Case C-833/21

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:

31 December 2021

Referring court:

Audiencia Nacional (Spain)

Date of the decision to refer:

14 December 2021

Applicant:

Endesa Generación, S. A.

Defendant:

Tribunal Económico Administrativo Central

Subject matter of the main proceedings

Assessment notice issued in respect of the coal tax levied on the consumption of coal for use in electricity production.

Subject matter and legal basis of the request for a preliminary ruling

Request, under Article 267 TFEU, for interpretation of the term 'reasons of environmental policy' in Article 14(1)(a) of Directive 2003/96, in relation to the Spanish tax on coal used for the generation of electricity.

Questions referred for a preliminary ruling

(1) Is the Spanish legislation which provides for a tax on coal used for electricity generation compatible with Article 14(1)(a) of Directive 2003/96/EC, when, despite stating that its aim is to protect the environment, that aim is not reflected in the structure of the tax and the tax levied is used to finance the costs of the electricity system?

(2) Is it possible to consider that the environmental aim is given concrete expression in the structure of the tax on the ground that the tax rates are set in relation to the calorific value of coal used for electricity generation?

(3) Is the environmental aim achieved simply by reason of the fact that taxes have been imposed on certain non-renewable energy products and that no tax is levied on the use of such products where they are considered to be less harmful to the environment?

Provisions of EU law relied on

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity

According to recital 2 in its preamble, this directive aims to impose a minimum rate of taxation on electricity and energy products owing to requirements relating to the proper functioning of the internal market.

Tax on electricity is levied on final consumption, as a consequence of which Article 14(1)(a) of the directive provides that Member States are to exempt from taxation 'energy products and electricity used to produce electricity and electricity used to maintain the ability to produce electricity.' The same paragraph permits Member States, for reasons of environmental policy, to subject those products to taxation without having to satisfy the minimum levels of taxation laid down in the directive.

Case-law of the Court of Justice.

In the judgment of 7 March 2018, C-31/17, *Cristal Union*, the Court of Justice ruled on the mandatory nature of the exemptions provided for in Article 14(1)(a) of Directive 2003/96, finding as follows:

'25 In addition, since Article 14(1) of Directive 2003/96 sets out an exhaustive list of the exemptions which Member States must apply in connection with the taxation of energy products and electricity …, its provisions cannot be interpreted broadly without depriving the harmonised taxation established by that directive of all practical effect.

26 However, as the Court has already held, the first sentence of Article 14(1)(a) of Directive 2003/96, in so far as it imposes on Member States the compulsory exemption of energy products used to generate electricity, provides a precise and unconditional obligation, with the result that it confers on individuals the right to rely directly on it before national courts …

27 In addition, it should be noted that, when the EU legislature intended to allow Member States to derogate from that regime of mandatory exemption, it did

so explicitly in, respectively, the second sentence of Article 14(1)(a) of Directive 2003/96, which states that Member States may tax energy products used to produce electricity for reasons relating to the protection of the environment, and in the third subparagraph of Article 21(5) of that directive, under which Member States which exempt electricity generated by small producers of electricity must tax the energy products used for the generation of that electricity.'

In relation to the criteria which a tax must fulfil in order to have a specific purpose, such as to satisfy reasons of environmental policy, the judgment of 5 March 2015, *Statoil Fuel & Retail*, C-553/13, referring to the same concept in Article 1(2) of Directive 2008/118, states that:

'37 As regards the first of those conditions – the only one to which the questions referred relate – it is apparent from the case-law of the Court that a specific purpose within the meaning of Article 1(2) of Directive 2008/118 is a purpose other than a purely budgetary purpose …

41 In order for the predetermined allocation of the revenue from a tax on excise goods to be regarded as indicating that the tax pursues a specific purpose within the meaning of the same provision, the tax in question must itself be directed at achieving the specific purpose referred to, so that there is a direct link between the use of the revenue and the specific purpose …

42 In the absence of such a mechanism for the predetermined allocation of revenue, a tax on excise goods can be regarded as pursuing a specific purpose within the meaning of Article 1(2) of Directive 2008/118 only if it is designed, so far as its structure is concerned, and particularly the taxable item or the rate of tax, in such a way as to guide the behaviour of taxpayers in a direction which facilitates the achievement of the stated specific purpose, for example by taxing the goods in question heavily in order to discourage their consumption …'

Provisions of national law relied on

Law 22/2005 of 18 November 2005

This Law transposes Directive 2003/96/EC into Spanish law and creates the coal tax through the amendment of Law 38/1992 on excise duty (Ley 38/1992 de impuestos especiales) of 28 December 1992, by inserting Title III 'Excise duty on coal'.

Liability to the tax is triggered by the release of coal for consumption, although Article 79(3) of Law 38/1992 exempted from the coal tax transactions whereby the release of coal for consumption involved the use of coal in electricity production and the cogeneration of electricity and heat.

The basis of assessment is the energy value of coal that is the subject of taxable transactions, expressed in gigajoules, and the tax rate was EUR 0.15 per gigajoule.

Law 15/2012 on fiscal measures for sustainable energy (Ley 15/2012 de medidas fiscales para la sostenibilidad energética) of 27 December 2012

This Law abolished the exemption, laid down in Article 79(3) of Law 38/1992, for the consumption of coal used in electricity production and the cogeneration of electricity and heat.

This Law also laid down a tax rate of 0.65, although subsequently, by means of Royal Decree Law 9/2013 adopting urgent measures to guarantee the financial stability of the electricity system (Real Decreto ley 9/2013 por el que se adoptan medidas urgentes para garantizar la estabilidad financiera del sistema eléctrico) of 12 July 2013, a reduced rate of 0.15 per gigajoule was introduced for coal intended for professional use, provided that that coal is not used in processes relating to cogeneration and the direct or indirect generation of electricity. The Royal Decree laid down rules governing the taxation of supplies of coal for use in combined heat and power plants generating electricity and useful thermal energy, the tax rates referred to being applied on the basis of the proportion of coal to be attributed to electricity production measured at the alternator terminals and to useful thermal energy, thereby complying with the case-law of the Court of Justice on that point.

The second additional provision of Law 15/2012, 'costs of the electricity system', provided that, in the annual General State Budget Laws (Leyes de Presupuestos Generales del Estado) an amount would be allocated for financing the costs of the electricity system, as provided for in Law 54/1997 on the Electricity Sector (Ley 54/1997 del Sector Eléctrico) of 27 November 1997, that was equivalent to the sum of (i) an estimate of the annual amounts collected by the State in respect of the levies and taxes included in that Law and (ii) the estimated revenue generated by the auctioning of greenhouse gas emission allowances, with a maximum of EUR 500 million.

As regards the objective of Law 15/2012, its preamble states as follows: 'The objective of this Law is to adapt our tax system to more efficient and environmentally friendly use and sustainable development, values that inspire this tax reform, and as such in line with the basic principles that govern the fiscal, energy and, of course, environmental policy of the European Union.

In today's society, the increasing impact of energy production and consumption on environmental sustainability requires a normative and regulatory framework that guarantees all agents the proper functioning of the energy model that also contributes to preserving our rich environmental heritage.

The basic foundation of this Law is Article 45 of the Constitution, a provision in which the protection of our environment becomes one of the guiding principles of social and economic policies. Thus, one of the axes of this tax reform is to internalise the environmental costs resulting from electricity production and from the storage of spent nuclear fuel and radioactive waste. In this way, [this] Law

must serve as a stimulus to improve our levels of energy efficiency while at the same time ensuring better management of natural resources and continuing to enhance the new model of sustainable development, both from an economic and social point of view, as well as from an environmental point of view.

The present reform also contributes to integrating environmental policies into our tax system, which includes taxes that are specifically environmental and also the possibility of incorporating the environmental component into other, existing taxes.

The values and objectives underpinning this Law are intended to be cross-cutting and must therefore be a cornerstone of the cohesion of the sectoral measures, particularly where these affect a sector, like the energy sector, having such a high economic and environmental impact on the country.

To this end, this Law regulates three new taxes: the tax on the value of electricity production, the tax on the production of spent nuclear fuel and radioactive waste resulting from the generation of nuclear power, and the tax on the storage of spent nuclear fuel and radioactive waste in centralised facilities; a charge on the use of inland waters for the production of electricity is introduced; the rates of taxation for natural gas and coal are amended and the exemptions for energy products used in the production of electricity and in the cogeneration of electricity and useful heat are abolished …'

Law 15/2012 retained the exemptions from hydrocarbon tax in respect of the production of electricity at power plants and the production of electricity or the cogeneration of electricity and heat at combined power plants in respect of fuels falling within its scope, which include natural gas and diesel fuel.

Law 54/1997 on the Electricity Sector (Ley 54/1997 del Sector Eléctrico) of 27 November 1997

This Law governed the costs and the financing of the electricity system.

Remuneration for activities in the electricity system

With regard to the remuneration of **production activity**, the Law provides as follows:

(a) Based on the price offered to the market operator by the different production units, remuneration for electricity shall be paid by reference to the marginal price corresponding to the offer made by the last production unit whose entry to the system was necessary in order to meet the demand for electricity.

(b) The capacity guarantee which each production unit effectively provides to the system, which shall be defined by taking into consideration the verified availability and technology of the plant in the long and short term and in each

programming period, shall be remunerated by calculating the price by reference to the long-term capacity requirements of the system.

(c) Additional services involved in the production of electricity, which are necessary in order to ensure adequate consumer supply, shall be remunerated.

Coal-fired power plants receive remuneration for production activity which reflects the capacity guarantee that each production unit effectively provides to the system.

Remuneration for **transport activity** shall be laid down by regulation and shall be determined in the light of the investment, maintenance and operation costs of equipment and other costs required for carrying on that activity.

Remuneration for **distribution activity** shall be laid down by regulation and shall enable the remuneration payable to each subject to be set on the basis of the following criteria: costs relating to investment, operation and maintenance of equipment, circulated energy, model showing the distribution areas, incentives to ensure quality supply and reduction of losses.

Remuneration for **marketing activity** which is payable by tariff customers shall be paid in the light of the costs derived from activities that are deemed necessary in order to supply electricity to those consumers and, where appropriate, the costs associated with demand management incentive schemes. The remuneration of marketing costs to eligible consumers shall be that which is freely agreed between marketers and their customers.

Costs of the electricity system

The following shall be regarded as **permanent operating costs of the system:** (i) costs which, because they are for carrying out activities relating to the supply of electricity, can be included in the system; (ii) costs allocated to the system operator and the market operator; and (iii) the operating costs of the Comisión Nacional del Sistema Eléctrico (National Commission of the Electricity System).

The premium payments referred to in Article 30(4) of this Law shall be regarded as **costs of diversification and security of supply**.

Law 24/2013 on the Electricity Sector (Ley 24/2013 del Sector Eléctrico) of 26 December 2013

Title III, ‘economic and financial stability of the electricity system’, of Law 24/2013 laid down new rules on the remuneration of activities aimed at the production, distribution and supply of electricity, which entered into force on 28 December 2013.

Article 14(5) provides as follows:

‘Remuneration for the activity of production shall include the following:

(a) Electricity traded on the day-ahead market and intraday auction markets, which shall be remunerated on the basis of the clearing price between the supply and demand of electricity on those markets, obtained through the mechanisms established.

Electricity traded on the bilateral, physical or futures markets, which shall be remunerated on the basis of the price of transactions definitively concluded on the markets in question. This component of remuneration shall be defined taking into account the losses incurred in the systems and the costs occasioned by disruption to the normal operation of the bidding system.

(b) System balancing services which are necessary to ensure adequate consumer supply.

The services which are regarded as system balancing services and the rules applicable to remuneration for those services shall be determined by regulation, and a distinction shall be drawn between mandatory services and optional services.

(c) Where appropriate, remuneration under the capacity mechanism, which shall be laid down by order of the Minister for Industry, Energy and Tourism, and which would allow the system to be given an adequate coverage margin and incentivise the availability of manageable capacity.

(d) Where appropriate, the additional remuneration referred to in paragraph 6 for the activity of electricity production in the electricity systems of non-peninsular territories.

(e) Where appropriate, the specific remuneration referred to in paragraph 7 for the production of electricity from renewable sources, high-efficiency cogeneration and residues.’

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant is an undertaking involved in the generation of electricity using coal. The applicant purchases coal through a connected company which declares the consignments of that fuel purchased for resale as exempt from coal tax on the ground that the chargeable event is consumption.

2 After carrying out an inspection, the tax authority considered that the chargeable event had occurred and the tax had become due at the time when the applicant purchased the consignments of coal for consumption in the generation of electricity and that the taxable amount should be determined in accordance with the higher calorific value of coal, irrespective of the energy actually used in the production of electricity. On those grounds, the tax authority issued a fresh

assessment notice and demanded a higher amount of tax and the applicable late-payment interest from the applicant.

3 On 7 April 2016, the applicant lodged an administrative complaint with the Tribunal Económico Administrativo Central (Central Tax Tribunal, Spain) against the notice of assessment to coal tax for the 2013 tax year, disputing (i) the taxable amount calculated on the basis of the higher calorific value of coal, since, in its view, that amount should be determined solely on the basis of the calorific value actually used in the generation of electricity; (ii) the taxation of 268 717.98 tonnes of coal, which the connected company had declared exempt in the 2011 tax year because it was intended for resale and which was then used by the applicant in the production of electricity; and (iii) the compatibility with EU law of the tax on coal used to generate electricity.

4 In its decision of 28 March 2019, the Central Tax Tribunal (i) refused to take into consideration the lower calorific value of coal to determine the taxable amount for the purposes of coal tax; (ii) maintained that there was no double taxation involved in the levying of tax on consignments of coal that had previously been declared as exempt on the ground that they were for resale, where the purchaser allocates that coal for self-consumption in the generation of electricity, an event triggering liability to coal tax; and (iii) did not rule on the compatibility with EU law of Law 15/2012 of 27 December 2012 on fiscal measures for sustainable energy, which abolished the exemption from coal tax for coal consumed for the purposes of electricity generation.

5 The applicant brought an administrative appeal before the referring court, raising identical questions to those raised before the tax tribunal and requesting a reference for a preliminary ruling on the compatibility of Law 15/2012 with EU law.

The essential arguments of the parties in the main proceedings

6 The parties' arguments are expressed in the positions that they adopted in the administrative proceedings.

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

7 The referring court is satisfied that, since the tax rate depends on the heat energy generated by the use of coal, measured in gigajoules, there is no reason to take into account only the heat energy actually used for the generation of electricity. The referring court also considers that the event triggering liability to the tax occurred when the applicant purchased the coal from its connected company for use in the production of electricity.

8 The referring court does have doubts regarding the compatibility of the taxation of the consumption of coal used for electricity generation laid down in Spanish law

with the European legislation restructuring the Community framework for the taxation of energy products and electricity.

9 If it must be held that the application of the coal tax to coal used for the generation of electricity does not have an environmental purpose, within the meaning of Article 14(1) of Directive 2003/96/EC, the Spanish legislation will be incompatible with EU law and the notice of assessment issued by the tax authority will be incorrect.

10 Specifically, the referring court has serious doubts regarding the nature of the purpose of that tax, since, for a tax to have a specific purpose, within the meaning of Article 14(1)(a), that tax cannot have a solely budgetary purpose such as financing the costs of the Spanish electricity system. That budgetary purpose is apparent from the fact that Law 15/2012 expressly stipulates that an estimate of the annual amounts collected in respect of the taxes included in that Law is to be allocated by the General State Budget Laws to financing the costs of the electricity system, as provided for in Article 16 of Law 54/1997 of 27 November 1997 on the electricity sector.

11 The environmental purpose announced in the preamble to Law 15/2012 is not reflected in the structure of the tax and nor is the tax collected intended to reduce the environmental impact of the use of coal for electricity generation. Furthermore, the fact that the use of a highly polluting energy product to generate electricity is subject to taxation does not appear to satisfy the conditions necessary for a tax to have a specific purpose, bearing in mind the marginalist system of setting prices in the electricity market and the fact that coal-fired power stations are not excluded from remuneration in respect of the production guarantee, which contributes to their economic and financial sustainability.