

Case C-105/22

Request for a preliminary ruling

Date lodged:

15 February 2022

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

27 April 2021

Appellant:

P. M.

Respondent:

Dyrektor Izby Administracji Skarbowej w Warszawie

ORDER

On 27 April 2021,

the Naczelny Sąd Administracyjny (Supreme Administrative Court) [...]

[...] [composition of the bench],

having heard at an *in camera* hearing on **27 April 2021** before the **Financial Chamber**

the appeal on a point of law brought by **P. M.**

against the judgment of the **Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court in Warsaw, Poland)**

of **9 September 2020**

case ref. no [...]

in the action brought by **P. M.**

against the decision of the **Dyrektor Izby Administracji Skarbowej w Warszawie (Director of the Tax Administration Chamber in Warsaw, Poland)**

of **13 August 2019, No ...**

concerning **a refusal to reimburse excise duty,**

orders:

1) that the following question be referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 [TFEU] [...]:

Must Article 56 of the Treaty on the Functioning of the European Union (consolidated version of 2012 – OJ 2012 C 326, p. 1 et seq.), the principle that excise duty is a single-stage tax on actual consumption, and the principle of proportionality be interpreted as precluding the application of a provision of national law such as Article 107(1) of the Ustawa z dnia 6 grudnia 2008 r. o podatku akcyzowym (Law of 6 December 2008 on Excise Duty) (Dziennik Ustaw (Journal of Laws) of [2019], item [864], as amended) in so far as it precludes the reimbursement to a taxable person of excise duty upon the export of a registered passenger car, calculated in proportion to the period during which that car was used in the national territory?

2) [...] [suspension of the proceedings]

Grounds

I. Legal framework

Provisions of European Union law relied on

1. Treaty on the Functioning of the European Union [...]

Article 56

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

2. Agreement on the European Economic Area [...]

Article 36

1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.
2. Annexes IX to XI contain specific provisions on the freedom to provide services.

Provisions of national law relied on

Law of 6 December 2008 on Excise Duty (Dziennik Ustaw (Journal of Laws) of 2019, item 864, as amended)

Article 107(1)

Where an entity which has acquired the right to dispose as owner of a passenger car previously unregistered in Poland in accordance with the provisions on road traffic, on which excise duty was paid in Poland, makes an intra-Community supply or export of that passenger car, or if that supply or export is made on its behalf, the entity concerned shall be entitled to the reimbursement of excise duty upon an application submitted to the appropriate head of the tax office within a year of the date on which the intra-Community supply or export of the passenger car in question was made.

II. Facts of the case

Proceedings before the tax authorities

- 1 By its application dated 5 March 2019, P. M., trading under the name N. ('the party'), applied to the Naczelnik Urzędu Skarbowego ... (Head of the Tax Office in ...) for the reimbursement of excise duty in the amount of 5 983.00 Polish zlotys (PLN) due to the export of a BMW ... passenger car, VIN number:.... It was established that the party had submitted the AKC-U form registered in the Z. financial and accounting system under No ... and had paid excise duty as a result of the intra-Community acquisition of the passenger car covered by the application in question.
- 2 By decision No ... dated 29 April 2019, the Head of the Tax Office in ... refused to reimburse to the party excise duty in the above amount for the export of the aforementioned passenger car to Norway, as the authority found that the party did not satisfy the condition concerning the absence of prior registration in Poland in

accordance with the provisions on road traffic with respect to the vehicle at issue, as it was registered in Poland on 9 August 2017, that is to say, before its export, which took place on 7 March 2018.

The authority stated that ‘the registration date of the vehicle is by operation of law the date of its temporary registration following the application for registration of the vehicle. Temporary registration is part of the registration process, the purpose of which is to allow the car to be used permanently on roads in Poland’.

- 3 By decision of 13 August 2019, the Dyrektor Izby Administracji Skarbowej w Warszawie (Director of the Tax Administration Chamber in Warsaw) upheld the decision at first instance, adding that, in his opinion, the party had also failed to satisfy the condition that the passenger car had to be exported personally by the party, or by another person but on the party’s behalf (that issue, however, remains outside the scope of the question referred).

Judgment of the court of first instance

- 4 By its judgment of 9 September 2020 in case Ref. No [...], the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court in Warsaw) dismissed the party’s action against the decision of the Director of the Tax Administration Chamber in Warsaw of 13 August 2019 concerning a refusal to reimburse excise duty.

The court of first instance stated that that authority of second instance had correctly assumed that there were no grounds to reimburse excise duty to the party for the export of the passenger car, since not all of the conditions referred to in Article 107(1) of the Law of 6 December 2008 on Excise Duty (Dziennik Ustaw (Journal of Laws) of 2019, item 864, as amended) (‘the LED’) had been met, as it was clear from the case file that the car had been registered in Poland in accordance with the provisions on road traffic prior to its export, which was the reason for the refusal to reimburse excise duty in the case at issue.

Proceedings before the Supreme Administrative Court

- 5 The party appealed the above judgment in its entirety, pleading that the court of first instance had, inter alia, infringed Articles 8, 10, 13, 14, 15, 25, 36 and 37 of the Agreement on the European Economic Area (OJ 1994 L 1, p. 3 et seq.) (‘the EEA Agreement’), read in conjunction with Article 1 of the Ustawa z dnia 16 kwietnia 2004 r. o ratyfikacji Porozumienia w sprawie udziału Republiki Czeskiej, Republiki Estońskiej, Republiki Cypryjskiej, Republiki Łotewskiej, Republiki Litewskiej, Republiki Węgierskiej, Republiki Malty, Rzeczypospolitej Polskiej, Republiki Słowenii i Republiki Słowackiej w Europejskim Obszarze Gospodarczym, podpisanego w Brukseli 14 października 2003 r. (Law of 16 April 2004 on the Ratification of the Agreement on the Participation of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the

Republic of Poland, the Republic of Slovenia and the Slovak Republic in the European Economic Area, done at Brussels on 14 October 2003 (Dziennik Ustaw (Journal of Laws) of 2004, No 130, item 1375), read in conjunction with Article 9 and Article 87(1) of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland) through the incorrect application of those provisions, namely the failure to apply those provisions in lieu of Article 107(1) of the LED, which resulted in an infringement of the fundamental principles of free movement of goods and services, the principle that excise duty is a single-stage tax on actual consumption and the principles of proportionality and non-discrimination by unlawfully narrowing the group of entities eligible for reimbursement of excise duty in the event of an intra-Community supply or export of a passenger car.

In support of that plea, the party argued, inter alia, that the refusal to reimburse even the amount of excise duty on the exported vehicle calculated pro rata to its period of use in Poland (consumption period) infringes the Treaty principle of freedom of movement of goods and services (including trade) and is contrary to the principle that excise duty is a single-stage tax and to the principle of proportionality, since where the excise duty is not reimbursed to the seller in Poland, it must be charged to a foreign purchaser who, in addition to that excise duty, must also pay another excise duty in his or her country. This obviously results in an unjustified increase in the price of the vehicle and drastically reduces the Polish seller's competitiveness when such a vehicle is sold on a foreign market, thus infringing the principle of commercial equality.

Accordingly, the party requested that the judgment under appeal be set aside in its entirety and that its action be upheld, or alternatively that that judgment be set aside in its entirety and that the case be referred back to the court of first instance.

III. Presentation of the reasoning of the national court (Supreme Administrative Court) in the request for a preliminary ruling

- 6 In the opinion of the Supreme Administrative Court, in order to decide the party's appeal on a point of law, it is necessary to obtain an answer from the Court of Justice of the European Union ('the Court of Justice') to the question concerning the interpretation and rules for the application of Article 56 of the Treaty on the Functioning of the European Union [...] ('TFEU'), and the single-stage nature of excise duty as a tax on actual consumption as well as the principle of proportionality. The appeal on a point of law is based on a plea of infringement of the norms stipulated in Articles 8, 10, 13, 14, 15, 25, 36 and 37 of the EEA Agreement, which norms, and in particular those of Articles 36 and 37, are also set out in Articles 56 and 57 TFEU.

The EEA Agreement was approved on behalf of the then European Communities on 13 December 1993 by the Council and the Commission, the substantive legal basis for that approval being provided by Article 238 of the EEC Treaty (now Article 217 TFEU).

- 7 Furthermore, in accordance with Article 267 TFEU, where a question is raised concerning the interpretation of the Treaties and the interpretation of acts of the institutions, bodies, offices or agencies of the Union in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is obliged to bring the matter before the Court.

Question referred for a preliminary ruling

- 8 When examining the appeal on a point of law in the present case, the Supreme Administrative Court entertained doubts concerning the plea that Article 107(1) of the LED infringes the principle of freedom of movement of goods and services (in the area of trade) set out in Article 56 TFEU (Article 36 of the EEA Agreement), which prohibits discrimination against entities from other Member States and any other restrictions that prohibit, impede or render less attractive the exercise of the freedom to provide services.

In particular, those doubts concern whether a regulation of that kind (Article 107(1) of the LED) results in domestic entrepreneurs who export passenger cars to third countries (as well as those making intra-Community supplies of such cars) being less competitive than entrepreneurs from other EU countries who export such vehicles (or make intra-Community supplies of such vehicles) due to the fact that the mere registration of an exported passenger car in Poland prevents reimbursement of the excise duty paid, even in an amount calculated pro rata to the period of its use in Poland.

There are also doubts as to whether a regulation such as Article 107(1) of the LED, by preventing the reimbursement of excise duty paid where a previously registered passenger car is exported, even in an amount calculated pro rata to the period of its use in Poland, is at odds with both the principle that excise duty is a single-stage tax on actual consumption and the principle of proportionality.

- 9 Passenger cars are not excise goods but are nevertheless subject to excise duty in Poland. The legal basis for this state of affairs is, inter alia, Article 1(3)(a) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12), which explicitly states that Member States may levy taxes on products other than excise goods, provided that this does not give rise to formalities connected with the crossing of frontiers.

This type of tax is not a harmonised excise duty, but its introduction and collection rules should be consistent with the tax rules applicable to excise duty as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax as well as its reimbursement are concerned.

As the Court of Justice pointed out in its order of 27 June 2006 in Case C-242/05, ..., EU:C:2006:430, paragraph 23, the taxation of motor vehicles has

not been harmonised, and therefore Member States are free to exercise their powers of taxation in that area, provided they do so in compliance with Community law (judgment of 21 March 2002 in Case C-451/99, ..., ECR 2002, p. I-3193, paragraph 40).

- 10 Excise duty on passenger cars in Poland is a single-stage tax: intra-Community acquisition, importation and the first sale of a passenger car not registered in Poland are subject to excise duty. Subsequent sales are in principle not subject to excise duty.
- 11 Article 107 of the LED sets out the basic rules for the reimbursement of excise duty paid on passenger cars which are subsequently exported to another Member State.

Pursuant to Article 107 of the LED, the entity that acquires the right to dispose of a passenger car as owner is entitled to reimbursement of excise duty if that duty has been paid on that car in Poland. Therefore, reimbursement is due regardless of whether excise duty is paid on the first sale in Poland, on intra-Community acquisition or on import. The basic condition for reimbursement, in addition to the payment of excise duty, is confirmation that the passenger car has been exported outside Poland.

However, entitlement to reimbursement does not arise if the car has ever been previously registered within the meaning of the ustawa z dnia 20 czerwca 1997 r. – Prawo o ruchu drogowym (Law of 20 June 1997 on Road Traffic) (Dziennik Ustaw (Journal of Laws) of 2020, item 110, as amended) [(‘the Law on Road Traffic’)]. In practice, this precludes the right to reimbursement of excise duty with respect to those vehicles that were registered prior to being exported, even if it was only a temporary registration as referred to in Article 74 of the Law on Road Traffic (for instance, for the purpose of exporting the vehicle).

However, it should be borne in mind that this condition is to be interpreted in accordance with the principle that excise duty is a tax on consumption, and not with the rules on vehicle registration set forth in the Law on Road Traffic. Therefore, it should be assumed that the mere registration of a passenger car is not to constitute an obstacle to the reimbursement of excise duty if the passenger car in question was not and is not intended for consumption in Poland.

- 12 However, even if it were to be assumed that the consumption of the vehicle in question began in Poland upon its registration, which was only temporary in nature – and continued until the time the passenger car was exported – then entirely depriving the taxable person who paid excise duty of the ability to recover that duty due to the absence of a regulation providing for partial (proportional) reimbursement based on the period of the car’s consumption (registration) in Poland would appear contrary to the provision of Article 56 TFEU (Article 36 of the EEA Agreement) and the principle that excise duty is a single-stage tax on actual consumption as well as the principle of proportionality, since

if, in spite of registration, the passenger car is not used (consumed) in Poland or the period of its use (consumption) is short, charging the full excise duty on that vehicle in Poland appears to be inconsistent not only with the principle of taxation of goods at the place of consumption, but also with the principle of free movement of goods – in this case passenger cars – between individual Member States within the European Union as well as in trade with third countries.

- 13 As the Court of Justice indicated in its order of 27 June 2006 in Case C-242/05 ..., a national law which requires payment of a tax the amount of which is not proportionate to the use of the vehicle in the Member State concerned, even if it proves a legitimate aim compatible with the Treaty, is contrary to Articles 49 EC to 55 EC where it applies to vehicles leased and registered in another Member State which are neither intended to be used essentially in the first Member State on a permanent basis nor in fact used in that way, except where its aim cannot be achieved by introducing a tax proportionate to the duration of the use of the vehicle in that State (paragraph 29).

Although that ruling concerned car rental, this does not mean that the principle expressed therein, which indicates the need for a tax such as excise duty to be proportionate to the period of use of the vehicle in the Member State concerned, cannot be applied to the sale of a car.

- 14 Additionally, it should be borne in mind that where a car is exported to another Member State or to a third country, it is, as a rule, subject to local consumption taxes or charges similar in nature to Polish excise duty, which in the absence of excise duty reimbursement in Poland may result in a breach of the principle that excise duty is a single-stage tax. Obviously, this also has the effect of increasing the price of the vehicle and drastically reducing the Polish seller's competitiveness when the vehicle is sold on a foreign market, possibly indicating an infringement of the principle of commercial equality, which is prohibited by Article 56 TFEU (Article 36 of the EEA Agreement). Therefore, doubts arise as to whether a provision such as Article 107(1) of the LED, which results in the taxable person being deprived of reimbursement of the excise duty paid on an exported passenger car, even in an amount calculated pro rata to the period of its use in Poland, as a result of any registration (even temporary) of that car in Poland, results in a situation, contrary to Article 56 TFEU (Article 36 of the EEA Agreement), where domestic traders exporting passenger cars to third countries (and also engaging in intra-Community supplies of such cars) are less competitive than traders from other EU countries exporting such vehicles (or engaging in intra-Community supplies of such vehicles), and whether this has the effect of restricting the freedom to provide services with respect to trade in passenger cars.

- 15 In the present case, the party argues that in a situation – such as that in the present case – where the period of consumption of a passenger car in the country in which excise duty was paid is insignificant in relation to the entire period of its operation and usefulness, and where it is not disputed that the car was exported outside the European Union, making it impossible for that party to obtain even partial

reimbursement of the excise duty paid infringes the above principles, since there is no justification whatsoever for the position that an entity which, after importing a passenger car, exported it, should be obliged to pay the entire excise duty only due to the fact that the car was registered, irrespective of the nature of the registration and the period of use (consumption) of the vehicle in Poland.

In the context of the plea alleging infringement of Articles 36 and 37 of the EEA Agreement, the party submits that the parties to that Agreement include Norway, to which the car in question was exported, and in which its importation is subject to a consumption tax similar in nature to Polish excise duty. Therefore, if excise duty is not reimbursed to the seller in Poland, it must be charged to a foreign purchaser who, in addition to that excise duty, must also pay another similar tax in his or her country, which is contrary to the rule that excise duty is a single-stage tax, and results in an unjustified increase in the price of the vehicle and a decrease in the Polish seller's competitiveness when such a vehicle is sold on a foreign market, thus infringing the principle of commercial equality.

- 16 Thus, in a situation such as in the present case, charging the taxable person the full amount of excise duty appears to be contrary to the principle of freedom of movement of goods and services (Article 56 TFEU, Article 36 of the EEA Agreement), the principle that excise duty is a single-stage tax on actual consumption (single-stage taxation), and the principle of proportionality in so far as Article 107(1) of the LED does not provide for proportional taxation (proportional reimbursement of excise duty) in the case of a car imported and registered, and subsequently exported from Poland, pro rata to the period of its use in Poland.
- 17 Obviously, it is not within the scope of the present case to indicate the principles that should guide a Member State in defining the rules for a pro rata reimbursement, but in general it would appear possible for a Member State to set criteria that would guarantee the achievement of the purpose of such a regulation, which would be to charge the taxable person with excise duty in proportion to the period during which the vehicle is used in the territory of that Member State, which would be consistent with the principle of freedom of movement of goods and services (Article 56 TFEU, Article 36 of the EEA Agreement) and with the principle that excise duty is a single-stage tax on actual consumption, while establishing conditions that would ensure the prevention and combating of excise tax fraud.
- 18 The above doubts, which are related to the interpretation of Article 56 TFEU (Article 36 of the EEA Agreement) in the light of the principle that excise duty is a single-stage tax and the principle of proportionality, justify referring the question set out above to the Court of Justice of the European Union for a preliminary ruling.
- 19 For those reasons, the national court, on the basis of Article 267 TFEU, has ruled as in paragraph 1 of the operative part of this order.

[...] [suspension of the proceedings]

WORKING DOCUMENT