

Case C-571/21

Request for a preliminary ruling

Date lodged:

16 September 2021

Referring court:

Finanzgericht Düsseldorf (Germany)

Date of the decision to refer:

6 September 2021

Applicant:

RWE Power Aktiengesellschaft

Defendant:

Hauptzollamt Duisburg (Germany)

[...]

Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany)

O R D E R

In the case of

RWE Power Aktiengesellschaft [...]

[...] Essen,

- Applicant -

[...]

v Hauptzollamt Duisburg (Principal Customs Office,
Duisburg, Germany) [...]

- Defendant -

concerning

electricity tax

the 4th Chamber [...]

[...]

made the following order on 6 September 2021:

The proceedings are stayed and the following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Having regard to the second sentence of Article 21(3) 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), can the first sentence of Article 14(1)(a) of Directive 2003/96, in so far as it provides that electricity used to produce electricity is to be exempt from taxation, be interpreted as meaning that that exemption also covers operations in which energy products are extracted in opencast mines and made more suitable for use in power stations, such as the operations of breaking the products down, separating foreign matter from them and crushing them down to the size operationally required by the boiler?

2. Having regard to the third sentence of Article 21(3) of Directive 2003/96, can the first sentence of Article 14(1)(a) of Directive 2003/96, in so far as it provides that electricity used to maintain the ability to produce electricity is to be exempt from taxation, be interpreted as meaning that the use of electricity to operate bunker installations and means of transport necessary for the permanent operation of power stations must also be exempt from taxation under that provision?

[...]

G r o u n d s:

- 1 The applicant operated three opencast mines situated physically apart from one another in, inter alia, the Rhenish lignite mining area, from which it extracted lignite primarily for the production of electricity in its power plants and, to a lesser extent (approximately 10%), for the production of pulverised lignite and briquettes in its three factories. In 2004, it extracted a total of 2 847 925.939 MWh of electricity from the opencast mines, which it used primarily as follows:
 - (1) in water pumps used to lower the groundwater level,
 - (2) in large equipment such as bucket-wheel excavators, which mined raw lignite and overburden, and spreaders, which backfilled the opencast mine with overburden in another part of the mine,
 - (3) for lighting the opencast mine, and
 - (4) for transporting the raw lignite on electrically operated freight trains on the companies own lines and via electrically operated conveyor systems that conveyed both raw lignite and overburden.

- 2 The operation of the applicant's power plants was designed for uninterrupted electricity production, with regard to five power plants intended for baseload electricity provision. By contrast, the electricity generation in the factories operated by it essentially served their own production, but was also intended to ensure permanent operation. In order to ensure uninterrupted electricity production, the applicant operated bunkers for the lignite in three different sizes, each serving a different function, from which the coal was gradually fed to the boilers in the power stations. In each opencast mine, the lignite was first stored in an opencast mining bunker with a capacity allowing for up to six days' operation, from where it was transported to the power station bunkers via a conveyor system or via the company's own railway, which were moved by electric locomotives, on extra-wide lines designed for particularly heavy trains. Those bunkers had a capacity allowing operation for one to two days and served to enable the power plant concerned to produce electricity using all its blocks (boilers) over a weekend. From there, electrically operated coal excavators loaded the coal onto a bunker belt. After a process for separating metal from the extracted material, and after passing through a downstream belt weigher, the raw lignite entered coal crushing facilities. Wood particles were then removed from the crushed lignite and the coal was fed into the boiler bunkers via further belts.

- 3 The boilers operated by the applicant in the power plants in 2004 required lignite that had been prepared in different ways:

- 4 One factory still had three grate-fired boilers in which the lignite was fed onto the grate in lumps and burned on it. For those boilers, the coal did not have to be dewatered by applying heat.
- 5 One power plant and the other two factories had fluidised-bed-fired boilers. Those boilers produced a fluidised bed consisting of burning coal and air. The resulting heat caused ash and the first parts of the coal to rise and be separated by cyclones. As fuel, those boilers required lignite in pieces of up to 40 mm in diameter, which were fed into the boiler from the boiler bunker together with recirculated hot flue gas. The addition of flue gas during that feed-in process caused water to escape from the lignite into the flue gas, but therefore also into the boiler.
- 6 Moreover, the applicant used mill-fired boilers, which were operated with pulverised lignite. Each boiler had a boiler bunker with a capacity for six to eight hours of operation. From those bunkers, the lignite and recirculated flue gas were fed to beater wheel mills, which consisted, in essence, of a large blower with a crushing function. The beater wheel mills produced such small coal particles, together with pressure, that the coal particles could be introduced into the boiler at certain points and then burnt in open flames between the entry points. Here, too, the addition of hot flue gas when feeding the lignite into the beater wheel mill caused the lignite to release water into the accompanying flue gas, which at the same time ensured inertisation during the addition process until the lignite entered the boiler.
- 7 The heat from the boilers was then used to generate steam, which was fed to steam turbines to produce electricity.
- 8 By order of the defendant, an on-site inspection of the applicant in respect of, inter alia, electricity tax for the years 2003 and 2004 began on 16 December 2004, the results of which were summarised in the audit report of 20 May 2009. During the on-site inspection of electricity tax, the applicant took the view that the consumption of electricity for the purpose of converting lignite into electricity, accounting for approximately 90% of the electricity used, was exempt from tax on the ground that it served to produce electricity pursuant to Paragraph 9(1), point 2, of the Stromsteuergesetz (Law on electricity tax; ‘theStromStG’). Its electricity tax declaration for EUR 31 526 540.15 (90% of EUR 35 029 489.05 or 2 847 925.939 MWh) was therefore submitted subject to reservations. According to the applicant, the raw lignite is already to be regarded as fuel, with the result that the consumption of electricity for the purposes of extraction and transport in the opencast mine must be exempt from tax under Paragraph 9(1), point 2, of the StromStG. The preparation of lignite by crushing it into pulverised lignite in the coal mills of the power plants is a harmless optimisation process.
- 9 The inspection officials, on the other hand, deemed the preparation of lignite to be production of a fuel, with the result that the tax had been levied correctly. In addition, all electricity consumption serving to extract and transport raw lignite is taxable, with the further consequence that the corresponding uses within the

power plant premises by means of coal excavators, coal belts and coal mills are also taxable.

- 10 By tax assessment notice of 8 October 2009, the defendant followed the findings of the on-site inspection, established refunds in respect of a number of circumstances not of relevance in the present case and requested, on the basis of other findings, that the applicant pay the electricity tax which, in the defendant's view, had been incurred.
- 11 In its decision of 26 October 2018 on the objection lodged by the applicant against that tax assessment notice, the defendant rejected the objection as unfounded with regard to, inter alia, the use of electricity in the plants for the further processing of the raw lignite extracted in the opencast mine, for the operation of the plants for the further treatment of the raw lignite in the factories and for the operation of the plants in the opencast mine for the extraction of the raw lignite, the transportation of the overburden and the transportation of the coal into the coal bunkers of the power plants and factories for subsequent further treatment.
- 12 In support of its action, the applicant submits the following: in line with the intentions of the EU legislature, all electricity necessary for the input of the electricity production process should be covered by the tax exemption. By interpreting Paragraph 12(1), point 1, of the Verordnung zur Durchführung des Stromsteuergesetzes (Regulation implementing the Law on electricity tax; 'the StromStV') in conformity with the directive, all ancillary and auxiliary systems without which an electricity production plant cannot be operated are in principle to be included in the preferential treatment. In accordance with the case-law of the Bundesfinanzhof (Federal Finance Court), this also includes the facilities without which an electricity production plant cannot be operated at all in accordance with the rules or requirements under commercial law, environmental law, water law or employment law.

Those conditions were met by all the forms of consumption at issue, because the operation of a lignite-fired power plant is a single process, from the extraction of the coal through to the disposal of waste products, which are an inevitable part of the process. The opencast mine and the lignite-fired power plant form a permanent economic and technical electricity production unit which cannot be artificially broken down into individual and independent operations. On the contrary, the electricity consumption in the opencast mine is vitally necessary to ensure uninterrupted electricity production. The production of electricity from lignite is economically feasible only if it is carried out in close proximity to the opencast lignite mine and the power plant.

- 13 The applicant, in essence, requests inter alia that:

the tax assessment notice of 8 June 2009 as confirmed by the objection decision of 26 October 2018 be annulled in so far as the applicant itself drew electricity for use in the following areas:

(1) 90% of the electricity: for water pumps used to lower the groundwater level, for operating large equipment such as bucket-wheel excavators and spreaders, for lighting the opencast mine and for transporting the raw lignite to the power stations; and

(2) electricity for transporting raw lignite in the power plants, and preparing it, by means of coal excavators, coal belts and coal mills.

The defendant requests that

the action be dismissed.

- 14 The defendant submits that, in accordance with Article 14(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), electricity is exempt from electricity tax under Paragraph 9(1), point 2, of the StromStG if it is extracted for the purpose of producing electricity. In accordance with Paragraph 12(1), point 1, of the StromStV, such exempt electricity is that which is consumed in the ancillary and auxiliary systems of an electricity production unit for the purpose of producing electricity in the technical sense. Such systems must be directly connected with, or necessary for, the production of electricity, such as fuel supply. This applies only to the introduction of the fuel from the coal mill into the burner of the boiler. Electricity that is used only indirectly in certain systems by means of which raw lignite is further processed, in particular by crushing, grinding and drying, is not exempt.

When electricity is consumed in opencast mining for the purpose of extracting and transporting coal and handling overburden, raw lignite is extracted and made available to the power plants via transport facilities, but no electricity is produced from a technical perspective.

Lignite is exempt from tax only when it is used to produce electricity. In so far as coal is exempt from energy tax, there can be no exemption from electricity tax (Article 21(3) of Directive 2003/96).

II.

- 15 The following national provisions were adopted in order to define electricity which is used to produce electricity:

- 16 Paragraph 9(1) of the StromStG:

The following shall be exempt from tax: [...]

2. electricity which is consumed in order to produce electricity; ...

- 17 Paragraph 11 of the StromStG:

In order to implement the Law, the Federal Ministry of Finance is authorised to do the following, by ordinance ...

8. for the purpose of ensuring the uniformity of the tax system, simplifying procedures and avoiding unreasonable economic burdens, to enact provisions relating to Paragraph 9, and, in particular, to

a) define more precisely the conditions for the tax-exempt consumption of electricity, including the concepts ...

- 18 Paragraph 12(1) of the Verordnung zur Durchführung des Stromsteuergesetzes (Regulation implementing the electricity tax; ‘the StromStV’):

Electricity is consumed in order to produce electricity within the meaning of Paragraph 9(1), point 2, of the Law where it is used

1. in the ancillary and auxiliary systems of an electricity production unit, in particular for the purposes of water treatment, steam generator water supply, fresh air supply, fuel supply or flue gas purification, ...

to produce electricity in the technical sense.

- 19 As regards EU law, the present case concerns the interpretation of Article 1, Article 2(1)(b), Article 14(1)(a), first sentence, and Article 21(3) of Directive 2003/96.

III.

On the questions referred:

Question 1

- 20 The present dispute concerns the scope of the mandatory tax exemption for electricity under Article 14(1)(a), first sentence, of Directive 2003/96. Germany did not make use of the option of taxation under Article 14(1)(a), second sentence, of Directive 2003/96.
- 21 Although the German-language version of the provision, which uses the wording ‘bei der Stromerzeugung ... verwendeter elektrischer Strom’ (‘electricity used to produce electricity’ in the English-language version), does not make it absolutely clear that the electricity to be exempted must be used with the aim of electricity production that would otherwise be taxable, this can be assumed on the basis of other language versions. Reference is made to the English, French and Dutch language versions in that regard. Paragraph 9(1), point 2, of the StromStG is also based on such an interpretation of Article 14(1)(a), first sentence, of Directive 2003/96.

- 22 Such causality would exist in respect of all the electricity used by the applicant, from extraction of the lignite through its preparation to its use in the power plants, and the subsequent disposal of the ashes, including transport.
- 23 In so far as the applicant attributes those activities to the production in its factories of briquettes and pulverised lignite for industrial customers, it does not claim tax exemption.
- 24 However, such broadly assumed causality may be precluded by the purpose of Article 14(1)(a), first sentence, of Directive 2003/96. That provision is aimed at avoiding double taxation (see, most recently, CJEU, judgment of 27 June 2018, C-90/17, paragraph 35). Moreover, as an exemption from tax liability that exists in principle, that provision cannot be interpreted broadly without depriving the harmonised taxation established by Directive 2003/96 of all practical effect (see CJEU, judgment of 7 March 2018, C-31/17, paragraph 25).
- 25 Therefore, electricity which is used to produce the energy product itself should be excluded from tax exemption, because such electricity is used to produce that product and only indirectly to produce electricity. In that respect, given that lignite is an energy product even in its raw state (Article 2(1)(b) of Directive 2003/96, Explanatory Notes to the Combined Nomenclature to heading 2702, point 01.0), the electricity used by the applicant to extract the raw lignite would have to be disregarded. However, once the raw lignite was stored in the opencast mine bunker, the production of the raw lignite as an energy product was likely to have ended.
- 26 Moreover, the raw lignite was further processed by being broken down, having foreign bodies removed, in particular metals and wooden particles, and being crushed further, in some cases until it turned into particles the size of specks of dust, so that it could be burnt in boilers adapted to the type of processing used.

The defendant considers that that processing constitutes production of lignite as an energy product within the meaning of Article 21(3), second sentence, of Directive 2003/96, which necessarily excludes a tax exemption for the electricity used for that purpose, because Germany has not made use of the option provided for by Article 21(3), second sentence, of Directive 2003/96.

- 28 Even if the use of electricity for the processing of lignite in the power plant meets the conditions of Article 21(3), second sentence, of Directive 2003/96, the defendant's assessment raises concerns. Article 14(1)(a) of Directive 2003/96 comprehensively exempts both energy products used to produce electricity and electricity used to produce electricity. Taxation takes place only subsequently, when the electricity produced is consumed. This is intended to avoid double taxation.
- 29 However, double taxation occurs if processes in the power plant that serve to produce electricity are still subject to electricity tax, a tax within the meaning of Directive 2003/96. With the exception of plants based on the outdated system of

grate firing, such processes are also common in the use of solid fuels in power plants for electricity production and are not limited to the lignite-fired power plants operated by the applicant. The surface area of the fuels must be significantly increased by reduction techniques such as crushing or grinding in order to ensure rapid and clean burning. It is precisely this means of preparing the fuel, which is not necessary for the outdated system of grate firing, that ensures a much more efficient and cleaner use of energy. In that context, it must be taken into account that, under the rules and requirements laid down by industrial and environmental law, the applicant, when using fluidised bed-fired boilers and mill-fired boilers, may not operate its power plants at all unless they use prepared lignite with a certain calorific value, which may be achieved by means of blending.

- 30 Moreover, Article 14(1)(a) of Directive 2003/96 itself, which provides for tax exemption for two uses of electricity, namely for producing electricity and for maintaining the ability to produce electricity, shows that the preferential treatment is not limited only to the process of energy conversion, but also includes upstream and downstream activities.
- 31 Finally, the defendant assumes that Article 21(3), second sentence, of Directive 2003/96 limits the scope of the tax exemption under Article 14(1)(a) of Directive 2003/96, even though only Article 14 of Directive 2003/96 contains a mandatory tax exemption.
- 32 The German legislation, in particular Paragraph 12(1) of the StromStV, does not contain a suitable standard in that respect, aside from the assumption that not only the narrow process of energy conversion may be tax-exempt. In addition to the production of electricity for the process of energy conversion, Paragraph 12(1) of the StromStV mentions, by way of example, ancillary and auxiliary systems, which, however, require that the electricity is consumed in order to produce electricity in the technical sense. When using that provision to interpret Article 14(1)(a) of Directive 2003/96, it must also be taken into account that both Paragraph 9(1), point 2, of the StromStG and Paragraph 12(1), point 1, of the StromStV, with the provisions relevant in the present case, were enacted before Directive 2003/96 entered into force on 31 October 2003. Paragraph 9(1), point 2, of the StromStG was introduced by the Gesetz zur Fortführung der ökologischen Steuerreform (Law on the continuation of the ecological tax reform) of 16 December 1999 (BGBl. I of 22 December 1999, page 2 432), and Paragraph 12(1) of the StromStV was introduced by the Verordnung zur Durchführung des Stromsteuergesetzes (Regulation implementing the Law on electricity tax) of 31 May 2000 (BGBl. I of 15 June 2000, page 794).

Question 2

- 33 In 2004, the applicant produced just under 10% of the electricity consumed in Germany with its power plants associated with the opencast mines, and, for that purpose, it used approximately 5% of the electricity produced by its power plants.

To that end, it operated the opencast mines and power plants in such a way as to be able to ensure, in principle, uninterrupted electricity production by means of redundant and adequate transport, bunker and processing systems. Thus, in the applicant's case, the system of opencast mines, together with the lignite-fired power plants attached to them, is also intended to maintain the ability to produce electricity.

- 34 Even if the extraction of lignite and the consumption of electricity, which justify a tax exemption under Article 14(1)(a) of Directive 2003/96 for the electricity consumed for the purpose of producing electricity, are excluded from this, the question arises as to whether the electricity consumed by the applicant to ensure its continuous operation, such as the transport, loading and unloading facilities used to transport the lignite from the opencast mine bunker into the power plants, is to be excluded from taxation.
- 35 It is also not clear whether the preferential treatment of electricity consumption for transport is not excluded under Article 21(3), third sentence, of Directive 2003/96. Does the provision under which consumption for purposes not connected with the production of energy products, in particular for the propulsion of vehicles, is deemed to be a chargeable event cover any transport of energy products and thus include the transport of lignite between the installations in which the lignite is stored and processed, or does it relate only to other uses of electricity?
- 36 In the present dispute, the lignite is transported over long distances in order to be prepared for use in the boilers of the power stations, because the relevant installations of the applicant are inevitably not located in one place but at a great distance from one another because of the size of the installations and the constant changes in the mining operation. Thus, transportation, whether via the company's own railway or via conveyors, can also serve to produce the lignite. In that respect, only instances of transportation in which things other than energy products are transported, such as personnel to the working areas on the applicant's premises, would be covered by Article 21(3), third sentence, of Directive 2003/96.