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By PwC Deutschland | 13. Juni 2022

Supreme Tax Court decides the electricity tax relief constitutes aid scheme

In a recent ruling, the Supreme Tax Court decided that companies in difficulty are not eligible for electricity tax relief as provided for in Sec. 9b and Sec. 10 Electricity Tax Act. Such relief constitutes illegal State aid as set forth in Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU). The Supreme Tax Court was called for the first time to deal with this issue.

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Background

In the case in question, the plaintiff, a private limited company (GmbH), reported a deficit in its balance sheet that was not covered by equity. The Principal Customs Office (*Hauptzollamt*) rejected the application for electricity tax relief provided in Sec. 9b and Sec. 10 Electricity Tax Act on the grounds that GmbH was a company in financial difficulty and, therefore, the relief could not be granted in accordance with EU State aid law.

The Regional Tax Court rejected the appeal in the first instance, the Supreme Tax Court also dismissed the claim of the plaintiff as unfounded.

Decision of the Supreme Tax Court

The Supreme Tax Court held that the tax reliefs under Section 9b and Section 10 of the Electricity Tax Act constitute State aid due to their selective effect and that therefore these provisions may not be applied pursuant to the implementation prohibition in Article 108 (3) sentence 3 TFEU (this prohibition applies to state aid within the meaning of Art 107 TFEU on which the EU Commission has not yet taken a final decision, which was also the case here). The court went on to say that the classification as illicit State aid in the case at hand is because, first, the assessment procedure and review as prescribed in Article 108 (3) TFEU was not observed and, second, there are no exceptional circumstances as provided in Art. 107 para. 3 lit. c or Article 108 (4) TFEU (i. e. certain measures to be compatible with the internal market).

The bottom line in the case of dispute, however, was whether a company is considered to be in financial difficulty within the meaning of Art. 2 No. 18 of “Commission Regulation (EU) No 651/2014” (*Allgemeine Gruppenfreistellungsverordnung – AGVO,* even if more than half of the subscribed capital stock has been lost as a result of accumulated losses, but a positive going concern forecast can be made due to the fact that the plaintiff was part of a group and as such integrated into to the financial strength of its parent company.

To this, the Supreme Tax Court provided two essential comments:

First, the AGVO, when defining “a company (undertaking) in difficulty” in Article 2 No. 18 (a), specifically refers to the individual company claiming the State aid. This definition of an undertaking refers to certain types of companies only and does therefore not comprise several affiliate undertakings within a group.

Second, a positive forecast for the continuation of the business is not at all relevant, because such a restriction is not provided for in the statute, i. e. according to the wording of Art. 2 No. 18 letter a AGVO. Rather, the EU legislature was specifically concerned at the time that no detailed investigation and analysis of the applicant's economic situation be necessary at all. The definition and interpretation of the term "undertakings in difficulty" should rather be simplified in order to reduce the administrative burden on Member States.

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Supreme Tax Court, decision of 19 January 2022 (VII R 28/19), published on 9 June 2022.

Schlagwörter

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