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France Violated Directive on Energy Taxation, ECJ Rules

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COUNTRY DIGEST

France Violated Directive on Energy Taxation, ECJ Rules

The European Court of Justice on October 25 ruled in *Commission v. France* (C-164/11) that France has failed to comply with Directive 2003/96/EC on the taxation of energy and electricity products.

The ECJ held that France did not adopt all the measures necessary to modify and adapt its electricity tax system during a transitional period that expired on January 1, 2009, and that it also missed a May 22, 2010, deadline set by the European Commission.

Background

The EU Council of Ministers on October 27, 2003, adopted Directive 2003/96/EC (the energy tax directive), extending the scope of an EU minimum-rate system for energy products — which previously had been limited to mineral oils — to all energy products, including coal, natural gas, and electricity. The energy directive entered into force on January 1, 2004, but included a transitional period that gave France until January 1, 2009, to adapt its tax system.

The directive set minimum tax rates for motor fuel for consumer use, motor fuel for industrial or commercial use, heating fuel, and electricity. The tax level applied by the EU countries could not be lower than the minimum rates set in the directive.

On March 18, 2010, the European Commission asked France, in a reasoned opinion, to adapt its legislation on electricity taxation within two months to bring it into compliance with the energy tax directive. French authorities maintained that France had already adopted all the necessary measures in article 23 of Law 2010-1488 of December 7, 2010.[1]

Maintaining that France did not respond adequately to the reasoned opinion, the European Commission on November 24, 2010, brought an action against France before the ECJ, which decided to hear the case on April 5, 2011.

The European Commission maintains that France's domestic electricity tax system is in violation of the directive because it allows taxes to vary on a municipal basis. In other words, consumers residing in one municipality do not pay the same electricity tax as consumers residing in another municipality.

In its October 25 judgment, the ECJ held that France failed to implement all the necessary measures to comply with the energy tax directive. Law 2010-1488 could not be taken into account because it was promulgated after the required deadlines, it said.

Notably, the government of Spain decided to support France in this case. Spain argued that the European Commission's position was not consistent with the option offered in article 1, paragraph 2 of the energy tax directive to levy other, non-harmonized indirect taxes on electricity.

Spain also pointed out that a draft directive modifying the energy tax directive would entitle France and Spain to implement higher rates in certain parts of their countries. (For the draft directive, see *Doc 2011-8244* or *2011 WTD 74-24*.)

However, the European Commission does not consider France to be applying a supplementary tax to the harmonized tax because France differentiates from the harmonized tax only at the local level. Furthermore, the draft directive would allow EU member states to levy additional taxes only for specific purposes in cases that could not be reached by harmonized taxes. Also, the draft directive would apply only between administrative regions and not between municipalities and departments. (The draft directive has not yet been adopted.) ◆

♦ *Sophie Borenstein, partner, Reed Smith, Paris*

[1] *See* the official gazette of Dec. 8, 2010, p. 21467.