– …

– …

– electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes,

…

10 Article 17 of Directive 2003/96:

1. Provided the minimum levels of taxation prescribed in this Directive are respected on average for each business, Member States may apply tax reductions on the consumption of energy products used for heating purposes or for the purposes of Article 8(2)(b) and (c) and on electricity in the following cases:

(a) in favour of energy-intensive business …

2. Notwithstanding Article 4(1), Member States may apply a level of taxation down to zero to energy products and electricity as defined in Article 2, when used by energy-intensive businesses as defined in paragraph 1 of this Article.

3. Notwithstanding Article 4(1), Member States may apply a level of taxation down to 50% of the minimum levels in this Directive to energy products and electricity as defined in Article 2, when used by business entities as defined in Article 11, which are not energy-intensive as defined in paragraph 1 of this Article.

11 Article 1 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2008 L 9, p. 12):

1. This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter ‘excise goods’):

(a) energy products and electricity covered by Directive 2003/96/EC;

(…) **[Or. 5]**

12 Applicable national law:

Paragraph 3 of the StromStG — Tax rate:

The tax rate shall be EUR 20.50 per megawatt-hour.

Paragraph 9 of the StromStG — Tax exemptions, tax reductions:

(1) to (2a) …

(3) Electricity shall be subject … to a reduced tax rate of EUR 12.30 per megawatt-hour if it is drawn by undertakings in the manufacturing sector or by undertakings in agriculture and forestry for operational purposes and is not exempt from taxation under subparagraph (1).

(4) to (8) …

IV.

13 There is uncertainty as to the legal appraisal of the case under EU law. The key question is whether under the case-law of the Court of Justice interest is payable in respect of an entitlement to a refund of electricity tax if a Member State bases that entitlement on the application of an optional tax reduction.

14 1. In the case in dispute (concerning the year 2010), the electricity tax arose when the alternating current was drawn from the supply network, because the electricity in the batteries was converted into chemical energy and therefore consumed. This electricity consumption is subject to a reduced tax rate of EUR 12.30 per megawatt-hour pursuant to Paragraph 9(3) of the StromStG and not the standard tax rate of EUR 20.50 per megawatt-hour pursuant to Paragraph 3 of the StromStG. This is because the present case concerns the drawing of electricity by an undertaking in the manufacturing sector for operational purposes. This was established in respect of the drawing of electricity by final court decision in 2006.

15 In the case in dispute, the entitlement to reimbursement of overpaid electricity tax results from the fact that the HZA had initially wrongly applied the standard tax rate to the amount of electricity consumed and therefore infringed the national provision of Paragraph 9(3) of the StromStG, which grants preferential tax treatment to undertakings in the manufacturing sector.

16 2. However, the application of a reduced tax rate pursuant to Paragraph 9(3) of the StromStG for electricity drawn from the supply network by an undertaking in the manufacturing sector for operational purposes is also based on Article 17(1)(a) of Directive 2003/96, as that provision simply provides Member States with the possibility **[Or. 6]** of granting a tax reduction to energy-intensive businesses. The referring court therefore wonders whether, in initially assessing the applicant to an

excessive amount of tax, the HZA infringed not only national law but also EU law. In that connection, the Chamber assumes that the feeding of electricity into batteries does not constitute electrolysis within the meaning of the third indent of Article 2(4)(b) of Directive 2003/96, to which that directive would not be applicable from the outset. This is confirmed by Council Implementing Decision (EU) 2016/2266 of 6 December 2016 authorising the Netherlands to apply a reduced rate of taxation to electricity supplied to charging stations for electric vehicles (OJ 2016 L 342, p. 30). This decision would not have been necessary were the charging of batteries to be regarded as electrolysis and therefore not covered by Directive 2003/96 in any event.

17 By judgment of 18 January 2017, *1RCCS — Fondazione Santa Lucia*, C-189/15 (EU:C:2017:17) […], the Court of Justice ruled, in relation to the scope of Article 17(1)(a) of Directive 2003/96, that it was apparent from recitals 9 and 11 of that directive that the directive sought to give Member States the flexibility necessary to define and implement policies appropriate to their national circumstances and the arrangements made in connection with the implementation of that directive were a matter for each Member State to decide. It stated that it followed therefrom that the Member States remained free to restrict the benefit of tax reductions for energy-intensive businesses to those in one or more industrial sectors.

18 The referring Chamber takes the view that, when transposing Article 17(1)(a) of Directive 2003/96, the Member States have a margin of discretion not only with regard to the definition of the range of undertakings which can benefit from the directive, but also with regard to the level of the tax rate, provided that it does not go below any minimum limits laid down by EU law. This is the only way in which the objectives of the legislature that are referred to in the aforementioned recitals can be fulfilled.

19 Accordingly, Article 17(1)(a) of Directive 2003/96 provides for an optional tax reduction which Member States can grant to tax payers. There is therefore no obligation to grant preferential tax treatment to energy-intensive businesses. In this respect, Article 17 of Directive 2003/96 differs from the mandatory tax exemptions under Article 14 of Directive 2003/96, which must be granted by the Member States and on which taxpayers can rely directly if they are not transposed **[Or. 7]** into national law within the prescribed period (judgment of the Court of Justice of 7 March 2018, *Cristal Union*, C-31/17, EU:C:2018:168 […]).

20 3. This raises the question of whether interest is payable on an entitlement to a refund of electricity tax which is based on a (merely) optional tax reduction (Article 17(1)(a) of Directive 2003/96 in this case) in the same way as an entitlement to a refund of electricity tax based on a mandatory tax exemption or reduction.

21 a) According to the case-law of the Court of Justice, where a Member State has levied charges in breach of the rules of EU law, individuals are entitled to

reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it which relate directly to that tax. That also includes losses constituted by the unavailability of sums of money as a result of a tax being levied prematurely (judgments of the Court of Justice of 19 July 2012, *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478, paragraph 25 […]; of 27 September 2012, *Zuckerfabrik Jülich*, C-113/10, C-147/10 and C-234/10, EU:C:2012:591, paragraph 65 […]; of 18 April 2013, *Irimie*, C-565/11, EU:C:2013:250, paragraph 21 […]; of 15 October 2014, *Nicula*, C-331/13, EU:C:2014:2285, paragraph 28; and of 18 January 2017, *Wortmann*, C-365/15, EU:C;2017:19, paragraph 37 et seq. […]).

22 Accordingly, the principle that the Member States are obliged to repay with interest charges levied in breach of EU law follows from EU law. In this respect, in the absence of EU legislation, it is for the internal legal order of the Member States to lay down the conditions in which such interest must be paid, particularly the rate of that interest and its method of calculation. Those conditions must comply with the principles of equivalence and effectiveness; that is to say that they must not be less favourable than those concerning similar claims based on provisions of national law or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible (judgments of the Court of Justice in *Littlewoods Retail and Others*, EU:C:2012:478, […] paragraphs 26 and 27; *Zuckerfabrik Jülich*, EU:C:2012:591, paragraphs 61 and 66 […]; *Irimie*, EU:C:2013:250, paragraphs 22 and 23 […]; *Nicula*, EU:C:2014:2285, paragraph 28; and of 6 October 2015, *Tarsia*, C-69/14, EU:C:2015:662, paragraph 25 […]). **[Or. 8]**

23 The mere fact that Directive 2003/96 is a legal act of the European Union which first had to be transposed into national law does not preclude interest from being payable on the refunded electricity tax. The reason for this is that, by the judgment in *Littlewoods Retail and Others* (EU:C:2012:478, […] paragraphs 26 and 27), the Court of Justice specifically did not regard this as a ground for ruling out an entitlement to interest (in respect of entitlement to the payment of default interest on overpaid VAT, see also judgment of the Court of Justice of 24 October 2013, *Rafinăria Steaua Română*, C-431/12, EU:C:2013:686 […]).

24 b) The referring court is inclined to take the view that there is no infringement of the provisions of EU law in cases where the entitlement to a tax refund arises as a result of the incorrect application of national law which has been adopted by a Member State making use of a discretion under EU law and of an optional provision of EU law.

25 It is clear from the case-law of the Court of Justice that the scope of the Member States' discretion in the transposition into national law of a particular exception or limitation must be determined on a case-by-case basis, in particular, according to the wording of that provision (see judgment of the Court of Justice of 29 July 2019, *Spiegel Online*, C-516/17, EU:C:2019:625, paragraph 25 […]).

26 However, Article 17(1)(a) of Directive 2003/96 only sets out requirements in relation to the definition of energy-intensive businesses. Whether provision is to be made at all for a reduced rate of taxation for energy-intensive businesses is left to the Member States, however. In addition, the dispute does not concern the question of whether Article 17(1)(a) of Directive 2003/96/EC has been transposed into national law in accordance with the directive. Rather, the HZA originally set the electricity tax too high in the case in dispute because it had wrongly concluded that the conditions for granting the reduced tax rate under Paragraph 9(3) of the StromStG had not been met.

27 In addition, the authorisation of a reduced rate of taxation under Article 17(1)(a) of Directive 2003/96 for energy-intensive businesses makes an exception to the harmonisation of the electricity tax by leaving Member States free to decide whether and to what extent they wish to authorise such preferential treatment in their national rules. The EU legislature therefore considers the proper functioning of the internal market, which is to be achieved inter alia by the introduction of binding minimum levels of taxation in Directive 2003/96 (see, for example, judgment of the Court of Justice of 2 June 2016, *ROZ-ŚWIT*, C-418/14, EU:C:2016:400, paragraph 32, […] with regard to laying down **[Or. 9]** minimum levels of taxation and with reference to recitals 3 and 4 of Directive 2003/96), to be of less importance in this area.

28 Aside from these considerations from the perspective of EU law, the excessive tax assessment in the case in dispute was based not on a late transposition of EU law, but on an incorrect application of national law which had been adopted in the exercise of discretion granted under EU law.

29 c) However, there are also arguments that militate in favour of granting an entitlement to interest in the case in dispute.

30 First, the Member States' discretion in respect of preferential tax treatment for energy-intensive businesses was provided by Article 17(1)(a) of Directive 2003/96. The basis for the reduced electricity tax rate therefore resides not only in Paragraph 9(3) of the StromStG, but ultimately also in EU law.

31 As follows, moreover, from Article 2(2) of Directive 2003/96 and Article 1(1)(a) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (Directive 2008/118), the taxation of electricity within the territory of the Community within the meaning of Article 5 of Directive 2008/118 has in principle been harmonised. If interest were not payable on entitlements to a refund based on optional tax reductions as opposed to those arising from mandatory tax reductions or exemptions, there would be unequal treatment. The question arises, however, as to whether different legal bases in EU law justify unequal treatment as regards interest on entitlements to a refund, especially given that this does not make any difference to the taxpayer. In both cases, the overpaid amount of tax is not available to him.

32 In addition, if it were found that, under EU law, there is no entitlement to interest in respect of entitlements to a refund based on optional tax reductions, this would have the result that interest could then only be granted in accordance with the different national rules.