JUDGMENT OF THE COURT (Fourth Chamber)

1 December 2011 *

In Case C-79/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 1 December 2009, received at the Court on 11 February 2010, in the proceedings

Systeme Helmholz GmbH

v

Hauptzollamt Nürnberg,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal (Rapporteur), L. Bay Larsen, C. Toader and E. Jarašiūnas, Judges,

* Language of the case: German.

Advocate General: E. Sharpston,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 5 May 2011,

after considering the observations submitted on behalf of:

— Systeme Helmholz GmbH, by G. Real, Wirtschaftsprüfer/Steuerberater,

— the Hauptzollamt Nürnberg, by S. Junker, Regierungsdirektor, and D. Jakobs, Prozessbevollmächtigter,

— the French Government, by G. de Bergues, B. Cabonat and B. Beaupere-Manokha, acting as Agents,

— the Cypriot Government, by E. Symeonidou, acting as Agent,

— the European Commission, by W. Mölls, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 11(3), 14(1)(b) and 15(1)(j) 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).

2 The reference has been made in proceedings between Systeme Helmholz GmbH and the Hauptzollamt Nürnberg (Nuremberg Customs Office; 'the Hauptzollamt'), concerning the Hauptzollamt's refusal to refund the excise duty on mineral oil ('mineral oil duty') paid by Systeme Helmholz on the fuel for an aircraft owned by it, on the ground that the company is not an air carrier.

Legal context

European Union ('EU') legislation

3 Recital 23 in the preamble to Directive 2003/96 is worded as follows:

'Existing international obligations and the maintaining of the competitive position of Community companies make it advisable to continue the exemptions of energy

products supplied for air navigation and sea navigation, other than for private pleasure purposes, while it should be possible for Member States to limit these exemptions.'

4 Article 11(3) of Directive 2004/18 provides:

'Where mixed use takes place, taxation shall apply in proportion to each type of use, although where either the business or non-business use is insignificant, it may be treated as nil.'

5 Article 14(1)(b) of the directive provides:

'In addition to the general provisions set out in Directive 92/12/EEC on exempt uses of taxable products, and without prejudice to other Community provisions, Member States shall exempt the following from taxation under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

...

(b) energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying.

For the purposes of this Directive "private pleasure-flying" shall mean the use of an aircraft by its owner or the natural or legal person who enjoys its use either

through hire or through any other means, for other than commercial purposes and in particular other than for the carriage of passengers or goods or for the supply of services for consideration or for the purposes of public authorities.

Member States may limit the scope of this exemption to supplies of jet fuel (CN code 2710 19 21)'.

6 Under Article 15(1)(j) of Directive 2003/96:

'Without prejudice to other Community provisions, Member States may apply under fiscal control total or partial exemptions or reductions in the level of taxation to:

...

(j) motor fuels used in the field of the manufacture, development, testing and maintenance of aircraft and ships'.

National law

7 The relevant provisions are those laid down in the Law on excise duty on mineral oils (Mineralölsteuergesetz) of 21 December 1992 (BGBl. 1992 I, p. 2185), in the version applicable in 2004, the year of the dispute; 'the MinöStG') and in the Regulation implementing the Law on excise duty on mineral oils (Mineralölsteuer-Durchführungsverordnung) of 15 September 1993 (BGBl. 1993 I, p. 1602), in the version applicable in 2004.

8 Article 4 of the MinöStG provides inter alia:

'Exemptions, definitions

(1) Subject to Paragraph 12, mineral oil may be used with exemption from tax

...

3. as fuel for the purpose of air navigation

(a) by air carriers carrying out the commercial carriage of persons and goods or the supply for consideration of services,

(b) in aircraft by authorities and the armed forces for official purposes and by the air rescue services for the purposes of air rescue.

For the purposes of the present Statute, fuel for the purpose of air navigation is CN code 27100026 aviation fuel with a Research Octane Number not exceeding 100, light jet fuel with CN code 27100037 and jet fuel (medium-viscosity oil) with CN code 27100051, if used in aircraft;

...'

9 Article 12 of the MinöStG was worded as follows:

'Licence

In relation to mineral oil in respect of which tax relief is granted under Paragraph 3(1) to (3), (5) and (7), Paragraph 4 or Paragraph 32(1) and (2), a licence must be obtained by persons who:

1. use or sell (distribute) it to others for fiscally advantageous purposes; or who

2. intend, as users or distributors, to transport it to

(a) a territory outside the territorial scope of the Community legislation on excise duty (third countries); or

(b) another Member State of the European Community for commercial purposes or by mail order.

...'

10 Paragraph 50(1) of the Regulation implementing the Law on excise duty on mineral oils, in the version applicable in 2004, provides:

'Refund of duty on fuel for the purpose of air navigation:

1. On application, tax paid on fuel for the purpose of air navigation shall be refunded, pursuant to Paragraph 4(1)(3) of the Law, to air carriers and bodies which have purchased such fuel, subject to tax, in the tax territory and which have used it for tax-free flights ...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Systeme Helmholz operates a company which develops and sells electronic components and software. It is the owner of an aircraft which is used by its managing director both for private purposes and for flights to other companies and to trade fairs, as

well as for maintenance and training flights. Systeme Helmholz does not have an operating licence for the purposes of the German law on air transport (Luftverkehrsgesetz), which is compulsory for air carriers in Germany.

12 Systeme Helmholz maintained monthly records concerning the use of the aircraft, in which it logged details of the date, the flight route, the duration of the flight and the purpose of the flight. On 16 December 2005, it applied for a refund – in the amount of EUR 1 700,12 – of the mineral oil duty that it had paid in respect of a total quantity of 2 358 litres of aviation fuel used for business flights made in Germany in 2004, including training flights and return trips to an aircraft maintenance facility.

13 By decision of 9 February 2009, the Hauptzollamt refused the refund application on the ground that Systeme Helmholz was not an air carrier.

14 Since, by decision of 12 April 2006, the Hauptzollamt declared the complaint made by Systeme Helmholz regarding that refusal to be unfounded, Systeme Helmholz brought an appeal before the Finanzgericht München (Finance Court, Munich). That court found that, in respect of the flights made for business purposes – with the exception of maintenance and training flights – Systeme Helmholz had the right to a refund of the mineral oil duty, on the basis of the first subparagraph of Article 14(1)(b) of Directive 2003/96. According to the Finanzgericht München, it cannot be inferred from that provision that the scope of the exemption is limited to air carriers. Where an aircraft is used for transport for company purposes, in order to develop business, a commercial purpose is pursued and, accordingly, the conditions for exemption as laid down in Community law are met.

15 However, in the case of training flights and flights for the purposes of maintenance and checking functional capacity, the Finanzgericht München found that Systeme Helmholz did not have a right to the tax relief provided for under Directive 2003/96. According to the Finanzgericht München, Article 15(1)(j) of that directive provides for the possibility of a refund only in respect of fuel consumed during maintenance. Furthermore, the maintenance and training flights do not constitute flights for commercial purposes because they are made for private, as well as commercial, reasons and have no direct link with the company's business activities. Proportionate tax relief was also held to be out of the question, since it was not provided for in Article 14(1)(b) of Directive 2003/96.

16 Both Systeme Helmholz and the Hauptzollamt brought appeals on a point of law against that judgment before the Bundesfinanzhof (Federal Finance Court), the former on the ground that the decision refuses to grant it the exemption for maintenance and training flights, and the latter in so far as that decision exempted Systeme Helmholz from the duty on fuel used for flights which it had made for company purposes.

17 It is in those circumstances that the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is the first sentence of Article 14(1)(b) of … Directive 2003/96 … to be interpreted as meaning that the exclusion of private pleasure-flying from the tax relief signifies that the exemption for energy products supplied for use as fuel for the purpose of air navigation is to be applied only to air carriers, or is the exemption to be applied to all fuel used for air navigation, provided that the aircraft is used for the purpose of earning income?

2. Is Article 15(1)(j) of … Directive 2003/96 … to be interpreted as meaning that it also pertains to fuel which an aircraft requires for the purposes of flights to and from an aircraft maintenance facility, or does the possibility of obtaining tax relief only apply to companies whose actual business purpose is the manufacture, development, testing and maintenance of aircraft?

3. Is Article 11(3) of … Directive 2003/96 … to be interpreted as meaning that, where an aircraft which is used for both private and commercial purposes is used for maintenance or training flights, pursuant to Article 14(1)(b) of … Directive 2003/96 … an exemption which is proportionate to the commercial use should be applied in respect of the fuel used for these flights?

4. If Question 3 is answered in the negative: may it be concluded from the non-applicability of Article 11(3) of Directive 2003/96 … for the purposes of Article 14(1)(b) of … Directive 2003/96 … that where there is mixed use of an aircraft for private and commercial purposes no exemptions are to be applied to maintenance or training flights?

5. If Question 3 is answered in the affirmative or if an analogous legal consequence arises from another provision of … Directive 2003/96 …: which criteria and which reference period should be taken as a basis for determining the respective proportion of use, within the meaning of Article 11(3) of … Directive 2003/96 …, for maintenance and training flights?'

Consideration of the questions referred

Question 1

18 By Question 1, the referring court asks, in essence, whether the tax exemption provided for under Article 14(1)(b) of Directive 2003/96 applies to an undertaking, such as the applicant in the main proceedings, whose corporate purpose is unrelated to the air navigation sector and which, in order to develop its business, uses an aircraft belonging to it to take members of its staff to clients or to trade fairs.

19 In order to reply to that question, it should be noted that the provisions of Directive 2003/96 concerning exemptions must receive an autonomous interpretation, based on their wording and on the objectives pursued by that directive (see, to that effect, Case C-389/02 *Deutsche See-Bestattungs-Genossenschaft* [2004] ECR I-3537, paragraph 19; Case C-391/05 *Jan De Nul* [2007] ECR I-1793, paragraph 22; and Case C-505/10 *Sea Fighter* [2011] ECR I-11089, paragraph 14).

20 As regards, first, the terms of Article 14(1)(b) of Directive 2003/96, the first subparagraph of that provision provides for a tax exemption for 'energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying'. The second subparagraph then defines 'private pleasure-flying' in negative terms, as 'the use of an aircraft … for other than commercial purposes and in particular other than

for the carriage of passengers or goods or for the supply of services for consideration or for the purposes of public authorities'.

21 It is apparent from the expression 'other than for the carriage of passengers or goods or for the supply of services for consideration' that the 'air navigation' covered by that exemption relates to the use of fuel where the aircraft is used directly for the supply of air services for consideration. In this context, therefore, the concept of 'navigation' implies that the supply of services for consideration is an inherent reason for the aircraft's movements (see, to that effect, *Sea Fighter*, paragraph 18).

22 Moreover, that interpretation of Article 14(1)(b) of Directive 2003/96 is borne out by the *travaux préparatoires* for that directive. In the proposal for a directive which resulted in the adoption of Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12), the European Commission had planned, by introducing a tax exemption on air fuel, 'to standardise the existing exemption for fuel supplied to international commercial flights, [extending it] to all commercial aviation' (COM(90) 434 final). According to the Commission, '[that should have enabled] equal treatment [for] air travel between any two points within the Community, [emphasising] the seamless nature of the internal market. Fuel supplied for private aviation [had to] be subject to tax – as [was] generally the case [at the time]'. For the purposes of the tax exemption for aviation fuel, therefore, the Commission drew a distinction between commercial aviation and private aviation.

23 Secondly, it follows from the purpose of Directive 2003/96, under which the Member States are to tax energy products, that the directive does not seek to establish general exemptions (see, to that effect, *Sea Fighter*, paragraph 21).

24 Furthermore, it emerges from recital 23 in the preamble to Directive 2003/96 that Article 14(1)(b) is based on compliance with international obligations and the maintaining of the competitive position of Community companies.

25 As regards international obligations, that reference mainly concerns – as the Commission observes – the tax exemptions on energy products intended for civil aviation which are granted to airlines on the basis of the Convention on International Civil Aviation, signed in Chicago on 7 December 1944 (*United Nations Treaty Series*, vol. 15, p. 296), and of international bilateral air service agreements concluded between the European Union and/or its Member States and third countries, and between the Member States themselves.

26 As regards the maintaining of the competitive position of Community companies, the competitiveness to which recital 23 to Directive 2003/96 alludes mainly concerns – as the Cypriot Government and the Commission note – the competitiveness between Community airlines and those of third countries. The imposition of duty on the aviation fuel used by European airlines for intra-Community or international flights significantly reduces the competitiveness of those companies in relation to the air transport companies of third countries.

27 It follows from those considerations that the air navigation operations carried out by a company like Systeme Helmholz, consisting in the carriage of its personnel to clients or trade fairs in its own aircraft, cannot be assimilated to the use of an aircraft for commercial purposes, for the purposes of Article 14(1)(b) of Directive 2003/96, and, accordingly, do not fall within the scope of the tax exemption for aviation fuel under that provision, in so far as those air navigation operations are not directly used for the supply of an air service for consideration.

28 That conclusion cannot be affected by the fact that there is a certain divergence between the various language versions of the first subparagraph of Article 14(1)(b) of Directive 2003/96 as regards the air navigation operations which are excluded from the tax exemption provided for under that provision. Whereas a number of language versions of that provision use terms which appear to refer only to leisure activities, such as the French and English versions which refer to 'aviation de tourisme privée' or 'private pleasure-flying', the German version of that directive refers, at least in the body of Article 14(1)(b) of Directive 2003/96, to the concept of 'private non-commercial aviation' ('private nichtgewerbliche Luftfahrt') which appears to embrace all non-commercial activities.

29 However, those diverging concepts are expressly defined in the second subparagraph of Article 14(1)(b) of Directive 2003/96 as being 'the use of an aircraft … for other than commercial purposes and in particular other than for the carriage of passengers or goods or for the supply of services for consideration or for the purposes of public authorities'. It is in the light of that definition that the scope of the tax exemption provided for under Article 14(1)(b) of Directive 2003/96 must be interpreted.

30 Lastly, the conclusion set out in paragraph 27 above cannot be undermined by the judgments in *Deutsche-See-Bestattungs-Genossenschaft* and *Jan De Nul*, referred to above. In those cases, the fuel for which a tax exemption had been sought fuelled ships which were directly used for the supply of services for consideration. Accordingly, in paragraph 28 of the judgment in *Deutsche See-Bestattungs-Genossenschaft*, the Court found, in respect of the operations of the Deutsche See which consisted in the organisation of burials on the high seas, for which it used three specially equipped ships, that 'it [was] not disputed that [those operations] constituted a supply of services for consideration'. Furthermore, in paragraph 40 of the judgment in *Jan De Nul*, the Court stated that the manoeuvres carried out by a hopper dredger during its

operations of pumping and discharge of materials, that is to say, journeys inherent in the carrying out of dredging activities, come within the scope of the term 'navigation', as used in the first subparagraph of Article 8(1)(c) of Directive 92/81.

31 That is the background against which it is necessary to view paragraph 23 of the judgment in *Deutsche See-Bestattungs-Genossenschaft*, in which the Court found that 'all navigation activity for commercial purposes comes within the scope of the exemption', and paragraph 25 of that judgment, in which the Court stated that Directive 92/81 does not draw any distinction as to the purpose of the navigation covered and that the distortion of competition which that directive aims to prevent may come about regardless of the type of commercial navigation in issue. Thus, the purpose of the journey is irrelevant for the purposes of applying the tax exemption if the navigation involves the supply of services for consideration (see, to that effect, *Sea Fighter*, paragraph 17).

32 In the case before the referring court, on the other hand, the work-related travel of Systeme Helmholz's staff in the aircraft belonging to that company, in order to visit clients and trade fairs, with a view to developing the company's business – the development and distribution of electronic components and software – is not directly used for the supply of air services for consideration by that company.

33 Accordingly, the answer to Question 1 is that Article 14(1)(b) of Directive 2003/96 must be interpreted as meaning that the tax exemption on fuel used for the purpose of air navigation, provided for under that provision, cannot apply to a company, such as the applicant in the main proceedings, which, in order to develop its business, uses its own aircraft to transport members of its staff to clients or to trade fairs, in so far as that travel is not directly used for the supply, by that company, of air services for consideration.

Question 2

34 By Question 2, the referring court asks, in essence, whether the tax exemption provided for under Article 15(1)(j) of Directive 2003/96 applies exclusively to fuels used by companies engaged in the manufacture, development, testing and maintenance of aircraft or whether that exemption also covers the fuels which an aircraft needs for the purposes of flights to and from an aircraft maintenance facility.

35 Article 15(1)(j) of Directive 2003/96 provides that Member States may apply under fiscal control total or partial exemptions or reductions in the level of taxation to motor fuels used in the field of the manufacture, development, testing and maintenance of aircraft and ships.

36 As regards, first, the wording of Article 15(1)(j) of Directive 2003/96, it is apparent from the terms in which it is framed and, in particular, from the use of the words 'bei der' in the German language version of that provision, of 'domaine' in the French language version and of 'field' in the English language version, that the tax exemption provided for under Article 15(1)(j) of Directive 2003/96 is reserved for the use of fuel by companies engaged specifically in the activities referred to in that provision.

37 As regards, secondly, the overall structure of Directive 2003/96, although the compulsory exemption under Article 14(1)(b) of that directive is designed to provide a fiscal incentive for the use of fuel for air navigation for commercial purposes, Article 15(1)(j) of that directive provides, in contrast, for an optional exemption which is specifically designed to encourage a certain number of commercial activities in which aircraft manufacturers and maintenance facilities are engaged, involving inter alia

fuel consumption on the ground and none of which fall within the scope of the normal activities of companies which are active in the air navigation sector.

38 It follows that Article 15(1)(j) of Directive 2003/96 does not cover fuel which has been consumed by an aircraft for the purpose of flights to and from an aircraft maintenance facility.

39 Accordingly, the answer to Question 2 is that Article 15(1)(j) of Directive 2003/96 must be interpreted as meaning that the fuel used for the purpose of flights to and from an aircraft maintenance facility does not fall within the scope of that provision.

Questions 3, 4 and 5

40 By Questions 3, 4 and 5, the referring court asks essentially whether, in the case of the mixed use of an aircraft, for both private and commercial purposes, an exemption proportionate to the commercial use can be granted for the fuel used for the purpose of maintenance or training flights and, if so, which criteria and which reference period should be taken as a basis for determining the respective proportion of use.

41 In view of the answer given to Question 1, there is no need to answer those questions.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 14(1)(b) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity must be interpreted as meaning that the tax exemption on air fuel used for the purpose of air navigation, provided for under that provision, cannot apply in the case of a company, such as the applicant in the main proceedings, which, in order to develop its business, uses its own aircraft to transport members of its staff to clients or to trade fairs, in so far as that travel is not directly used for the supply, by that company, of air services for consideration.**

2. **Article 15(1)(j) of Directive 2003/96 must be interpreted as meaning that the fuel used for the purpose of flights to and from an aircraft maintenance facility does not fall within the scope of that provision.**

[Signatures]