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DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
Value added tax

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**VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 992**

**CONSULTATION
PROVIDED FOR UNDER DIRECTIVE 2006/112/EC**

ORIGIN:	Portugal
REFERENCE:	Article 102
SUBJECT:	Application of a reduced VAT rate on certain supplies of electricity

1. INTRODUCTION

Article 102 of the VAT Directive¹ provides that Member States may apply a reduced VAT rate to the supply of natural gas, electricity or district heating after consulting the VAT Committee.

In accordance with Article 102, Portugal has submitted a consultation to the VAT Committee in view of applying reduced VAT rates to certain supplies of electricity. The reduced VAT rates currently in force in Portugal are 13% and 6%.

The intention of Portugal is to “*creat[e] consumption bands based on contracted power in the Portuguese electricity market and then appl[y] reduced rates of VAT to supplies of electricity in accordance with these bands*”. Portugal plans to implement the measure as soon as the consultation procedure with the VAT Committee is completed.

The measure at issue is part of a set of measures being adopted by the Portuguese State with the objective of reducing the costs of energy consumption and its negative impact on the environment. The Portuguese authorities take the view that applying a reduced VAT rate to lower consumption would act as an incentive for customers to make more efficient use of energy resources and avoid excessive consumption. It is noted that such a measure would fit with the policy objective of the current Commission to make Europe carbon-neutral by 2050.

The text of the consultation is annexed to this document.

2. SUBJECT MATTER

Portugal states that the purpose of the present consultation is to broaden the measure on which the VAT Committee was consulted in 2019. On that occasion, Portugal had consulted the VAT Committee on two intended measures, one as regards the supply of electricity and another as regards the supply of natural gas. In terms of the former, the Commission services had taken note² of Portugal’s intention to apply the reduced VAT rate of 6% to the fixed component of the supply of electricity whose subscribed power did not exceed 3.45 kVA. At that instance, the rate reduction was limited to the fixed component rather than on the variable consumption. The fixed component of the supply of electricity is a standing charge determined annually by the Portuguese energy market regulator that is reflected on the supplies of electricity made both in the regulated and liberalised market.

Portugal now plans to broaden the rate reduction to include supplies of electricity in lower consumption bands including standard low-voltage contracted power. The Portuguese authorities maintain that the measure is based on the same rationale as the application of the reduced VAT rate to the fixed component for supplies of electricity for contracted power not exceeding 3.45 kVA. The judgment of the Court of Justice of the European Union (CJEU) in Case C-384/01 is mentioned³, which refers to a similar VAT rate

¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

² Working Paper No 966 of 25 March 2019, taxud.c.1(2019)2377943.

³ Judgment of 8 May 2003, case C-384/01, *Commission v France*, EU:C:2003:264.

structure in France considered to be in accordance with the VAT principles by the CJEU. According to the interpretation of that judgment by the Portuguese authorities, the CJEU found that a selective application of a reduced VAT rate to supplies of electricity could not be excluded insofar as there was no risk of distortion of competition, and the restriction of its application to concrete and specific aspects of supply was consistent with the principle that exemptions or derogations must be interpreted narrowly.

The Portuguese authorities argue that, since electricity supplies are taxed at the place where the customer effectively uses and consumes them, no distortion of competition between Member States may arise. Likewise, since any taxable person can access such supplies, no distortion of competition among taxpayers would be possible.

3. THE COMMISSION SERVICES' OPINION

The Commission services take note of the intention of Portugal to apply a reduced VAT rate to certain supplies of electricity, notably to consumption bands with lower amounts of contracted power including standard low-voltage contracted power, as soon as the consultation procedure with the VAT Committee is completed.

According to the Portuguese legislation, the compensation to be paid in respect of the supply of electricity forms part of a fixed component and an amount varying according to the consumption. This aims at differentiating the price of energy consumed by reference to the volume and modes of consumption. As regards electricity, the fixed components are determined according to the power contracted by the customer. These components are ring-fenced in the invoices relating to the supply of electricity.

It is understood that Portugal already applies a reduced VAT rate of 6% to the fixed component for supplies of electricity for contracted power not exceeding 3.45 kVA. The intended measure on which consultation is now undertaken will target specific consumption bands corresponding to “lower amounts of contracted power”.

The Commission services note that essential information is yet to be provided, notably as to which reduced rate Portugal intends to apply (6%, 13% or a combination of both), the specific consumption bands to which such rate will be applied, the percentage of the electricity contracts – as well as the percentage of domestic users and businesses – that would benefit from the measure, and the impact of the measure on VAT revenue.

In light of the information available, the Commission services underline the following:

The Commission is determined to tackle the challenges of climate change and environmental degradation. Both the Commission President von der Leyen and the Commissioner for Economy Gentiloni have consistently declared their commitment to promote and implement ambitious environment, climate and energy policies. This commitment is illustrated in the Commission communication on ‘The European Green Deal’⁴, presented on 11 December 2019, which refers to specific actions in this regard that constitute clear political priorities for the Commission. Portugal expects the measure to promote energy efficiency and thus have a positive impact on the protection of the

⁴ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions ‘The European Green Deal’, COM(2019) 640 final.

environment. A measure aiming at reducing the energy consumption and thus reducing the negative impact on the environment would be in line with the objectives of the European Green Deal.

Portugal refers to a similar VAT rate structure in France, which was considered in accordance with the VAT principles by the CJEU⁵. The case concerned the application of a reduced VAT rate only to the fixed component of the prices for gas and electricity supplied by the public networks⁶. The CJEU ruled that the fiscal neutrality principle, which precludes treating similar goods, which are thus in competition with each other, differently for VAT purposes was not infringed by the selective application of the reduced VAT rate to one part only of the supply of gas and electricity, provided that no risk of distortion of competition existed. The CJEU further clarified that, since the reduced VAT rate is an exception, the restriction of its application to concrete and specific aspects, such as a standing charge, is consistent with the principle of strict interpretation of the exemptions or derogations⁷. The Commission services note further that the division of the consideration for the supply of natural gas and electricity into a fixed and a variable part was deemed as “*constitut[ing] the exercise of the distribution undertakings’ freedom to fix prices for an integrated supply*”⁸.

The Portuguese consultation does not contain an explicit assessment of whether the selective application of a reduced VAT rate to specific consumption bands could be seen as consistent with the principle of fiscal neutrality. In contrast, Portugal submits that the measure would not result in a distortion of competition between Member States. In this regard, it is pointed out that, according to Council Directive 2009/162/EC⁹, the rules for determining the place of taxation of electricity determine that VAT is levied at the place where electricity is actually consumed. They thus ensure that the likelihood of distortion of competition between Member States is minimal.

Portugal states that the measure contemplated does not lead to distortions of competition between taxpayers, as “*any taxable person can access this type of supply*”. The Commission services note that the determination of whether the intended measure is likely to cause competition concerns in the domestic market shall be left to the competent national authorities.

Based on the information provided by the Portuguese authorities, the intended measure appears likely to contribute to the objectives of the European Green Deal, provided that it does not lead to a compromise of the principle of fiscal neutrality or a distortion of competition in the Single Market and does not significantly erode the national VAT revenue.

At this point, it is recalled that the VAT Committee is solely an advisory committee and has not been attributed any legislative powers¹⁰. For this reason, it cannot take legally

⁵ See footnote 3.

⁶ The French government charged a reduced rate on standing charges for the public networks for the supply of gas and electricity and a standard rate on the consumption of these two products.

⁷ See paragraphs 25-28 of the judgment.

⁸ See Advocate General’s opinion, EU:C:2002:574.

⁹ Council Directive 2009/162/EU of 22 December 2009 amending various provisions of Directive 2006/112/EC on the common system of value added tax (OJ L 10, 15.1.2010, p. 14).

¹⁰ It was set up under Article 398 of the VAT Directive to promote the uniform application of the provisions of the directive.

binding decisions. It can, however, provide guidance on the application of the VAT Directive. The consultation of the VAT Committee in accordance with Article 102 of the VAT Directive is a procedural requirement for the application of a reduced VAT rate to the supply of natural gas, electricity of district heating by the Member States. The VAT Committee does not, however, have the power to approve or reject the measure in question. Nor can the consultation procedure be seen as constituting an approval of the measure from the Commission.

3. DELEGATIONS' OPINION

Delegations, in particular Portugal, are invited to express their views on the matters raised and the observations made by the Commission services.

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Consultation request by Portugal (English translation):

Subject: Consultation of the VAT Committee by the Portuguese Republic pursuant to Article 102 of Directive 2006/112/EC

Legal basis

Article 98 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax allows the Member States to apply one or two reduced rates to supplies of goods or services in the categories set out in Annex III to the Directive.

Article 102 of Directive 2006/112/EC allows the Member States, after consulting the VAT Committee, to apply a reduced rate to supplies of electricity.

Scope of measure and grounds

The Portuguese State wishes to make use of the option provided for in Article 102 of Directive 2006/112/EC, with a view to creating consumption bands based on contracted power in the Portuguese electricity market and then applying reduced rates of VAT to supplies of electricity in accordance with these bands.

When we consulted the VAT Committee in early 2019 (taxud.c.1(2019)2377943 – Working paper No 966), the European Commission raised no objections to the Portuguese State's making use of the option provided for in Article 102 of Directive 2006/112/EC in order to apply a reduced VAT rate of 6% to the fixed component for supplies of electricity for contracted power not exceeding 3.45 kVA.

The purpose of this consultation is to broaden the measure on which the VAT Committee was consulted with respect to applying the reduced rate to the fixed component for supplies of electricity for contracted power not exceeding 3.45 kVA, to include supplies of electricity in lower consumption bands including standard low-voltage contracted power.

The measure is to be put in place as soon as the VAT Committee has given a favourable opinion.

The Portuguese State takes the view that the measure is based on the same rationale as the model already in place and on which the VAT Committee was previously consulted (application of the reduced rate of VAT to the fixed component for supplies of electricity for contracted power not exceeding 3.45 kVA) and that there is a precedent in the French model approved by the Court of Justice in its judgment of 8 May 2003 in Case C-384/01. The Court found that a selective application of the reduced rate to supplies of electricity could not be excluded in so far as there was no risk of distortion of competition and the restriction of its application to concrete and specific aspects of supply was consistent with the principle that exemptions or derogations must be interpreted restrictively (paragraphs 27 and 28 of the judgment).

Since the supplies of electricity at issue here are taxed at the place where the customer effectively uses and consumes them, there is no distortion of competition with other

Member States. Similarly, as any taxable person can access this type of supply, the measure does not lead to distortions of competition between taxpayers.

Objective

A reduced VAT rate on consumption bands with lower amounts of contracted power is part of a set of measures being adopted by the Portuguese State in order to reduce the costs of energy consumption and the associated adverse environmental effects.

Applying a reduced rate of VAT to lower consumption acts as an incentive for customers to make more efficient use of energy resources and avoid excessive consumption, with a positive impact on the environment. This fits with the policy objective of the current European Commission to make the European continent carbon-neutral by 2050.

Request

Considering that the conditions of Article 102 of Directive 2006/112/EC are met, Portugal hereby requests that the European Commission submit this consultation to the VAT Committee.