

## The European Court of Justice endorses the Spanish tax on electricity generation

The recent ECJ decision of March 3<sup>rd</sup>, 2021 (case C-220/19, Promociones Oliva Park, S.L.) brings to an end the long-lasting controversy on the compatibility with EU Law of the Tax on the Value of Electricity Generation.



As explained in our [Newsflash #11](#), the High Court of Justice of the Autonomous Community of Valencia ("TSJV" by its Spanish acronym) had referred to the ECJ for a preliminary ruling the question of the real nature of the tax and the compatibility of the Tax on the Value of Electricity Generation (hereinafter, "IVPEE" by its Spanish acronym) with the legal system of the European Union, to the extent the tax burden of the IVPEE is in practice being borne by the final consumer of electricity. The IVPEE has been challenged by taxpayers since its introduction by Law 15/2012, on fiscal measures for sustainable energy.

The ECJ has now finally concluded that the IVPEE cannot be considered an indirect tax for the following reasons:

- » The IVPEE regulations do not provide a formal reverse charge mechanism.

- » The tax base of the IVPEE is determined by the total amount gained by the taxpayer for its activities of production and incorporation of electricity in the Spanish electricity system, which is subject to a fix 7% tax rate. Therefore, the tax base is calculated regardless of the amount of electricity effectively generated and incorporated to the electricity system.

In addition, the TSJV requested that it was determined whether articles one and three of Directive 2009/28 should be interpreted in the sense that preclude national legislation that provide for a tax which is levied on the generation of electricity and its incorporation into the electricity system, even when electricity is generated from renewable sources, with the objective not to protect the environment but to increase the volume of budgetary revenue.

According to the ECJ, there is no Directive that precludes Member States from introducing a tax, like the IVPEE, which is levied on the generation of electricity and its incorporation to the electricity system, regardless of such tax not having the objective to protect the environment but to increase the country's budgetary income. Likewise, with regards to the possible distortion of the competition between Spanish national electricity producers subject to the IVPEE and those which electricity generation takes place outside of the IVPEE's territory of application, the ECJ disregards this claim concluding that it is not

within the scope of the Treaty of Functioning of the EU.

Finally, with regards to the administrative and judicial proceedings submitted by the taxpayers requesting the refund of the IVPEE, following the ruling of the ECJ it is foreseeable that they will be dismissed.

Hence, we recommend not to continue any administrative proceedings and to voluntarily withdraw from the judicial proceedings to avoid any litigation fees.

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