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Fiscal Court: limits for customs administration when exempting electricity generated from renewable energy sources from electricity tax

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1 Background

In electricity tax law, the concept of “installation” is an ongoing source of debate. Most recently, the Düsseldorf Fiscal Court (FC) had to deal with this issue in the context of the electricity tax exemption for electricity generated from renewable energy sources acc.to sec. 9 para. 1 no. 1 of the Law on Electricity Tax (StromStG), judgment of 21 February 2024 (4 K 1324/22 VSt). The definition of installation is crucial for making use of the tax exemption if several electricity generation units (eg PV systems or combined heat and power plants, hereinafter EGU) are located at different sites. The interpretation of the concept of “installation” then determines whether the individual units are considered to be one installation. If so, then their rated electrical outputs must be added together. If this output is more than two megawatts, tax exemption is possible acc. to sec. 9 para. 1 no. 1 of the StromStG, provided that the operator withdraws the electricity for his own consumption at the place of generation. If, on the other hand, the rated electrical output of each individual EGU is less than two megawatts, then an electricity tax exemption would only be possible acc. to the conditions laid down in sec. 9 para. 1 no. 3 of the StromStG. Here, electricity from renewable energy sources is tax exempt if the operator withdraws the electricity for his own consumption in a specific proximity to the installation or supplies the electricity to end consumers who withdraw it in a specific proximity to the installation.

Contrary to sec. 9 para. 1 no. 1 of the StromStG, the concept of “installation” in the sense of sec. 9 para. 1 no. 3 of the StromStG is defined. Acc. to sec. 12b para. 2 sentence 1 of the Electricity Tax Regulation (StromStV), EGU located at different sites are deemed to be one installation in the sense of sec. 9 para. 1 no. 3 of the StromStG if the individual units can be controlled remotely and the electricity generated is to be at least partially fed into the supply grid. However, as regards the tax exemption acc. to sec. 9 para. 1 no. 1 of the StromStG, the customs administration applies the so-called

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location-based concept of “installation” (General Directorate of Customs information letter on the concept of “installation” in electricity tax law, as per 11 March 2021). In its opinion, sec. 9 para. 1 no. 1 of the StromStG only applies to EGU located at one site. A corresponding application of sec. 12b para. 2 sentence 1 of the StromStV is ruled out. Therefore, the rated electrical output of units located at different sites cannot be aggregated using the criterion of remote controllability.

2 Facts

The plaintiff operates two modular combined heat and power plants (CHP) at each of five sites to generate electricity. In 2018 and 2019, it withdrew the electricity generated at each site for its own consumption. Furthermore, the plaintiff supplied the electricity to end consumers who withdrew it from the premises of the respective plant. In addition, the plaintiff fed the surplus electricity into the general supply grid by way of direct marketing. The plaintiff declared the quantities of electricity withdrawn as tax exempt acc. to sec. 9 para. 1 nos. 1 and 3 of the StromStG. The main customs office, however, rejected both tax exemptions and assessed electricity tax. Due to their remote controllability, the CHPs located at the different sites constituted one installation acc. to sec. 12b para. 2 sentence 1 of the StromStV. This installation had a rated electrical output of more than two megawatts, which excluded tax exemption pursuant to sec. 9 para. 1 no. 3 of the StromStG. A tax exemption acc. to sec. 9 para. 1 no. 1 of the StromStG, in its 1 July 2019 version, was out of the question, as the installations did not each have a rated electrical output of more than two megawatts.

3 Fiscal Court decision

The FC also rejected the tax exemption acc. to sec. 9 para. 1 no. 3 of the StromStG. However, the court found that the electricity withdrawn, as from 1 July 2019, for own consumption is tax exempt acc. to sec. 9 para. 1 no. 1 of the StromStG (new version). The rated electricity outputs of the individual EGU were found to be one installation. The concept of “installation”, within the meaning of sec. 9 para. 1 no. 1 of the StromStG, is assessed according to the principles already developed by the German Federal Fiscal Court (VII R 30/19). The new provision sec. 9 para. 1 no. 1 of the StromStG has not changed this. It relates exclusively to the place where the electricity generated is withdrawn and does not redefine the concept of “installation”. This means that the definition of an installation is not location-based but function-based. This prohibits considering individual EGU in isolation. Rather, both the entirety of the technical facilities and the functional context must be taken into account. The geographical connection is merely an indication - albeit a strong one - that several units are grouped together to form an installation. Other important indications are the metrological registration, the control options, the operation by an operator and the supply to a specific group of customers. It is not at all clear, from the legislator’s intention that, in the cases covered by sec. 12b para. 2 of the StromStV, the electricity withdrawn from installations with a rated output of more than two megawatts should no longer be exempt from tax. If this were the case, then the legislator would be violating the principle of equal treatment under Union law, as well as the principle of consistency arising from Art. 3 para. 1 of the German Constitution.

4 Consequences for the practice

The FC has, once again, set limits for the customs administration. Operators of installations for the generation of electricity from renewable energy sources that can be remotely controlled should therefore carefully examine the requirements of both sec. 9 para. 1 no. 3, as well as no. 1 of the StromStG. Operators who have been denied tax exemption by the customs administration, acc. to sec. 9 para. 1 no. 1 of the StromStG, using the concept of “installation” based on location, should check to what extent the electricity generation units are to be regarded as an installation using the concept of “installation” based on function and, if necessary, lodge appeals against the electricity tax assessments and apply for suspension of execution. The customs administration has lodged an appeal with the German Federal Fiscal Court (VII R 5/24).

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