Case C-743/22

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

1 December 2022

Referring court:

Tribunal Supremo (Spain)

Date of the decision to refer:

15 November 2022

Appellant:

DISA SUMINISTROS Y TRADING, S. L. U.

Respondent:

Agencia Estatal de la Administración Tributaria

Subject matter of the main proceedings

Excise duties on mineral oils – Regional tax rate – Application to rectify self-assessments and for the recovery of undue payments resulting from non-conformity with EU law – Application made by the person liable for duty passed on in accordance with the law – Procedural remedy – Evidence of unjust enrichment

Subject matter and legal basis of the request

Request for a preliminary ruling on interpretation – Article 267 TFEU – Compatibility of a national provision with Directive 2003/96/EC – Tax rate limited to the territory of one autonomous community

Question referred for a preliminary ruling

Must Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, in particular

Article 5 thereof, be interpreted as precluding a national provision, such as Article 50*ter* of Ley 38/1992 de Impuestos Especiales (Law 38/1992 on excise duties) of 28 December 1992, which authorised the autonomous communities to set differentiated rates of the excise duties on mineral oils for each territory in respect of the same product?

Case-law and provisions of EU law relied upon

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity: Articles 4, 5 and 6.

Judgment of 2 October 2003, *Weber's Wine World and Others*, C-147/01, EU:C:2003:533, paragraphs 115 and 116.

Judgment of 14 June 2017, *Compass Contract Services*, C-38/16, EU:C:2017:454, paragraphs 29 and 30.

Judgment of 6 October 2005, *MyTravel*, C-291/03, EU:C:2005:591, paragraph 17.

Judgment of 20 October 2011, *Danfoss and Sauer-Danfoss*, C-94/10, EU:C:2011:674.

Judgment of 6 September 2011, *Lady & Kid and Others*, C-398/09, EU:C:2011:540, paragraph 20.

Judgment of 14 January 1997, *Comateb and Others*, C-192/95 to C-218/95, EU:C:1997:12, paragraph 22.

Order of 7 February 2022, *Vapo Atlantic*, C-460/21, EU:C:2022:83, paragraph 40.

Judgment of 25 October 2012, *Commission v France*, C-164/11, not published, EU:C:2012:665.

Judgment of 14 January 2021, *Commission v Italy (Contribution towards the purchase of motor fuel)*, C-63/19, EU:C:2021:18.

Judgment of 25 July 2018, *Messer France*, C-103/17, EU:C:2018:587.

Provisions of national law relied upon

Law 38/1992 of 28 December 1992 on excise duties, as amended by the Ley de Presupuestos Generales del Estado (Finance Law) for 2012

Article 50*ter*

'1. The autonomous communities may establish an autonomous community rate of excise duties on mineral oils in order to levy additional tax on products …

consumed in their respective territories. The autonomous community rate of tax shall be applied in accordance with this Law and with the limits and conditions laid down in the legislation governing the financing of the autonomous communities.

2. The applicable autonomous community rate shall be that for the autonomous community in whose territory the final consumption of the taxable products takes place. …

3. Taxable persons [the owners of the establishments from which products are forwarded to the territory of an autonomous community other than that in which they are located] shall be entitled to deduct from the tax accruing … any amounts of duty corresponding to application of the autonomous community rate which they have already borne as duty passed on or incorporated in the price. Where, in each tax period, the deductible amounts exceed the tax accrued, the taxable person shall be entitled to recover or offset the difference on the terms laid down by regulation. …'

That article was repealed with effect from 1 January 2019, by the Finance Law for 2018, as a result of which the autonomous community rate of tax was included in the special State rate 'in order to ensure a unified market in the field of fuels and propellants, although this measure shall not imply any reduction in the resources of the autonomous communities and the foregoing shall be subject to the Community legislative framework'.

Ley 22/2009 por la que se regula el sistema de financiación de las Comunidades Autónomas (Law governing the system of financing of the autonomous communities) of 18 December 2009 (version in force from 2013).

Article 44: 'the revenue generated in its territory from the autonomous community rate of the excise duties on mineral oils shall be transferred to the autonomous community'.

Under the seventh transitional provision of that Law, the autonomous community tranche of the excise duties on mineral oils replaced the autonomous community tranche of the former Impuesto sobre las Ventas Minoristas de Determinados Hidrocarburos (tax on retail sales of certain hydrocarbons), which was abolished on 31 December 2012.

Reglamento general de desarrollo de la Ley 58/2003, de 17 de diciembre, General Tributaria, en materia de revisión en vía administrativa (General regulation for the implementation of Law 58/2003 of 17 December 2003 on the General Tax Code in relation to administrative review) ('the RRVA') (approved by means of Royal Decree 520/2005 of 13 May 2005)

Article 14: '1. The following persons and entities shall be entitled to apply for the recovery of undue payments:

…

c) Where the undue payment relates to duties for which there is a legal obligation to pass on the charge, … the person or entity that bore the duty passed on.

2. The following persons and entities shall be entitled to recover undue payments:

c) The person or entity that bore the charge passed on, where the undue payment relates to duties that must by law be passed on to other persons or entities. ..'

Succinct presentation of the facts and the main proceedings

1 The company DISA, SUMINISTROS Y TRADING, S. L. ('DISA'), applied to the Spanish Administración Tributaria (tax authority) ('tax authority') for a rectification of the self-assessments submitted by various taxable persons in respect of the excise duties on mineral oils (Impuesto Especial de Hidrocarburos, 'IEH') for the tax years 2013 to 2015, as the person liable for and which had borne the declared amounts of those duties passed on to it by law, in respect of the autonomous community tranche, and for reimbursement of the amounts of tax paid in that regard, taking the view that the aforementioned autonomous community tranche was contrary to EU law.

2 The tax authority refused those applications, by virtue of decisions that DISA challenged before the Tribunal Económico-Administrativo Central (Central Tax Tribunal, Spain), which dismissed its claim by an implied decision. DISA brought an appeal against the aforementioned implied decision before the Audiencia Nacional (National High Court, Spain), which was dismissed by a judgment of 25 November 2020. DISA has brought an appeal against that judgment before the Tribunal Supremo (Supreme Court), the referring court.

3 The context of the dispute in the main proceedings is that it is one of several appeals pending before the Tribunal Supremo (Supreme Court) targeting the autonomous community tranche of IEH, that is to say, the part of the tax rate applicable in the territory of an autonomous community, alleging that it is contrary to EU law. On the question of who may apply to the tax authority to recover undue payments of a tax on the grounds that it is contrary to EU law and using which procedural remedy, in some of those appeals the application to recover undue payments was made to the tax authority by third parties to the tax debtor-creditor relationship who claimed that, as purchasers of the fuel, they had borne the tax charge through an increase in the price. In appeal proceedings No 1908/20, the first instance court had found such an application to be admissible, whereas in appeal proceedings No 1902/21, in contrast, the first instance court held otherwise, since it found that the third party to the tax debtor-creditor relationship could not initiate a tax procedure to recover undue payments, and had to bring civil proceedings against the seller or, as applicable, seek to hold

the State liable on the grounds that it had failed to comply with EU law if it could prove a causal link between the tax provision and the economic loss sustained.

4 The referring court states that, although, according to the Court of Justice of the European Union, the Member State is required to repay charges levied in breach of EU law (judgment of 14 June 2017, *Compass Contract Services*, C-38/19, paragraph 29), it is also true that EU law does not govern the procedural remedies to give effect to that repayment, and that it is for each Member State to lay down the conditions under which such applications may be made, which must observe the principles of equivalence and effectiveness (judgment of 6 October 2005, *Mytravel*, C-291/03, paragraph 17). Those criteria are not at issue in this appeal. Embodying that procedural autonomy, in Spain, Article 14 of the RRVA, entitles a person to whom a duty unduly paid has legally been passed on, as a party to the tax debtor-creditor relationship, to *apply for and obtain* the repayment of the sums paid. DISA is an entity to whom IEH has, by law, been passed on, by other taxable persons, and therefore, in terms of Spanish law, it has standing to *apply*, to the tax authority, both for rectification of the self-assessment and to recover the sums so passed on and, if applicable, to *obtain* recovery of those sums, if the requirements of the legislation and the case-law are satisfied, in a tax procedure for the recovery of undue payments.

5 That conclusion is not undermined by the fact that the abogado del Estado makes reference to the request for a preliminary ruling made by an Italian court that has given rise to Case C-316/22, *Gabel Industria Tessile SpA, Canavesi SpA* v *A2A Energía SpA and Others*, as a result of which, it is argued, this appeal should be suspended and there is no need to make the reference for a preliminary ruling until the Court of Justice has dispelled the doubts of the Italian court. In that case a final consumer is being refused the right to apply directly to recover amounts of tax unduly paid to the State, and is being allowed only to bring a civil action against the taxable person. In its case-law, the Court has accepted that, once it is proven that tax has been passed on to the final consumer (purchaser), the Member State may, in principle, oppose the consumer's application to recover the duty, on the grounds that it was not that purchaser who paid the duty to the tax authorities, provided the purchaser – if it does indeed bear the economic burden – is able, on the basis of national law, to bring a civil action against the taxable person (or against the person withholding the duty) and provided that compensation, by that taxable person, of the damage suffered by the purchaser is not virtually impossible or excessively difficult – in particular where the taxable person is insolvent –, in which case the purchaser may bring his claim for reimbursement against the tax authorities directly (judgment of 20 October 2011, *Danfoss A/S*, C-94/10). It is for the national court alone to determine whether that civil action, and in the final analysis national civil proceedings, make it impossible or excessively difficult to exercise that right.

6 As regards the uncertainty surrounding the principle prohibiting unjust enrichment as an exception to the obligation to reimburse duties levied contrary to EU law, although DISA claims that the Spanish legislation, that is to say, Article 14 of the

RRVA, does not require any evidence that it would not be unjustly enriched by reimbursement of the unlawful duty, the referring court calls to mind the Court's case-law in that regard, according to which the direct passing on to the purchaser of the tax wrongly levied constitutes the sole exception to the right to reimbursement of tax levied in breach of EU law (judgment of 6 September 2011, *Lady & Kid and Others*, C-398/09, EU:C:2011:540, paragraph 20). Indeed, to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge (judgment of 14 January 1997, *Comateb and Others*, C-192/95 to C-218/95, EU:C:1997:12, paragraph 22). Furthermore, it is for the national authorities and courts to ensure observance of the principle prohibiting unjust enrichment, including where national law is silent (order of 7 February 2022, *Vapo Atlantic*, C-460/21, ECLI:EU:C:2022:83, paragraph 40).

7 Since the actual passing on of taxes, either in whole or in part, depends on various factors in each commercial transaction and is, in the final analysis, a matter of fact that must be examined by the national court, given the specific circumstances of the case and the Court's abundant case-law on the matter it is not necessary to refer a question for a preliminary ruling on the principle prohibiting unjust enrichment – as an obstacle to the obligation to reimburse –, which will be duly assessed in the judgment disposing of this appeal.

The essential arguments of the parties in the main proceedings

8 As grounds for its applications, DISA submitted that the autonomous community rate of tax for IEH, established in Article 50*ter* of Law 38/1992 on excise duties, in force since 1 January 2013, was contrary to EU law because it contravened certain requirements of Directive 2003/96. In particular, according to DISA, the tax burden of excise duties must be identical for the same products and uses throughout national territory, and there may be no regional disparities. In its view, it can be inferred from Article 5 of Directive 2003/96 that the Member States may apply differentiated rates of tax only in the situations explicitly listed and not in any others. According to DISA, the fact that this autonomous community rate of IEH was included in the special State rate, once Article 50*ter* of the Law on excise duties was repealed from 1 January 2019, as the result of a complaint made to the Commission, constitutes tacit acknowledgement by the legislature that the differentiated autonomous community rates of IEH were contrary to EU law. DISA also argues that, according to the former Director-General for Taxation and Customs Union, Michel Aujean, 'other things being equal, according to the information available, it would appear that the fundamental principle of unified harmonised excise duties would not be complied with if there were autonomous community differentiation of those duties' (cited in *Informe sobre la Reforma del Sistema de la Financiación Autonómica. Comisión para el Estudio and propuesta de un nuevo sistema de financiación de las Comunidades Autónomas aplicables a partir de 2002 [Report on reform of the system for autonomous community*

financing. Commission for the examination and proposal of a new financing system for the Autonomous Communities applicable from 2002]). DISA also submits that the Court's dictum in its judgment of 25 October 2012, *Commission v France*, C-164/11, can be extrapolated to this case. In that judgment the Court found that France had failed to fulfil its obligations under Directive 2003/96 by maintaining a regionalised taxation system that could give rise to disparities in the price of electricity. Lastly, DISA submits that the principle of national uniformity prevails in the harmonised levying of excise duties and requires that the tax burden must be identical for each product and each use throughout national territory, with no regional disparities, and cites the Opinion of Advocate General de la Tour delivered in Case C-63/19.

9 Given the bearing that EU law has on this dispute, the referring court invited the parties to express a view, in essence, on whether, from various perspectives, the autonomous community rate of IEH is compatible with EU law in the light of Directive 2003/96.

10 In its response, DISA argued, in summary, that it was not necessary to refer a question for a preliminary ruling since, according to the Court's case-law, the autonomous community rate of IEH was contrary to Article 5, interpreted in conjunction with Articles 4, 14, 15, 17 and 19, of Directive 2003/96, because rates that were differentiated (by autonomous community) contravened the principle of national uniformity according to which the rate of excise duties must be identical for each product and each use throughout national territory, with no regional disparities.

11 The Administración del Estado (State Administration, Spain), for its part, argued that it was not necessary to refer a question for a preliminary ruling because, first, the matter of whether the autonomous community rate of IEH was compatible with EU law was not discussed either on appeal or at first instance, and because it is a hypothetical issue; secondly, it is not apparent either from Article 5 of Directive 2003/96 or any other provision of that directive, or from Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC that it is necessary to set uniform rates of tax within each State, but rather only minimum rates; thirdly, setting the autonomous community rate of tax is an expression of the financial dimension of political autonomy, guaranteed for the autonomous communities by the Spanish Constitution and safeguarded by Article 4(2) TFEU; and fourthly, the proper functioning of the internal market is not jeopardised as a result of the autonomous communities setting autonomous community rates in order to charge additional tax on certain of the products referred to in Article 50*ter* of the Law on excise duties.

Succinct presentation of the reasoning in the request for a preliminary ruling

12 The referring court is uncertain whether the autonomous community tranche of IEH is compatible with EU law.

13 In the appeals brought on the same topic, none of the lower courts has issued a ruling in this regard because the discussion has always focused on whether the appropriate procedural remedy had been chosen in order to recover undue payments. In its judgment of 25 November 2020, now under appeal, the Audiencia Nacional (National High Court) acknowledged that it was appropriate to refer a question for a preliminary ruling in order to dispel the legal uncertainty concerning the interpretation of Directive 2003/96, but confined itself to dismissing DISA's application for the recovery of undue payments on the grounds that the applicant had failed to demonstrate that it had not passed on those amounts to other persons, which would have precluded any unjust enrichment. Citing the Court's judgment of 2 October 2003, *Weber's Wine World and Others*, C-147/01, the Audiencia Nacional (National High Court) held in its judgment that 'although the case-law of the Court of Justice of the European Union precludes the existence of special conditions in the procedures for claiming the reimbursement of taxes that are contrary to EU law, the establishment of a presumption that taxes have been passed on or evidential requirements that make it impossible or very difficult to establish that circumstance, the applicant's claim cannot in our view be upheld because it has not adopted a fair and transparent approach in the proceedings when it claims an astronomical tax reimbursement without making the slightest attempt to prove that this does not afford it any unjust enrichment, by providing the court with concrete information about the transactions performed from the entry into force of the autonomous community rate, the changes in fuel prices since it came into force or, if applicable, any reduction in profits as a result of a fall in sales volume resulting from the tax burden being transferred to the purchaser.'

14 Contrary to the affirmation of the abogado del Estado, the question now being referred is not hypothetical. Indeed, since the administrative proceedings DISA has applied for the reimbursement of the amounts of tax it paid in respect of the 'autonomous community tranche' of IEH, on the grounds that those amounts were contrary to EU law, and has maintained and submitted that claim before the Audiencia Nacional (National High Court) and before the Tribunal Supremo (Supreme Court). Furthermore, the tax authority acknowledged that DISA had standing to apply for recovery in a tax procedure because it was liable for tax that had been passed on. However, it was the first instance court that, for the first time, questioned whether DISA had standing to apply for that recovery, taking the view that since it had not demonstrated that it had not passed on the tax burden to purchasers of the fuel (in the price), it could be unjustly enriched. Moreover, the Tribunal Supremo (Supreme Court) needs to know how to interpret certain provisions of Directive 2003/96 on the basis of which, according to those who have applied to recover payments, the 'autonomous community tranche' of IEH was wrongly levied. As regards this appeal, DISA's standing to apply for the

recovery of undue payments using the corresponding tax procedure must be determined in accordance with national law, according to the principle of procedural autonomy, and it has already been indicated that it is not appropriate to deny DISA that standing. A separate issue will be any consequences flowing from the principle prohibiting unjust enrichment, understood as an exception to the rule that payments are reimbursed, and issues relating to the burden of proving it, which have in any event been sufficiently clarified by the Court.

15 In the light of the judgments handed down by the Court adduced by the parties in order to refute the need to refer the question for a preliminary ruling, in particular those in Cases C-164/11 and C-63/19, the referring court is of the view that no clear interpretation of Article 5 of Directive 2003/96 emerges from the Court's case-law regarding whether, within a Member State and in the field of the taxation of energy products and electricity, anything precludes the setting of territorially differentiated rates of tax for the same product, and regarding on what conditions they might be set. Nevertheless, resolution of this dispute depends on such an interpretation.