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By PwC Deutschland | 29. November 2022

Finance Bill 2022 - Introduction of a so-called "windfall tax" (EU energy crisis contribution) and further proposed amendments

The Federal Ministry of Finance (MoF) has provided the Finance Committee of the Bundestag several formulation aids for its ongoing consultations on the Finance Bill 2022.

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EU Energy Crisis Contribution Introduction Bill – (EU-ECCIA – DRAFT)

The EU Energy Crisis Contribution Introduction Bill provides, inter alia, for the introduction of a temporary windfall tax (EU energy crisis contribution) as part of the implementation of a solidarity contribution as required by the EU. (Council Regulation (EU) 2022/1854 of 6 October 2022 on emergency measures to address high energy prices).

Scope

According to the current draft, the EU energy crisis contribution is to apply to EU enterprises and establishments active in the oil, natural gas, coal and refinery sectors, which, in the relevant taxation period, generate at least 75 percent of their annual turnover through business activities in the sectors of extraction, mining, refining of petroleum or the manufacture of coke oven products as referred to in Regulation (EC) No 1893/2006 of the European Parliament and of the Council. (Sections 1 and 2 (1) ECCIA – DRAFT)

An enterprise in the aforementioned sense is, according to Section 2 (2) EU ECCIA – DRAFT, every commercial enterprise if it is operated domestically, i.e. where a permanent establishment is maintained in Germany. The term "domestic" shall also include the exclusive economic zone and the continental shelf within the meaning of Section 1 (3) Corporation Tax Act (CTA). The legal form of the enterprise will not to be relevant. As a result, sole proprietorships, partnerships and corporations and permanent establishments (also of limited taxpayers) will be covered by the ECCIA.

If a tax consolidation group (“Organschaft”) exists for income tax purposes, both the tax group parent and the tax group company shall each be subject to the EU energy crisis contribution with their respective profits. This results from the qualification of the EU energy crisis contribution as an independent tax that is entirely separate from income or corporation tax.

EU energy crisis contribution as a separate form of taxation

The EU energy crisis contribution is to be levied as an independent tax within the meaning of the General Tax Code. It will be limited in time and will be levied quite separately from any taxation under the Income Tax Act (ITA) or the CTA. The tax revenue will be allocated exclusively to the Federal Government (Bund) and its administration shall be the responsibility of the Federal Central Tax Office.

As with other personal taxes within the meaning of Section 10 No. 2 CTA or Section 12 No. 3 ITA, the EU energy crisis contribution shall not be deductible as a business expense (Sections 1 (3), 4 2 ECCIA - DRAFT). Against this background, it is surprising that the explanatory memorandum to the draft bill foresees – in the case of an Organschaft- a reduction in the income attributable to the tax group parent due to its energy crisis contribution.

Tax period, assessment basis and tax rate

According to the present draft, the EU energy crisis contribution is to be levied for a limited period of 2 years (Section 3 (2) EU-ECCIA – DRAFT), will arise at the end of the respective **tax period** (Section 3 (1) ECCIA

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– DRAFT). The initial taxable period is the first tax period beginning after 31 December 2021 and the relevant following tax period. In this case tax period means full financial years covering a period of 12 months.

The **basis of assessment** for the EU energy crisis contribution is the positive difference between

1. the taxable income for the relevant tax period calculated according to income or corporation tax regulations, **and**
2. **1.2 times the average taxable income** arising in the tax years beginning after 31 December 2017 and ending before the first tax year for the EU energy crisis contribution (i.e. the financial years 2018 to 2021, (Section 4(1) sentence 1 EUECCIA – DRAFT).

According to the explanatory memorandum to the draft, for corporations taxable income means the taxable income in accordance with Rule 7.1 Para. 1 Sentence 2 No. 31 of the CTA Guidance Rules 2022; for taxpayers in other legal forms, the corresponding figure is meant.

If the **calculated average profit** is negative, it will be set at zero for the determination of the tax base (Section 4 (1) Sentence 2 ECCIA – DRAFT).

The same will apply to the average profit of an enterprise whose profit has been subject to income or corporation tax for the first time after 31 December 2021 (e.g., in the case of a start-up) (Section 4 (1) Sentence. 3 EUECCIA – DRAFT).

The taxable income is to be modified in the following cases:

- **Profit shares from foreign permanent establishments** are to be deducted from the tax base if a solidarity contribution or a levy based upon an equivalent national measure within the meaning of Art. 14 Para. 1 of the EU Regulation 2022/1854, (Section 4 (1) sentence 4 ECCIA – DRAFT). The same will also apply to CFC add-backs under Section 10 (2) Foreign Taxes Act.
- Profit shares in the profits of domestic or foreign partnerships (or other co-entrepreneurial entities) are to be deducted from the tax base if the relevant entity itself meets the conditions for the EU energy crisis contribution under Section 2 EU-ECCIA – DRAFT (Section 4 (2) Sentence 2 ECCIA – DRAFT).

Where a company can prove that the positive differential amount for the tax base is wholly or partly the result of a reorganisation, the tax base will be corrected accordingly (Section 4 (2) Sentence 1 ECCIA - DRAFT). According to the explanatory memorandum to the draft, the circumstances of the individual case will be decisive in this respect.

The **tax rate is to be 33%** and thus the minimum rate provided for in Art. 16 para. 1 of Regulation (EU) 2022/1854.

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Procedural issues

Affected companies must file the EU energy crisis contribution declaration with the Federal Central Tax Office no later than the relevant filing date for the income or corporate income tax return or the return for the separate determination of tax bases (partnership return) (Section 6 (1) ECCIA – DRAFT). The contribution will be due and payable at the latest on the 10th day after submission of the tax declaration (Section 6(2) ECCIA – DRAFT).

Example

A-GmbH, which operates in the petroleum sector and whose financial year corresponds to the calendar year generates a taxable profit in the years 2018 - 2021 of 100 on average (100 in 2018, 110 in 2019, 90 in 2020 and 100 in 2021). In 20222, the A-GmbH generates a taxable profit of 130. The tax base for the energy crisis contribution is 10 (130-100*1.2). The contribution is 3.30 (33% of 10). The tax base is to be calculated independently by the A-GmbH and declared to the Federal Central Tax Office. In addition to the contribution, corporation tax and trade tax will be levied as normal on the excess profit, so that this part of the taxable income is subject to a total tax burden of regularly of more than 60%.

Extension of Section 27 (8) CTA to third-country cases

In addition to the introduction of a windfall tax, the Finance Act 2022 should, upon the initiative of the Bundesrat, also amend Section 27 (8) CTA and extend its application to distributions and nominal capital repayments by third-country corporations and associations of persons.

The new rule should apply for the first time to distributions and repayments of capital repayments made after 31 December 2022.

Further amendments

The current consultations of the Finance Committee of the Bundestag further provide for, inter alia:

- The introduction of a statutory materiality threshold linked to the low-cost asset limit of currently EUR 800, up to which threshold the creation of provisions for prepaid expenses and deferred income under Section 5 (5) Sentence 1 Nos. 1 and 2 Income Tax Act can be avoided.
- An extension of the fictitious tax liability in repatriation cases as introduced by the ATAD Implementation Act (Section 6 (2) Sentence 4 Foreign Taxes Act) to repatriation cases pursuant to Section 6 (3) Foreign Taxes Act in the version applicable until 30.6.2021.
- A revision of the transition rule in Section 21 (3), Sentence 1 Foreign Taxes Act, regarding the transition from the old to the new version of Section 6 Foreign Taxes Act.

Outlook

The Finance Committee of the Bundestag will again hold a public hearing on 28 November 2022. Its

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deliberations on the Finance Act 2022 should be completed by 30 November 2022 and result in a recommendation for a resolution. Subsequently, the Bundestag (according to the current timetable, on 2 December 2022) and the Bundesrat must approve the bill.

Schlagwörter

Finance Act, Income Tax Act, Inflation, Windfall Taxes, corporate income tax