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By PwC Deutschland | 11 June 2023

Payment of interest on tax levied in breach of EU law

If a tax privilege which is optional under EU law was wrongfully not granted, and where the taxpayer therefore was forced to make advance tax payments, interest is payable on the eventual tax refund claim. This was decided by the Supreme Tax Court in a case where the tax office refused to apply the reduced electricity tax rate on the quantity of electricity drawn in respect of the plaintiff’s own consumption.

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Background

In its electricity tax declaration for the year 2010, the appellant declared the quantity of electricity drawn in respect of its own consumption and selected the reduced tax rate provided for in Paragraph 9(3) of the Electricity Tax Act. In the corresponding notice of assessment, however, the Principal Customs Office applied the electricity tax at the standard rate, which the appellant successfully contested. Whereupon the appellant claimed interest on the amount refunded in respect of the year 2010, a request which the Customs Office refused.

The action brought for payment of that interest was dismissed by the tax court of first instance (lower tax court) on the ground that the appellant was not entitled to it under either EU law or German law. Contrary to the lower tax court, **the Supreme Tax Court** took the view that such activity falls within the scope of Directive 2003/96 and raised the question before the ECJ whether interest must be paid on the amount of electricity tax that was overpaid and later refunded.

ECJ decision

The ECJ held that, "*in the event of refund of the amount of electricity tax wrongly levied on account of the incorrect application of a national provision adopted based on the opportunity granted to the Member States for restructuring the Community framework for the taxation of energy products and electricity, EU law must be interpreted as requiring that interest be paid on that amount*" (ECJ judgment of 9 September 2021 C?100/20 *Hauptzollamt B*).

It is clear from settled EU case-law that the right to a refund of charges levied in a Member State in breach of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law as interpreted by the ECJ. The Member States are therefore in principle required to repay charges levied in breach of EU law. Thus, the obligation to pay interest on the amount of tax levied in breach of EU law also applies where that breach results from a failure to observe the general principles of EU law.

In that regard, the ECJ stated that, for the purposes of the amount of tax wrongly levied and the corresponding obligation to refund it, an economic operator who is subject to a reduced rate of electricity tax, the amount of which has been wrongly levied, **is in a situation comparable to that of an entrepreneur ("economic operator") subject to the standard rate** of this tax, which was levied incorrectly.

Final (follow-up) decision of the Supreme Tax Court

The Supreme Tax Court held that the applicant is entitled under EU law to interest from the date of payment of the unduly levied electricity tax.

The Supreme Tax Court went on to explain that in the absence of specific EU legislation, it is for the Member States to determine in detail the conditions for the payment of such interest, in particular the interest rate and the adequate method of calculating the interest. As the ECJ pointed out, those detailed rules must, first, in accordance with the principle of equivalence, not be less favorable than those governing

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similar domestic actions and, second, in accordance with the principle of effectiveness, not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order.

The Supreme Tax Court considers the ECJ decision in the case *Gräfendorfer Geflügel und Tiefkühlfeinkost* (joint cases: **C?415/20, C?419/20 und C?427/20**) to be specifically applicable in this context because the ECJ explicitly specified in this ruling as to how reasonable compensation is to be calculated.

The interest period runs from the payment of the respective advance payment until the refund of the unduly levied tax. The obligation to pay interest extends to the entire period during which the amount was not available for the taxpayer. The interest rate of 0.5% per month is in line with the requirements of EU law since it is also applicable in the case of interest on a refund claim under national law and therefore the plaintiff does not suffer any disadvantage or discrimination.

Finally, the Supreme Tax Court points out that, in a situation where the taxable person (i. e. the person liable to tax) had declared too high an electricity consumption and if, as a result, the advance payments are assessed too high, no interest is to be charged on the refunded tax amount as there is no infringement of EU law in this respect.

Sources:

Supreme Tax Court, decision of 15 November 2022, case no. VII R 29/21 (VII R 17/18) – published on 1 June 2023.

ECJ Judgment of 9 September 2021 **C-100/20** *Hauptzollamt B (Réduction fiscale facultative)*

Keywords

interest period, refund claim