

**Case C-391/22**

**Request for a preliminary ruling**

**Date lodged:**

14 June 2022

**Referring court:**

Pécsi Törvényszék (Hungary)

**Date of the decision to refer:**

7 June 2022

**Applicant:**

Tüke Busz Közösségi Közlekedési Zrt.

**Defendant:**

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Authority, Hungary)

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**Pécsi Törvényszék (High Court, Pécs, Hungary)**

**Decision**

[...]

**Applicant:** Tüke Busz Közösségi Közlekedési Zrt. ([...], Pécs [Hungary])

[...]

**Defendant:** NAV Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Authority, Hungary) ([...], Budapest [Hungary])

[...]

**Subject matter of the dispute:** Administrative action in a tax matter

[...] [Matters of domestic procedural law]

### **Operative part**

The High Court, Pécs [...], has made a reference to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union for a preliminary ruling on the following question:

Are the decision adopted in this case by the Nemzeti Adó- és Vámhivatal (National Tax and Customs Authority) and the practice followed by that authority, whereby ‘regular passenger transport does not include the mileage necessary for the maintenance of regular passenger transport vehicles or for refuelling’, compatible with the provisions of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity?

[...] [Matters of domestic procedural law]

### **Grounds**

#### **I. Succinct presentation of the facts**

During the period under examination (2017), the applicant carried on the activity of passenger transport under a public service contract. In connection with that activity, it applied for a refund of excise duty on commercial gas oil. The tax authority found that the applicant had exercised its right to a refund of excise duty not only on the gas oil used in its activity of passenger transport but also on that used in the course of activities aimed at ensuring the operating capacity of its vehicles (repair, maintenance, refuelling). Consequently, the tax authority increased the excise duty on energy products for the months of January to December 2017 by the amount of excise duty collected on the fuel recorded on journey forms relating to repair and maintenance time.

In this case, the defendant referred to previous case-law, as indicated below.

In connection with that transport activity, the applicant was the service provider and the passengers were the service recipients.

The concept of a provision of services is defined in civil law as an act of performance which the recipient may demand from the provider or which the provider has an obligation to deliver under a contract.

A provision of services is a legal relationship between a provider and a recipient. The provider performs an activity for the recipient in return for consideration which is contingent upon the performance of the activity. Since the applicant was obliged to provide the passenger transport service and the recipients were the passengers using that service, the provision of that service, and of the corresponding ancillary services, can be interpreted only in relation to those persons. Only activities included in the principal obligation, such as air conditioning or heating, can be regarded as constituting ancillary services, which also include, for example, the carriage of luggage, dogs or bicycles. All such services have in common the fact that they are provided by the service provider, namely the applicant, that the persons for whom they are provided are the recipients, namely the passengers, and that the ancillary services are deliverable against payment (for example, the carriage of dogs, bicycles and luggage may be payable separately).

Such services do not, however, include bus repair and maintenance. The passenger, as recipient of the service, is not the object of that legal relationship, since repair and maintenance is not an activity which takes place between the passenger and the provider, namely the applicant. Through that activity (repair and maintenance), the applicant ensures the fulfilment of one of the conditions essential to its operational capacity and is not the provider of that service, but its recipient. Passengers do not form any part of that obligation and it is even harder to argue that that obligation is discharged for consideration in that passengers have to pay the applicant for repair and maintenance costs, in the sense that the latter, as service provider, may expressly pass on those costs to passengers.

In the light of the foregoing, the tax authority therefore adopts a practice whereby the service provider is entitled to a deduction of excise duty on certain means of transport but not on the journeys it makes in connection with bus maintenance, be it for the purposes of making technical repairs or for refuelling.

For the reasons given, the defendant stated in its decision that the applicant's application for a refund of excise duty on journeys made in respect of repair and maintenance was unlawful.

## **II. Relevant national legislation**

The a jövedéki adóról és a jövedéki termékek forgalmazásának különös szabályairól szóló 2003. évi CXXVII. törvény (Law CXXVII of 2003 on excise duties and special regulations on the distribution of excise goods; 'the former Law on excise duties') provides in Article 7 that, for the purposes of that Law:

51. commercial gas oil means gas oil as referred to in Article 52(1)(d) that is used for the following purposes:

- a) the carriage of goods for hire or reward, or on own account, by motor vehicles or articulated vehicle combinations (articulated lorries) intended

exclusively for the carriage of goods by road and with a maximum permissible gross laden weight of not less than 7.5 tonnes; or

- b) the carriage of passengers, whether by regular or occasional service, by a motor vehicle of category M2 or category M3, as defined in the Ministerial Order on the technical inspection of road vehicles.

The a jövedéki adóról szóló 2016. évi LXVIII. törvény (Law LXVIII of 2016 on excise duties; ‘the new Law on excise duties’) provides in Article 3(2) that, in matters relating to the taxation of energy products, for the purposes of that Law:

21. commercial gas oil means gas oil used for the following purposes:

- a) the carriage of goods for hire or reward, or on own account, by motor vehicles or articulated vehicle combinations (articulated lorries) intended exclusively for the carriage of goods by road and with a maximum permissible gross laden weight of not less than 7.5 tonnes; or
- b) the carriage of passengers, whether by regular or occasional service, by a motor vehicle of category M2 or category M3, as defined in the Ministerial Order on the technical inspection of road vehicles.

In accordance with Article 113 of the new Law on excise duties, persons who operate coaches and buses of category M2 or category M3, as defined in the Ministerial Order on the technical inspection of road vehicles, in urban or interurban traffic are to be entitled to a refund of the duty on the natural gas used for that activity.

The a személyszállítási szolgáltatásokról szóló 2012. évi XLI. törvény (Law XLI of 2012 on passenger transport services; ‘the Law on passenger transport services’) defines public passenger transport services, in Article 2, point 29, as a passenger transport service provided under a public service contract, in accordance with Article 2(a) of Regulation (EC) No 1370/2007.

In accordance with Article 2, point 30, of the Law on passenger transport services, passenger transport service means the carriage of passengers by means of one of the vehicles determined in that Law, under contract and for consideration, together with the corresponding ancillary services.

Under Article 152(h) of the new Law on excise duties, that Law is intended to transpose the following EU act: Commission Implementing Decision 2012/209/EU of 20 April 2012 concerning the application of the control and movement provisions of Council Directive 2008/118/EC to certain additives, in accordance with Article 20(2) of Council Directive 2003/96/EC.

### III. Relevant European Union legislation

Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulation (EEC) Nos 1191/69 and 1107/70 [as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016], Article 2(a) and (e):

‘For the purpose of this Regulation:

- a) “public passenger transport” means passenger transport services of general economic interest provided to the public on a non-discriminatory and continuous basis;
- e) “public service obligation” means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward’.

In accordance with Article 4(1)(a) of the same regulation, public service contracts and general rules must clearly set out the public service obligations, defined in that regulation and specified in accordance with Article 2a thereof, with which the public service operator is to comply, and the geographical areas concerned.

Article 7 of Directive 2003/96 defines the concept of commercial gas oil:

‘3. “Commercial gas oil used as propellant” shall mean gas oil used as propellant for the following purposes:

[...]

- b) the carriage of passengers, whether by regular or occasional service, by a motor vehicle of category M2 or category M3, as defined in Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers’.

### IV. Circumstances of, and reasons for, the reference for a preliminary ruling

The applicant has requested that a reference for a preliminary ruling be made on the ground that it has been unable to find any judgment of the Court of Justice of the European Union to assist its interpretation of the law. It has therefore proposed that the national court should make such a reference in order to put an end to the legal uncertainty as to how the wording of the provision in question should be interpreted. In its opinion, another reason for making the reference is that, to its

knowledge, all Hungarian road passenger transport undertakings without exception (including those owned by the State) act in the same way it does when discharging their tax obligations, which has left the entire sector in a state of uncertainty about that issue. Relying on Article 113(3) of the new Law on excise duties, it argues that, since that provision permits the refund of excise duty on gas used by buses running on natural gas in the course of their operations (which is to say, not only during passenger transport journeys), there would have been no reason to apply a different rule to the refund of excise duty on gas oil.

[...] [Matters of procedural domestic law]

Pécs, 7 June 2022.

[signature]

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