

Case C-657/22

Request for a preliminary ruling

Date lodged:

18 October 2022

Referring court:

Tribunalul Prahova (Romania)

Date of the decision to refer:

29 March 2022

Applicant:

SC Bitulpetroleum Serv SRL

Defendants:

Administrația Județeană a Finanțelor Publice Prahova

Direcția Generală Regională a Finanțelor Publice Ploiești

ROMANIA

TRIBUNALUL PRAHOVA (REGIONAL COURT, PRAHOVA, ROMANIA)

SECȚIA A II-A CIVILĂ DE CONTENCIOS ADMINISTRATIV ȘI FISCAL

(SECOND CIVIL DIVISION FOR ADMINISTRATIVE AND TAX
LITIGATION)

[...]

ORDER

Public hearing of 29 March 2022

[...]

Ruling on the request for a preliminary ruling addressed to the Court of Justice of the European Union by the applicant, SC BITULPETROLIUM SERV SRL [...], in proceedings brought against the defendant, ADMINISTRAȚIA JUDEȚEANĂ A FINANȚELOR PUBLICE PRAHOVA [-] DIRECȚIA GENERALĂ

REGIONALĂ A FINANTELOR PUBLICE PLOIEȘTI (Office of Public Finance for the County of Prahova – Regional Directorate-General for Public Finance of Ploiești) [...],

THE REGIONAL COURT,

with regard to the request for a preliminary ruling addressed to the Court of Justice of the European Union, after examining the documents and the case file, makes the following findings:

1. Circumstances of the case. Procedural framework. Background

SC BITULPETROLIUM SERV SRL, a company involved in the production and wholesale of solid, liquid and gaseous fuels and derived products [...], brought an action before this Regional Court against the defendant ADMINISTRAȚIA JUDEȚEANĂ A FINANTELOR PUBLICE PRAHOVA [-] DIRECȚIA GENERALĂ REGIONALĂ A FINANTELOR PUBLICE PLOIEȘTI ('the tax authority'), challenging the obligation to pay the amounts of 310 309 Romanian Lei (RON), by way of additional excise duty on diesel and biodiesel, and RON 65 901, by way of additional value added tax, and seeking annulment of the notification of tax liability of [...] 7 August 2020.

Following the tax audit of SC BITULPETROLIUM SERV SRL, the tax audit report [...] of 28 April 2018 and the notification of tax liability of [...] 7 August 2020 were drawn up and the applicant was required to pay the amounts of RON 310 309, by way of additional excise duty on diesel and biodiesel, and RON 65 901, by way of additional value added tax [...].

According to the tax audit report and the notification of tax liability, the applicant is in possession of [a] certificate of registration for the distribution and wholesale of energy products without storage [...] issued by Biroul Vamal Prahova (Customs Office, Prahova) on 5 December 2016.

Furthermore, the audited establishment serves as a warehouse for the production of energy products subject to harmonised excise duty on the basis of an authorisation to operate a tax warehouse [...] dated 30 September 2013, issued by the Comisia pentru autorizarea operatorilor de produse suspendate armonizate din cadrul Ministerului Finanțelor Publice (Commission for the authorisation of dealers of products subject to harmonised excise duty at the Romanian Ministry of Finance) and valid until 1 October 2018.

From the audit on a sample basis of the supply documents and accounting records submitted by the audited company, it emerged that SC BITULPETROLIUM SERV SRL [...] had issued certificates of receipt and variation and cancellation invoices, by which it reintroduced into the tax warehouse a total of 238 382 kg of fuel for industrial chimneys and BP type liquid fuel, without sending written notification to the competent local customs authority.

The tax authority also pointed out that between June 2014 and December 2017, SC BITULPETROLIUM SERV SRL [...] issued certificates of receipt and variation and cancellation invoices for a total of 238 383 kg, in which it made no mention of the marking and colouring of the energy products being returned, nor their purpose. In addition, for the energy products reintroduced [...] into the tax warehouse, the audited company failed to notify the Biroul Vamal de Interior Prahova (Inland Customs Office, Prahova) in writing of the decision not to accept the energy products, as provided for in Article 206(2) of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), as amended and supplemented, in force until 31 December 2015, and also in Article 400(4) of Legea nr. 571/2003 privind Codul fiscal (Law No 227/2015 establishing the Tax Code), in force since 1 January 2016.

In its application, the applicant claimed, in essence, that during its operations [...] it had discovered that the products sold had not been accepted on account of product quality issues or because the energy products sold were not suitable for customers' heating systems. Consequently, of the total quantity of energy products sold, for which excise duty was paid at the time of release for consumption, [...] less than 1.5% was returned by the customers for whom the products were originally intended, to be subsequently sold to other customers.

The energy products are usually transported to customers in sealed tankers and accompanied by proof of marking and colouring, proof of payment of excise duty, the inspection report, the declaration of conformity, the weighing receipt, and so forth. The customer would take a sample of the delivered energy product once it reached its destination and examine it to check that it could be used in its thermal power plant. If the product did not present the necessary characteristics, the customer would ask to return the product and cancel the invoice; the tanker containing the energy product for which payment had been refused would return to the warehouse, together with all the abovementioned supporting documents, and remain there until another customer could be identified to whom the goods might be delivered.

The applicant points out that no refund of the excise duty was requested for any of the products when they were returned to the warehouse. Furthermore, it had not notified the customs authorities of the return of the energy products since none of the cases provided for by the Tax Code and the procedural rules requiring such notification applied, namely: where a refund of the excise duty had been requested and where the products had been returned for recycling, repackaging or disposal.

The supervisory authorities equate the failure to notify the reintroduction into the warehouse of the energy products originally delivered to customers with the storage, transportation and sale of such unmarked and uncoloured products without payment of excise duty, alleging an infringement of the provisions of Article 400(4) of Law No 227/2015 establishing the Tax Code, which provides that, 'for products subject to excise duty reintroduced into the tax warehouse, the excise duty paid may be refunded'.

In its defence, the defendant tax authority claimed that the applicant had introduced into the tax warehouse 143 622 kg of energy products from goods returned by various customers on the basis of 10 cancellation invoices, invoices in which the returned energy products were described as liquid fuel for industrial chimneys.

The defendant also argued that the energy products returned and introduced into the tax warehouse were subsequently sold without being marked and coloured, despite the fact that the tax legislation prohibits the sale of unmarked and uncoloured or incorrectly marked and coloured energy products, establishing the liability of the taxpayer in such cases, including non-compliance with the obligations regarding tax audit arrangements and procedures [missing text].

2. Legal assessment

From a fiscal point of view, the applicable provisions are Article 206⁶⁹(14) of Law No 571/2003 establishing the Tax Code, as amended and supplemented, in force until 31 December 2015, which provides that:

‘Article 206⁶⁹:

...

(14) The energy products referred to in Article 206¹⁶(3)(g), or assimilated products in terms of the level of excise duty, may be released for consumption, stored outside a tax warehouse, transported, including under a duty suspension arrangement, used, offered for sale or sold in the territory of Romania only if marked and coloured in accordance with the provisions of paragraphs 16 to 19.

...

(23) It is prohibited, unless the law states otherwise, to release for consumption, store outside a tax warehouse, transport, including under a duty suspension arrangement, use, offer for sale or sell in the territory of Romania the energy products referred to in Article 206¹⁶(3)(g), or for those products to be assimilated from the point of view of the level of excise duty, if they are unmarked and uncoloured, or are marked and coloured in a manner inconsistent with this Title.

...

(26) For the energy products referred to in Article 206¹⁶(3)(g), or assimilated products in terms of the level of excise duty, released for consumption, stored outside a tax warehouse, transported, including under a duty suspension arrangement, used, offered for sale or sold in the territory of Romania, unmarked and uncoloured, or incorrectly marked and coloured, and in the event of non-compliance by economic operators with the obligations regarding tax audit arrangements and procedures laid down in Ordinul preşedintelui Agenţiei

Naționale de Administrare Fiscală nr. 207/2012 privind modalitățile și procedurile pentru realizarea supravegherii fiscale a producției depozitării, circulației și importului produselor accizabile (Order No 207/2012 of the President of the National Agency for Tax Administration on the arrangements and procedures for tax audits on the production, storage, circulation and importing of products subject to excise duty), excise duty shall be payable to the same extent as provided for gas oil.’

Tax Code (Law No 227/2015 establishing the Tax Code)

‘Article 425 – (1) The energy products referred to in Article 355(3)(g), or assimilated products with regard to the level of excise duty, may be released for consumption, stored outside a tax warehouse, transported, including under a duty suspension arrangement, used, offered for sale or sold in the territory of Romania only if marked and coloured in accordance with the provisions of paragraphs 425 and 427.

2. The provisions of paragraph 1 shall not apply to the energy products referred to in Article 355(3)(g) or assimilated products from the point of view of the level of excise duty: ...

(d) for which the holder can furnish proof of payment of the excise duty to the Treasury to the same extent as provided for gas oil.

...

Article 427 ... 4. Unless the law states otherwise, the release for consumption, storage outside a tax warehouse, transportation, including under a duty suspension arrangement, use, offer for sale or sale in the territory of Romania of the energy products referred to in Article 355(3)(g), or assimilated products from the point of view of the level of excise duty, which are unmarked and uncoloured, or marked and coloured incorrectly with regard to the level of excise duty, unmarked and uncoloured or marked and coloured incorrectly within the meaning of this Title, shall be prohibited. ...

7. In the case of the energy products referred to in Article 355(3)(g), or assimilated products in terms of the level of excise duty, released for consumption, stored outside a tax warehouse, transported, including under a duty suspension arrangement, used, offered for sale or sold in the territory of Romania, unmarked and uncoloured, or incorrectly marked and coloured, and in the event of non-compliance by economic operators with the obligations regarding tax audit arrangements and procedures laid down in the procedural rules, excise duty shall be payable to the same extent as provided for gas oil.’

In accordance with Article 2(2), Article 5 and Article 21(1) of Council Directive 2003/96/EC of 27 October 2003:

‘Article 2

...

2. This Directive shall also apply to:

Electricity falling within CN code 2716.

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.

...

Article 5

Provided that they respect the minimum levels of taxation prescribed by this Directive and that they are compatible with Community law, differentiated rates of taxation may be applied by Member States, under fiscal control, in the following cases:

- when the differentiated rates are directly linked to product quality;
- when the differentiated rates depend on quantitative consumption levels for electricity and energy products used for heating purposes;
- for the following uses: local public passenger transport (including taxis), waste collection, armed forces and public administration, disabled people, ambulances;
- between business and non-business use, for energy products and electricity referred to in Articles 9 and 10.

...

Article 21

1. In addition to the general provisions defining the chargeable event and the provisions for payment set out in Directive 92/12/EEC, the amount of taxation on energy products shall also become due on the occurrence of one of the chargeable events mentioned in Article 2(3).'

In accordance with Article 273 of Council Directive 2006/112/EC of 28 November 2006: 'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

This Regional Court considers that the points of law submitted for the analysis of the administrative court are:

[...] [Reproduction of the questions referred for a preliminary ruling, set out in the operative part]

Before adjudicating on the present case, it is necessary, pursuant to Article 267 TFEU, to request the Court of Justice to give a preliminary ruling on the questions raised in the operative part.

The following legislative provisions have a bearing on the case:

Relevant provisions of national law

Article 425(1) and (2) and Article 427 of Law No 227/2015 establishing the Tax Code, Article 206 of Order No 207/2012 of the President of the National Agency for Tax Administration.

Relevant provisions of European Union law

Article 2(2) and (3), Article 5 and Article 21(1) of Council Directive 2003/96/EC of [27 October] 2003 restructuring the Community framework for the taxation of energy products and electricity, and Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

[...]

ON THOSE GROUNDS,

IN THE NAME OF THE LAW

STATES THAT IT:

Accepts the request of the applicant SC BITULPETROLIUM SERV SRL for a preliminary ruling from the Court of Justice of the European Union.

Refers the case under Article 267 of the Treaty on the Functioning of the European Union to the Court of Justice of the European Union for a preliminary ruling on the following questions:

1. Are national provisions and practices such as those at issue in the present case, according to which the reintroduction into a tax warehouse of a heating fuel (heating oil) in the absence of a customs inspection [constitutes] an alleged infringement of the warehousing procedure justifying the application of excise duty at the rate fixed for gas oil – a fuel whose excise duty is more than 21 times higher than the excise duty on heating oil – contrary to the principle of

proportionality and to Article 2(3), Article 5 and Article 21(1) of Directive 2003/96/EC[?]

2. Are national provisions and practices such as those at issue in the present case, according to which VAT is charged on additional amounts determined by the tax authority by way of excise duty on gas oil as a penalty for non-compliance with the customs supervision arrangements of the taxable person, as a result of the taxable person reintroducing into the warehouse energy products of the heating oil type, on which excise duty had already been paid, and which have been refused by customers and remain intact and [in storage] until a [new] buyer is identified, contrary to the principle of proportionality, the principle of neutrality of VAT and Articles 2, 250 and 273 of Directive 2006/112/EC?

[...] [stay of proceedings, signatures]

WORKING DOCUMENT