Case C-266/23

Request for a preliminary ruling

Date lodged:

26 April 2023

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

28 December 2022

Appellant:

A. S.A.

Respondent:

Dyrektor Izby Administracji Skarbowej w Bydgoszczy

[…] [file reference of the case]

ORDER

28 December 2022

The Naczelny Sąd Administracyjny (Supreme Administrative Court) […]

[…] [composition of the court]

following consideration on **14 and 28 December 2022**

at the hearing before the **Izba Gospodarcza** (Finance Chamber)

concerning the appeal on a point of law brought by **A. S.A., established in** […]

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

of **16 October 2018** […] [file reference of the case]

in the action brought by **A. S.A., established in** […]

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

of […] **May 2018** No […]

concerning **refusal to refund excise duty in part**

makes the following order:

1. the following questions concerning the interpretation of provisions of European Union law are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union:

   (a) 'Can Article 17(1)(a) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51) be understood as meaning that only the purchase price of the electricity itself, to the exclusion of any additional charges, for example a distribution charge, which must be borne under the legislation in force in a Member State in order to purchase electricity, must be included in the actual cost of the energy purchased?';

   (b) 'Must Article 17(1)(a) of Directive 2003/96 be interpreted as precluding the exclusion of an exemption from excise duty on the purchase of electricity for an energy-intensive business [Article 31d(1) of the Ustawa z 6 grudnia 2008 r. o podatku akcyzowym (Law of 6 December 2008 on excise duty (Dz. U. of 2022, item 143)] in the event that that business benefits from an object-specific exemption from excise duty under national legislation (Article 30(7a) of the Law on excise duty), when that business demonstrates that, in relation to the same energy, it does not benefit from those two exemptions simultaneously, and assuming that the total amount of the exemptions does not exceed the amount of excise duty paid for the same period of time?';

2. the proceedings before the Naczelny Sąd Administracyjny are stayed.

Grounds

I. Legal framework

<u>Provisions of European Union law</u>

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51) – 'Directive 2003/96':

Article 17(1)(a)

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1. Provided the minimum levels of taxation prescribed in this Directive are respected on average for each business, **Member States may apply tax reductions on the consumption of energy products used for heating purposes or for the purposes of Article 8(2)(b) and (c) and on electricity in the following cases:**

(a) in favour of energy-intensive businesses

An ‘energy-intensive business’ shall mean a business entity, as referred to in Article 11, where either the **purchases** of energy products and electricity amount to at least 3.0% of the production value or the national energy tax payable amounts to at least 0.5% of the added value. Within this definition, Member States may apply more restrictive concepts, including sales value, process and sector definitions.

‘Purchases of energy products and electricity’ shall mean the **actual cost of energy purchased or generated within the business**. Only electricity, heat and energy products that are used for heating purposes or for the purposes of Article 8(2)(b) and (c) are included. **All taxes are included, except deductible VAT**.

[…]

Provisions of national law

A. Ustawa z 6 grudnia 2008 r. o podatku akcyzowym (Law of 6 December 2008 on excise duty) (Dz. U. of 2022, item 143):

Article 30(7a):

7a. Electricity shall be exempt from excise duty if used:

(1) for purposes of chemical reduction;

(2) in electrolytic processes;

(3) in metallurgical processes;

(4) in mineralogical processes.

Article 31d(1), (2) and (11):

Article 31d. 1. An energy-intensive business using electricity which fulfils the following cumulative conditions:

(1) carries on economic activities denoted by the following codes of the Polish Classification of Economic Activities (PKD): […] [PKD codes]

(2) keeps accounts within the meaning of the provisions on accounting,

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(3) does not benefit in respect of that electricity from the exemption from excise duty laid down in Article 30(7a)

– shall be entitled to an exemption from excise duty, implemented by refunding part of the excise duty paid on the electricity used by that business.

2. An energy-intensive business using electricity shall be understood as an entity in which the share of the cost of electricity used in the value of the production sold in the tax year for which an application as referred to in paragraph 5 is submitted amounts to more than 3%. An energy-intensive business using electricity may not be smaller than a part of an undertaking, meaning an organisationally and financially separate group of tangible and intangible assets within an existing undertaking, including liabilities, used to perform specific economic tasks, which at the same time could constitute an independent undertaking performing those tasks independently.

11. The amount of partially refunded excise duty may not exceed the amount of excise duty paid on the electricity used by an energy-intensive business during the tax year for which an application as referred to in paragraph 5 is submitted.

B. Ustawa z 10 kwietnia 1997 r. Prawo energetyczne (Law of 10 April 1997 on Energy) (Dz. U. of 2012, item 1059):

Article 45a(1):

An electricity company shall, on **the basis of the prices and rates of charges contained in the tariff or the prices and charges** set on a competitive market, as referred to in Article 49(1), **calculate** the charges for the gaseous fuels, electricity or heat supplied to the customer.

Article 47(1):

Energy companies holding concessions shall set tariffs for gaseous fuels and energy, which are to be subject to approval by the Chair of the Energy Regulatory Office, and propose the duration thereof. Energy companies holding concessions shall submit tariffs and amendments thereto to the Chair of the Energy Regulatory Office on their own initiative no later than two months before the expiry of the previous tariff or at the request of the Chair of the Energy Regulatory Office.

Article 49(1):

The Chair of the Energy Regulatory Office may exempt an energy company from the obligation to submit tariffs for approval if he or she finds that it operates under competitive conditions, or may revoke an exemption granted if the conditions justifying the exemption cease to exist.

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C. Rozporządzenie Ministra Energii z 29 grudnia 2017 r. w sprawie szczegółowych zasad kształtowania i kalkulacji taryf oraz rozliczeń w obrocie energią elektryczną (Regulation of the Minister for Energy of 29 December 2017 laying down detailed rules on the formation and calculation of tariffs and payments on the electricity market) (Dz. U. [of 2017], item 2500):

Paragraph 5(2) and (3):

An electricity company performing economic activity relating to the transmission of electricity shall **include in the tariff:**

(1) the rates of charges for the provision of electricity transmission services, hereinafter referred to as 'rates of transmission charges';

[…]

3. An electricity company performing the commercial activity relating to electricity distribution shall **include in the tariff:**

[…]

(2) the rates of charges for the provision of electricity distribution services, hereinafter referred to as **'rates of distribution charges'**;

[…]

Paragraph 14(3) to (6):

3. **Rates of distribution charges shall be calculated** having regard to the division into rates arising from:

(1) the distribution of electricity;

(2) the use of the national electricity grid;

(3) the readings from metering and billing systems and the ongoing monitoring thereof.

4. The rates of distribution charges referred to in subparagraph 3(2) shall be calculated as single-component rates, based on the costs of purchasing electricity transmission services from the electricity transmission system operator in so far as they concern use of the national electricity grid.

5. The rates of distribution charges referred to in subparagraph 3(3), hereinafter referred to as 'subscription rates', shall be calculated as single-component rates.

6. Subscription rates shall be differentiated with regard to the length of the payment period.

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7. The rates of transmission or distribution charges referred to in subparagraphs 1(1) and 3(1), hereinafter referred to as 'network rates', shall be calculated as two-component rates broken down by component:

(1) a fixed network rate – calculated per unit of contracted power and, for a household electricity customer, calculated with reference to the metering and billing system;

(2) a variable network rate – calculated per unit of electricity taken from the grid at the point of supply.

D. Ustawa z 20 lutego 2015 r. o odnawialnych źródłach energii (Law of 20 February 2015 on renewable sources of energy (Dz. U. of [2015], item 478):

Article 52(1):

1. An electricity company, a final customer, an industrial customer and a commodity brokerage house or a brokerage house as referred to in paragraph (2) shall be obliged to:

(1) **obtain and submit to the Chair of the Energy Regulatory Office, for clearance purposes, a certificate of origin** or a certificate of agricultural biogas origin which has been issued:

(a) respectively for electricity or agricultural biogas generated in a renewable energy source installation located in the territory of the Republic of Poland or situated in the exclusive economic zone or

(b) on the basis of the Law on Energy or

(2) make a compensation payment within the time limit laid down Article 68(2) calculated in the manner set out in Article 56.

<u>II. Facts</u>

<u>1. Proceedings before the tax authorities</u>

By decision of 8 February 2018, the Naczelnik Urzędu Skarbowego w Toruniu (Head of the Tax Office in Toruń) refused to refund to A., a public limited company in W., part of the excise duty paid on electricity used in 2016. As a result of considering the appeal lodged by the company, the Dyrektor Izby Skarbowej w Bydgoszczy (Director of the Tax Chamber in Bydgoszcz), upheld, by a decision of 14 May 2018, the decision of the authority of first instance, highlighting two key issues in that case.

First, the authority stated that, in the event that a company benefits from the exemption from excise duty on electricity used in electrolytic processes laid down in Article 30a(7a)(2) of the Law on excise duty, it is not entitled to benefit simultaneously from the exemption from excise duty for energy-intensive plants

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set out in Article 31d(1) thereof. In the view of that authority, a literal interpretation of the phrase contained in Article 31d(1)(3) of the Law on excise duty, 'does not benefit, in relation to this electricity, from the exemption from excise duty referred to in Article 30(7a)', leads to that conclusion.

Second, the authority considered that the actual cost of electricity, as referred to in Article 17(1)(a) of Directive 2003/96, includes only the price of electricity, with taxes but without value added tax and additional charges relating to the purchase of electricity. In the view of the authority, distribution charges or certificates of origin are not components of the cost of electricity which can be added to the value of that electricity within the meaning of that provision.

2. Proceedings before the administrative courts

Proceedings before the court of first instance – the Wojewódzki Sąd Administracyjny w Bydgoszczy:

The action brought by A. S.A. against the abovementioned decision of the Director of the Tax Administration Chamber in Bydgoszcz was dismissed by the Wojewódzki Sąd Administracyjny w Bydgoszczy (Regional Administrative Court, Bydgoszcz). The court held that an energy-intensive business is entitled to the object-specific exemption laid down in Article 31d(1)(3) of the Law on excise duty only if it does not simultaneously benefit from the object-specific exemption laid down in Article 30(7a) thereof. In the view of the court, the literal wording of Article 31d(1) of the Law on excise duty *ab initio*, by referring to an energy-intensive business as a whole and to all the energy used by it, leads to that conclusion. Thus, the exemption relates to the entire business and all the energy used by that business, and not – as the appellant company argues – only to that part of the energy used in electrolytic processes, as referred to in Article 30(7a)(2) of the Law on excise duty. In the view of the court, the legislature ruled out the possibility of applying the two tax exemptions simultaneously.

With regard to the second legally significant issue in this case, the national court concluded that the phrase 'purchase of electricity' used in Article 17(1)(a) of Directive 2003/96 means the actual cost of that electricity, that is to say, only the electricity and all taxes, excluding value added tax and other mandatory charges. That cost therefore includes only the expenditure on the purchase of electricity and not the expenditure on the purchase of related services, such as distribution services. Despite – as the court accepted – the necessity of bearing them when electricity is used, because without the supply of electricity, that electricity cannot be used, they do not constitute a cost of purchasing electricity. The court considered that the charge for the energy distribution service does not constitute a tax or other charge under public law. It held that they constitute charges under civil law, arising from the contractual relationship between the consumer and the energy company. With reference to the judgment of the Court of Justice of 18 January 2017, C-189/15, the court considered that, for the purposes of classifying certain amounts as a tax, it is essential that there be an obligation to

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pay them and that, in the event of failure to fulfil that obligation, that the taxable person be pursued by the competent authorities. Since the distribution charge does not constitute a tax in that sense, it cannot constitute a cost of purchasing electricity. Nor, as the court held, does the cost of obtaining, and gaining clearance for, a certificate of origin of electricity.

Proceedings before the Naczelny Sąd Administracyjny:

The appellant lodged an appeal on a point of law against the above judgment in its entirety and, pursuant to Article 174(1) of the Ustawa z 30 sierpnia 2002 r. – Prawo o postępowaniu przed sądami administracyjnymi (Law of 30 August 2002 establishing the code of procedure before the administrative courts) (Dz. U. of 2018, item 1302), alleged that the court of first instance had infringed provisions of substantive law, that is to say:

(a) Article 31d(1) of the Law on excise duty, in conjunction with Article 31d(11) thereof, by dint of misinterpretation in that it holds that the benefit, by the appellant, of the exemption laid down in Article 30(7a) of Law on excise duty (exemption for energy used in electrolytic processes), irrespective of the scope of that exemption, completely rules out the possibility of the appellant benefiting from the exemption laid down in Article 31d of the Law on excise duty;

(b) Article 31d(2) and (3) of the Law on excise duty, by dint of misinterpretation in that it holds that the costs of additional charges (inter alia distribution charges) cannot be included in the costs of the electricity used and in that it held that additional charges, in particular distribution charges, should not be taken into account in calculating the costs of the energy used, despite the fact that under the closest rules clarifying the concept of the cost of energy … [list of provisions of national law clarifying the concept of the ‘cost of energy’] those charges are clearly included in such cost;

(c) Article 31d(2) and (3) of the Law on excise duty, in conjunction with Article 17(1)(a) of Directive 2003/96, by dint of misinterpretation in that it held that additional charges which do not constitute taxes must not be taken into account in calculating the cost of electricity used, where, under the directive, the actual cost of energy products and electricity are taken into account within the definition of an energy-intensive business and, in addition, in that it held that additional charges, in particular distribution charges, are not taken into account in calculating the cost of electricity despite the fact that, under similar provisions based on the same rules of the directive on exemptions from excise duty for coal products and gas products for energy-intensive businesses, which use the narrower concept of ‘purchase’ and not cost, it is held that the full cost of purchase must be taken into account in that calculation.

In its appeal on a point of law, the appellant claimed that the judgment under appeal should be set aside in its entirety and that the case should be referred back to the Wojewódzki Sąd Administracyjny w Bydgoszczy, and applied for costs.

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III. Reasons for the national court's request for a preliminary ruling

For the appeal on a point of law to be considered, the Court of Justice of the European Union must [answer] the question concerning the interpretation and application of the provisions of Directive 2003/96 set out in the order in light of the following arguments.

The appeal on a point of law alleges infringement of Article 31d(1), (2), (3) and (11) of the Law on excise duty and of Article 17(1)(a) of Directive 2003/96. The accuracy of the outcome of the interpretation of the provision of the directive adopted by the tax authorities and the court of first instance, and contested in the appeal on a point of law, raises doubts for the Naczelny Sąd Administracyjny with regard to both issues relevant in this case. In this instance, the Naczelny Sąd Administracyjny was obliged, under Article 267 of the Treaty on the Functioning of the European Union (consolidated version of 2012 – OJ 2012 C 326, p. 1), to refer a question to the Court of Justice for a preliminary ruling.

In the present case, it is common ground that the appellant is an energy-intensive business within the meaning of Article 17(1)(a) of Directive 2003/96 and Article 31d of the Law on excise duty, and also that it uses electricity in electrolytic processes.

The appellant corrected the excise duty declaration submitted for 2016 and requested the authority to refund the amount of excise duty originally paid, which, in the view of the appellant, had been overpaid. In the appeal, the appellant set out two grounds for its request. The first was based on the claim that the appellant was entitled to a tax exemption for an energy-intensive plant. The second concerned the scope of the costs of purchasing electricity in such a business.

Both categories are covered by Community harmonisation and in both cases the interpretation of the provisions of EU law relating to them raised doubts on the part of the Naczelny Sąd Administracyjny.

With regard to the first issue raised, it should be noted that Article 17(1)(a) of Directive 2003/96 relates to the exemption from excise duty laid down for an energy-intensive business. The Republic of Poland has made use of the possibility of establishing such an exemption, which, moreover, has already been the subject of the judgment of the Court of Justice of 31 March 2022 in Case C-139/20. A reading of that provision of the directive may lead to the conclusion that the exemption laid down therein cannot be ascribed a mandatory nature. However, an analysis of the objectives of the directive, which must be given primacy from the perspective of the tools of interpretation of this category of legal act, may lead to a somewhat different conclusion. In addition, once a Member State has decided to introduce such an exemption, by drawing up the applicable legislation, it is obliged to comply with the relevant provisions of the directive.

With reference to the objectives of the directive, it should be recalled that they include the proper functioning of the internal market, the achievement of

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Community policies and, in addition, respect for the Kyoto Protocol (recitals 3 and 7 of the directive). The need for exemptions was emphasised, in particular 'because of the lack of a stronger harmonisation at Community level, because of the risks of a loss of international competitiveness or because of social or environmental considerations' (recital 28). Attention was also drawn to the need to give specific treatment to energy-intensive businesses as businesses entering into agreements to significantly enhance environmental protection and energy efficiency (recital 29). It should not be forgotten that the aspect of competitiveness noted in the directive must relate not only to the equal treatment of persons in a similar situation on the common market, but also to the possibility of such persons competing on the international market, outside the European Union.

The available legislative texts show that, in introducing an exemption for an energy-intensive business, the Member State considered it necessary to fulfil the aforementioned objectives of the directive. In the drafting of the national Ustawa z 24 lipca 2015 r. o zmianie ustawy o podatku akcyzowym oraz niektórych innych ustaw (Law of 24 July 2015 amending the Law on excise duty and certain other laws (Dz. U., item 1479), which introduced Article 31d into the system, it was declared that the purpose thereof was to improve the competitiveness of the industry on the international market, especially after the financial crisis of 2009 […] [statement of the document concerning the *travaux préparatoires*].

Therefore, doubt arises as to whether – in the light of the foregoing remarks – Article 17(1)(a) of the directive may be construed as allowing application of that exemption to be made subject to conditions which are not laid down therein. Under Article 17(1)(a) of the directive, can the benefit of another exemption under national law constitute a condition excluding the application of the exemption laid down in the directive, the establishment of which is intended to achieve the stated objectives of EU law? The interpretation of that provision by the tax authorities and by the court of first instance allows such a possibility, which in practice may render the abovementioned exemption illusory. As a consequence, it calls into question the implementation by the national legislature of the objectives declared by the EU legislature.

The second doubt of the referring court concerns the definition in Article 17(1)(a) of Directive 2003/96 of the purchase of energy as: 'the actual cost of energy purchased or generated within the business'. There are two possible outcomes for an interpretation of that phrase. First, it is possible – like the tax authorities and the court of first instance – to conclude that it covers only the price of the electricity itself, excluding the costs of its transmission (distribution) and other elements necessary for the purchase thereof. That position is also set out in the case-law of the Naczelny Sąd Administracyjny, for example in the judgments of 18 September 2019, I GSK 228/17, and of 22 January 2020, I GSK 397/17.

Second, however, it is possible to regard it as meaning the cost of all goods and services which are necessary for the purchase of electricity, that is to say, first and foremost, transmission, as well as other compulsory accessory payments, without

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the payment of which the purchase of electricity is not possible in the light of the law. In the view of the referring court, there is no logical basis for asserting that, since all taxes (with the exception of value added tax) are included in the costs, charges of another kind do not constitute such costs. After all, one does not exclude the other.

There is no doubt, and it is not disputed in this case, that energy cannot be purchased without an accompanying distribution service or without covering additional costs, including gaining clearance for energy certificates. The distribution service is not a duty under public law, including in particular an indirect tax, to which the Court of Justice referred in its judgment of 18 January 2017, C-189/15. This is not the subject of doubt as to interpretation since payment of the distribution service charge is obligatory, but the amount thereof is determined on the basis of precise legal provisions and it is borne by the energy supplier. The amount of the distribution fee is determined (as the law stood in 2016) pursuant to Article 45a(1) and Article 49(1) of the Law on Energy and Paragraph 5(2) and (3) and Paragraph 14(3) to (6) of the Regulation of the Minister for Energy of 29 December 2017 laying down detailed rules on the formation and calculation of tariffs and payments on the electricity market in the tariff approved by the Chair of the Energy Regulatory Office. However, difficulties of interpretation are raised by whether the nature of this charge excludes it from being included in the category of actual costs of purchasing energy. In the tradition of legal language, 'actual' in terms of property values (*actual cost, die tats[ä]chlichen Kosten*) relates to dues actually incurred, which are necessary for the purchase of something. The reference in Article 17(1)(a) of Directive 2003/96 to the concept of tax is related to the exclusion of certain taxes from the category of costs. That provision does not refer to other types of costs; in particular, it does not establish any exclusions in that respect. The fact that a charge does not bear the name tax does not automatically mean that it does not constitute a cost of purchasing electricity. Similar considerations arise with regard to the certificate of origin of energy, which must be obtained and submitted for clearance purposes under Article 52(1) and (2) of the Law of 20 February 2015 on renewable energy sources.

[…]

[repetition of the content of the questions referred]

[…] – […] – […] [repetition of the legal basis of the request for a preliminary ruling; national rules of procedure]

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