March 2018
#1.2018

WTS Tax Newsletter

Energy taxes, energy law, energy management systems

Editorial

Excise duties & energy law

Dear reader,

The second law amending the Energy and Electricity Tax Act came into force on 1 January 2018. On 10 January 2018, the ordinance amending the Energy and Electricity Tax Implementing Ordinance was also published in the Federal Law Gazette. In this information letter, you will find out everything you need to know about the resulting legal changes at the turn of the year 2018.

Since 1 November 2017, lawyer Dr. Sabine Schulte-Beckhausen has been a new partner in the WTS team and will introduce herself in this information letter.

We would also like to welcome you to our annual seminar

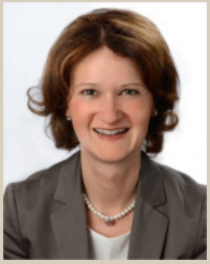
„Energy and Electricity Tax & Energy Law"

April 12th 2018 at the Maritim Hotel Düsseldorf

Experts from jurisprudence, teaching, industry and consulting will give lectures on current topics of energy and electricity tax and energy law.

Please do not hesitate to contact us if you have any questions.

With kind regards



Dr. Karen Möhlenkamp

Partner
attorney-at-law
Phone +49 (0) 211 200 50-817
karen.moehlenkamp@wts.de

Bertil Kapff

Senior Consultant
M.Sc. Business Administration
Phone +49 (0) 211 200 50-669
bertil.kapff@wts.de

Table of contents

1. Energy and Electricity tax

1.1. General Information

1.1.1. Amendments to the Energy and Electricity Tax Ordinance (Energie- und Stromsteuerdurchführungsverordnung) as of 01.01.2018

The second law amending the Energy and Electricity Tax Act of 27 August 2017 was promulgated in the Federal Law Gazette on 4 September 2017. Against this backdrop, the Federal Ministry of Finance (BMF) issued the ordinance amending the Energy Tax and Electricity Tax Implementing Ordinance on 10 October 2017 with publication in the Federal Law Gazette of 2 January 2018. The changes came into force retroactively as of January 1,2018. The amendments to the ordinance are intended to implement the new legal regulations and thus ensure their uniform application.

Since 1 January 2017, the self-declaration on state aid on the official form 1139 must be submitted to the competent main customs offices with all applications for relief relevant to the aid. The amendment of the Regulation now provides a national legal basis for this additional obligation to declare. Contrary to previous practice, persons entitled to relief will in future only have to submit the form with the first relief section - as long as there are no changes to the circumstances described in the form. In addition, violations of the reporting obligations of the Energy Tax and Electricity Tax Transparency Ordinance (EnSTransV) are to be punishable by administrative offensives as of January 1,2017.

For the tax relief in accordance with Section 9a StromStG and Section 51 EnergieStG, the applicants are obliged to measure the quantities of electricity and natural gas that can be discharged with meters. Up to now, this requirement has only been regulated in service regulations. Other methods of investigation are still permitted on request.

In order to limit the tax privileges granted to enterprises in the manufacturing sector (Unternehmen des Produzierenden Gewerbes (UdPG) to companies that actually produce their goods, companies that commission other enterprises to manufacture and process their goods should not in future be classified as if they were processing the goods themselves. UdPGs which are currently entitled to discharge should examine whether the amendment of the ordinance will have an impact on their main focus of economic activities.

A declared or fixed tax or tax relief shall not be fixed, amended or corrected by the competent main customs offices until an amendment of at least EUR 25 has been made. At present, the implementing regulations do not provide for small amount arrangements.

In Section 1a StromStV, additional exceptions to the supply status under electricity tax law have been included. In particular, it is now possible to purchase taxed electricity as final consumer and to supply it exclusively to third parties within the meaning of Section 3 No. 24a and No. 24b of the German Energy Industry Act (EnWG) within the meaning of Section 3 No. 24a and No. 24b. As a rule, customer systems are company networks connected to the public electricity grid (see also article 1.5 in this issue of the

information letter). An official form has also been introduced for the hitherto informal application of the utility permit.

Pursuant to Section 1c StromStV, battery electric vehicles as well as externally rechargeable hybrid electric vehicles (plug-in hybrids) fall under the definition of the term "electromobility" according to electricity tax law. A battery-electric vehicle is a motor vehicle as defined in Section 1 Straßenverkehrsgesetz (Road Traffic Act) with an electric drive, the electric energy storage of which can be recharged from outside the vehicle. An externally rechargeable hybrid electric vehicle is a vehicle with several drives, at least one of which is electric and whose electrical energy storage device can also be charged from outside the vehicle.

The use of electrically powered vehicles which are not approved for road traffic and which are used exclusively on a company site, as well as electrically powered bicycles which are used exclusively on a company site, are expressly not electric mobility within the meaning of the law. As a result, for example, the amounts of electricity that are taken from forklifts and hand trucks used solely for in-house operations do not have to be deducted as part of the tax relief in accordance with Sections 9b, 10 StromStG.

1.1.2. Statute of limitation for the concealed supplier and claims for excise duty relief

Anyone wishing to supply electricity as a utility with its registered office in the tax territory requires a permit pursuant to Section 4 (1) StromStG. Insofar as electricity is supplied to the final consumer without such a permit, the case of the so-called "hidden supplier" exists, provided that no exceptions to the supply status according to Section 1a StromStV apply. As a rule, a concealed utility company has no knowledge of its utility status or the obligation to obtain a permit.

In this situation, the tax is initially incurred by supplying the electricity from the pre-supplier to the hidden supplier. As a rule, the pre-supplier will declare the electricity tax for these quantities paid and charge it to his customer. In addition, the tax arises from the actual consumption of electricity by the final consumer. Tax debtor is the hidden supplier.

In order to eliminate double taxation and avoid costly invoice corrections, the covered utility can apply for a compensation of the tax paid by the pre-supplier in accordance with Section 5 (3) Sentence 3 StromStG. For this purpose, he must prove that the tax incurred by the actual taxpayer has been paid.

In its judgments of 01.06.2017, the Munich Fiscal Court ruled on this issue that the time limit for determining the compensation claim of the hidden pension provider does not begin until the end of the year in which the latter pays its tax liability. It is only through the payment of the tax resulting from the actual withdrawal of the electricity that all preconditions for the claim for remuneration are fulfilled.

The main customs office had previously argued, however, that the claim for remuneration had already arisen with the supply of electricity by the pre-supplier to the concealed supplier. The BFH judgement of 20.09.2016, VII R 7/16, is relevant with regard to the tax statements and the payment periods.

In this context, it should be noted that the customs administration currently regularly takes the view, with reference to the BFH judgement of 20.09.2016, that the time limit for applications for relief in the case of applications for relief also begins with the purchase of excise dutyable products if the goods have not been expressly taxed until now. In particular, in the event of irregularities subsequently discovered during carriage under suspension or exemption procedures, all economic operators and the customs authorities shall presume untaxed products until the tax is assessed. If a tax is determined retrospectively, e. g. as a result of a tax audit, the tax relief applied for should then normally no longer be granted due to expired application deadlines. Against this backdrop, the Federal Ministry of Finance (BMF) has announced in its draft bill for a decree amending the Energy Tax and Electricity Tax Implementing Ordinance of 10 October 2017 that the so-called extended application deadline for the EnergieStV and the StromStV will be canceled.

The recent rulings of the Munich Regional Court raise doubts about the legal position of the administration. For the purposes of excise duty relief,"verifiably taxed" products are regularly required. In its judgment of 20.09.2016, the Federal Fiscal Court ruled in respect of an energy tax relief for pipeline bound natural gas that the applicant must only submit invoices as a means of substantiating the taxation of natural gas from which the purchase of taxed energy products can be seen, because he cannot access the taxation documents of his supplier.

Since the applicant cannot furnish proof of tax with an invoice for products that are expressly untaxed, it is justified that the preconditions for the respective entitlements to relief were not fulfilled at the time of the purchase of the goods. In such cases, the period for determining the entitlement to relief should only commence when economic operators and administration assume that taxable products are available on the basis of an actual tax assessment.

Due to the legal uncertainty described above, persons entitled to relief should strictly ensure that applications are submitted in due time.

1.1.3. New official forms for the calendar year 2018

The customs administration has provided the new official forms for the calendar year 2018 at www.zoll.de. There are a number of changes compared to the previous year.

Relief applications for the manufacturing industry

In its ruling of September 25,2013, VII R 64/11, the Bundefinanzhof (BFH) ruled that a tax relief for the amounts of electricity consumed on the premises by employees of another legally independent company is excluded for the fulfilment of a contract for work and services concluded with this company. In accordance with the BFH ruling of 18.03.2014, VII R 12/13 (NV), a tax relief is also to be excluded for the quantities of electricity that are supplied to a legally independent group company controlled by an enterprise of the producing trade.

With regard to the tax relief for companies in the producing industry pursuant to Sections 9a, 9b, 10 StromStG and Sections 51,54,55 EnergieStG, it must now be expressly confirmed in the official forms under point 6 by ticking off that the electricity or energy products to be subsidised have not been withdrawn or used by a third party.

In accordance with the explanations on the forms, the query refers in particular to levies to contracted companies, such as management companies and contractors for work and services. Irrespective of whether this company is, for example, part of the group of companies or the controlling company, the smallest legally independent unit (e. g. GmbH, etc.) is used.

Tax relief for electricity generation and cogeneration plants

According to Sections 53,53a, 53b EnergieStG, only the energy products used for generating electricity or for combined generation of power and heat are eligible for relief. If the user of the energy products, i. e. the operator of the power generating plant who uses the energy products in the beneficiary plant, is not the operator of the power generating plant, the latter must confirm by means of the self-declaration on the new form 1130 that the useful energy obtained from it has been used fully or proportionately (incl. quantification of the share) in a power generation or cogeneration process.

As of 1 January 2018, the partial tax relief for combined heat and power generation in accordance with Section 53b EnergieStG old was integrated into the relief standard in accordance with Section 53a EnergieStG. The new official form 1135 is used to apply for the benefit from the year of application, and it should be noted that the form provides for different input tables for the various elements of the relief standard.

In the case of the complete tax relief for combined heat and power generation in accordance with Section 53a (6) EnergieStG (corresponding to Section 53a EnergieStG old) all investment subsidies granted from 1 April 2012 for the installation of a CHP plant must be deducted with the application year 2018. The tax relief shall be granted for the part exceeding the investment aid.

The tax relief in accordance with section 53a (6) of the EnergieStG (EnergieStG - German Energy Tax Act) constitutes state aid in the sense of the Treaty on the Functioning of the European Union (TFEU). In accordance with EU state aid rules, this tax relief can therefore only be granted if investment aid already received is deducted from the operating aid.

All investment aid must be taken into account, irrespective of the institution or public body which granted it. Examples of such subsidies are the mini CHP impulse programme up to 20 kWel (investment subsidy) of the Federal Office of Economics and Export Control (BAFA), the subsidy programme for regenerative energies - progres. nrw of the federal state of North Rhine-Westphalia or low-interest loans and repayment subsidies from banks and savings banks.

Electricity tax registration

With the amendment to the Electricity Tax Ordinance of 02.01.2018, the obligation to report tax-free quantities of electricity withdrawn in accordance with Section 4 (6) StromStV has been supplemented by a few points. The notification is no longer limited to the quantities of electricity withdrawn in accordance with Section 9 (1) No. 3b of the ElectricityStG (electricity from power generation plants with a nominal electrical capacity of up to 2 MW for the purpose of supplying electricity in spatial context). In addition, the quantities withdrawn pursuant to Section 9 (1) No. 1 StromStG (electricity from green grids) and Section 9 (1) No. 2 StromStG (electricity for generation) and Section 9 (1) No. 3a StromStG (electricity from electricity generation plants with a rated elec-

trical output of up to 2 MW for internal consumption) must now also be reported in the official form.

Suppliers who file an annual electricity tax return should continue to use the form 1400 and report the tax-free quantities withdrawn. This form is unchanged from the previous year. The enquiry of the tax-exempt electricity quantities in the official form has so far been carried out without a legal basis.

Utilities that do not have to declare taxable quantities use the new 1429 official form 1429, which specifies the total amount of electricity used and/or supplied that is tax-exempt, depending on the tax collection act. A tax is not charged.

The deadline for filing the electricity tax return for the calendar year 2017 remains 31 May 2018, irrespective of the form used.

Energy tax registration

The form for the energy tax declaration for heating fuels without natural gas and coal (Pressure 1101) has also been redesigned. The tax relief to be applied for under Sections 46,47,47,47a and 52 of the EnergieStG using the same form must now be entered in separate tables.

Application for electricity tax permits

In the following cases, a new official form for the application for or notification of a preferential treatment under electricity tax law and the corresponding company declaration were posted on www.zoll.de. The application has so far been made informally.

- Application for permission as electricity supplier (forms 1410 and 1410a)
- Display as electricity supplier in the cases of Section 1a (6) and (7) StromStV (forms 1412 and 1412a)
- Application for a permit for the tax-exempt extraction of electricity for power generation (forms 1420 and 1420a)

1.2. State aid law requirements

1.2.1. Online platform for the EnSTransV

Due to the decree published in the Federal Law Gazette on 17 May 2016 on the implementation of transparency obligations under EU law in the Energy and Electricity Tax Act (EnSTransV), state subsidies for energy and electricity tax have to be reported annually to the customs administration since 1 July 2016.

The EnSTransV distinguishes between a duty to notify for tax exemptions and tax reductions and a duty to declare for tax relief. In the declaration of tax exemptions and reductions, the declarants of the customs authorities should disclose the quantities of electricity and energy products they have withdrawn or used in the preceding calendar year and the amount of the corresponding tax relief (year of use). On the other hand, the declaration of tax relief requires beneficiaries to declare the amount of the tax relief actually paid to them in the previous calendar year, as well as the corresponding amounts of electricity and energy products. By switching to the payment year, elabo-

rate corrections of declarations in the event of changes to tax relief amounts, e. g. in the course of tax audits or appeal proceedings, are to be avoided. For tax concessions with an annual benefit volume of less than EUR 150,000 each, an exemption from the obligation to declare can also be applied for.

For the second reporting period from 1 January to 31 December 2017, the EnSTransV declarations must be submitted to the competent main customs office by 30 June 2018 at the latest. For this purpose, the official forms 1461 (Display of tax exemptions and reductions), 1462 (Declaration of tax relief) and 1463 (Application for exemption from the obligation to declare) can be downloaded from www.zoll.de

In addition to the submission in paper form, the reporting requirement can also be fulfilled online via the newly established Internet portal to the EnSTransV as of May 1,2017. The Internet portal can be accessed via www.zoll.de in the "Services and databases" section or directly via https://enstransv.zoll.de The new website is intended to save time and money for business and administration.

The start of the electronic registration procedure and the associated procedural instructions were published in the Federal Gazette (Bundesanzeiger) on January 11,2018. Pursuant to section 7 (2) of the EnSTransV, it is only possible to submit notifications on paper forms one year after the electronic registration portal has been announced in the Bundesanzeiger (Federal Gazette). This means that the use of paper forms is permitted until at least January 10,2019. Afterwards, the portal must be used in a binding manner. An exemption from the use of electronic data transmission shall then only be permitted and possible upon a justified request.

Prior to the initial data entry in the online system, the person subject to registration must set up a user account once. The user account must then be activated via a confirmation link sent by e-mail. In the next step, the company name and address of the person subject to registration as well as, if available, his sales tax identification number, company number at the main customs office and agricultural donkey number must be entered. Please note that only one user account and one company can be registered per email address stored in the portal. Conversely, only one email address can be assigned to each user account. For this reason, a central storage of the access data for the reporting portal and the stored email is recommended. This can be done, for example, using typed email addresses (e. g. entransv1@wts.de).

After entering this data, a registration request is generated, which the person responsible for reporting must sign and send to his main customs office. This can be done by uploading the scanned application directly on the Internet portal, but also by e-mail or post. According to the customs administration, the expected processing time for a registration application is approximately 1 week. After the application has been checked, the user account is activated by the responsible main customs office and can be used to enter EnSTransV declarations.

In terms of content, the online advertisements, declarations and exemption requests correspond to the previous paper forms. No additional information is required to meet the reporting requirements. After the successful transmission of the declarations in the portal, the person liable to report receives an acknowledgement of receipt with a declaration ID to uniquely identify his declaration in case of queries by the main customs office. The person subject to registration can print out and archive this PDF document. It cannot be sent to the main customs office.

The Internet portal automatically transmits the data entered to the relevant main customs office. In analogy to the previous paper procedure, no questions regarding the content of online reports submitted correctly are to be expected from the authorities. The persons subject to the reporting obligation also do not receive a confirmation of processing after having been checked by the main customs offices.

1.3. Tax relief for enterprises in the manufacturing sector

1.3.1. The person entitled to relief under electricity tax law in the case of compressed air contracting

With the application for tax relief under Sections 9b and 10 StromStG, companies in the producing trade can reduce their electricity tax burden. When submitting an application, it must be ensured that the tax relief is granted only for the amounts of electricity withdrawn for internal operational purposes. In cases where several contracting parties are involved in an electricity withdrawal, the determination of the beneficiary is generally disputed.

According to the assessment criteria of the BFH judgement of 25.09.2013, VII R 64/11, a legally independent performance of tasks associated with the operationally induced use of electricity is decisive for the determination of the electricity recipient entitled to discharge. It must be based on the legally independent entity.

In a letter dated September 7,2017, the General Customs Directorate (GZD) issued a statement on the question of who is entitled to relief under electricity tax law in accordance with Sections 9b, 10 StromStG for compressed air contracting models. Within the scope of these contractual agreements, the customer shall pay a compressed air contracting rate to his contractor in order to obtain a fixed annual quantity of compressed air for this purpose. For this purpose, the Contractor shall normally install a compressed air station, i. e. an automated system for the production of compressed air, on the premises of his customer. During operation, the plant remains the property of the contractor. The customer may not make any changes to the system without the contractor's consent. Insofar as the customer requires quantities of compressed air exceeding the annual flat rate, these will be billed separately.

The compressed air station is operated automatically, i. e. no personnel of the contractor are employed to produce the compressed air. Instead, the compressors of the system switch on automatically as soon as the customer takes compressed air from the station. The customer shall provide the contractor with the electricity required to operate the compressed air station free of charge.

According to the current GZD order, the initiative to produce compressed air is based on the customer's automatic mode of operation. The compressed air extraction by the customer thus also triggers the real act of current extraction: The customer decides himself whether and in which quantity of compressed air to be extracted from the system and thus directly influences the power consumption required to generate compressed air. As a result, in GZD's opinion, the customer is thus entitled to relief in accordance with Sections 9b, 10 StromStG for the amounts of electricity used in the plant.

To the extent that the contractor has so far been regarded as entitled to discharge in the case of existing plants, the procedure is to be changed over from the year of appli-

cation 2018. Credits may be granted to the contractor until the application year 2017. No recoveries shall be made by the main customs offices.

It is to be expected that the main customs offices will also transfer the design represented by GZD for compressed air contracting to other automatically operated plants, such as automatic on-site systems for nitrogen production. In order to make use of the transitional period, relevant facts should be disclosed at an early stage and discussed with the responsible tax authority.

1.3.2. Peak compensation: tax relief will also be granted in full for the 2018 application year

On the basis of a monitoring report by the Rheinisch-Westfälisches Institut für Wirtschaftsforschung (RWI) (Rhineland Westphalia Institute for Economic Research), the Federal Cabinet stated on 13 December 2017 that companies in the manufacturing industry had met the legal requirements for increasing energy efficiency for the reference year 2016. The monitoring report is based on an agreement between the Government of the Federal Republic of Germany and the German business community on increasing energy efficiency of 1 August 2012 and is a prerequisite for granting tax exemptions in accordance with Section 10 of the Electricity Tax Act and Section 55 of the Energy Tax Act (peak compensation).

According to the legal requirements, the target value for reducing the energy intensity in the reference year 2016, which is relevant for the application year 2018, is 5.25% compared to the base value of the annual average energy intensity in the years 2007 to 2012. according to the monitoring report, the adjusted energy intensity of the year 2015 is 13.8% lower than in the base period, so that the target value has been reached by more than 100%.

As a result, the tax relief in accordance with Section 10 StromStG and Section 55 EnergieStG can also be granted in full for the application year 2018, which must also be taken into account when calculating the tax advance payments for electricity suppliers and natural gas suppliers. The determination of target achievement was published in the Federal Law Gazette on 18 December 2017.

Employer contributions to pension insurance

On 15 December 2017, the Federal Council also approved the Contribution Rate Ordinance 2018. As a result, the contribution rate in general pension insurance will be reduced to 18.6 percent as of January 1,2018. The contribution for the calendar year 2017 was 18.7 percent. In the short-sightedness pension insurance, the contribution is reduced to 24.7 percent. The publication in the Federal Law Gazette (Bundesgesetzblatt) was published on 22.12.2018. The contribution rates to the pension insurance are required for the calculation of the equalization payments.

Fully implemented energy management system

For the application year 2018, it is also necessary to prove that an energy management system (EMS) in accordance with DIN EN ISO 50001, an environmental management system (EMS) in accordance with Art. 13 Regulation 1221/2009/EC (EMAS Regulation) or, in the case of small and medium-sized enterprises (SMEs), an alternative system has been fully implemented, i. e. in principle for the whole enter-

prise. The verification procedure is based on the peak compensation efficiency system ordinance (SpaEfV). Evidence is provided by means of the official form 1449 for the calendar year 2018, which can be downloaded at www.zoll.de recently.

1.4. Tax relief for thermal waste or exhaust air treatment

1.4.1. New restrictive administrative opinion on energy tax relief for thermal waste or exhaust air treatment in accordance with Section 51 (1) No. 2 EnergieStG - without amendment of the law

On the basis of the ECJ case-law on the so-called dual-use processes (ECJ rulings C-426/12 of 2 October 2014 and C 529/14 of 17 December 2014, the European Court of Justice has ruled in accordance with ECJ rulings C-426/12 of 2 October 2014 and C 529/14.2015) and without changing the law, the fiscal authorities have redefined the conditions for tax relief for thermal waste or exhaust air treatment in accordance with Section 51 (1) No. 2 of the Energy Tax Act (EnergieStG) in accordance with the wording of the national law. First of all, it should be noted that we believe this is illegal and contrary to the principle of the division of powers. Should Section 51 (1) No. 2 EnergieStG reject EU law, the national legislator must act. However, a corresponding legislative initiative has recently failed. Now only the BMF, by decree of 18.12.2017, has announced the partial service provision for Section 51 (1) No. 1 letter d EnergieStG (Dual-Use). The administrative instructions result in considerable restrictions compared to previous legal practice and new delimitation problems for asset operators. The new regulation is to be applied from the application year 2018.

By decision of 17 December 2015, the ECJ ruled that the burning of energy products for overheating and drying process steam and for the thermal destruction of exhaust gases does not constitute a consumption exempt from the scope of the Energy Tax Directive for two purposes. As a result of the ECJ decision, the conformity of the tax relief for thermal waste or exhaust air treatment in accordance with Section 51 (1) No. 2 of the EnergyStG is in question.

As a result, the General Customs Directorate (GZD) had sent a letter to all the main customs offices on 30 May 2016 informing them that the previous interpretation of the tax relief in accordance with Section 51 (1) No. 2 of the Energy Tax Act (EnergieStG) and the corresponding partial service provision for tax relief for thermal waste or exhaust air treatment (DV TAR) should remain unchanged for the time being even after the ECJ decision of 17 December 2015. The final assessment and, if necessary, implementation of the provisions of the ECJ decision of 17 December 2015 is reserved for parliamentary procedure.

In this respect, the Federal Government had published a draft discussion on a second law amending the Energy and Electricity Tax Act of 22 April 2016. Accordingly, the incineration of energy products for the thermal treatment of waste or exhaust air should only be eligible for subsidy if a "dual-use" use within the meaning of Section 51 (1) No. 1 letter d EnergieStG, i. e. if the energy products are simultaneously used for heating purposes and for other purposes than heating or fuel (Section 51 (1c) EnergieStG Draft). In the course of the legislative process, the planned amendment was again dispensed with. Accordingly, the tax relief for the thermal waste and exhaust air treatment in accordance with Section 51 (1) No. 1 EnergieStG remains unchanged in principle even after the amendment to the law that came into force on January 1,2018.

Contrary to the will of the legislator, the legal adaptation should now be made by administrative channels.

Pursuant to paragraphs 41,43,44 and 46 to 48 of the Ordinance on Partial DV relating to Section 51 (1) No. 1, letter of intent. d In addition to the energetic use of the energy product for heating, a second purpose must be added to the EnergyStG, which consists in the fact that the energy product itself, its chemical components or its combustion products (usually carbon dioxide) are absolutely necessary for the thermal treatment of waste or exhaust air. This should only be the case if components of the flue gas (usually consisting of carbon dioxide and water in varying proportions, depending on the raw material) as combustion product enter the waste to be treated or the exhaust air as a material in the waste to be treated and thus contribute to the elimination of the pollutant potential, or if they are involved in the waste or exhaust air treatment as a necessary component of an intermediate product, for example. A process-engineering or chemical necessity for the thermal treatment of waste or exhaust air, however, should not be present if the combustion product of the energy product has only the function as a heat transfer medium or transport medium.

In addition, the DV TAR was abolished with effect from 1 January 2018. However, the principles laid down therein concerning the group of persons entitled to relief, the definition of waste and exhaust air, thermal treatment, the delimitation of thermal waste or exhaust air treatment from other uses of energy products and the upstream and downstream processes shall continue to apply mutatis mutandis.

If the tax relief is to continue to be applied for in accordance with Section 51 (1) No. 2 EnergieStG for the application year 2018, the main customs offices are instructed to request updated company declarations. These declarations shall specify the form in which the energy product itself, its chemical constituents or its combustion products are absolutely necessary for the thermal treatment of waste or exhaust air, either by process engineering or chemically, in that they contribute to the elimination of the pollutant potential or are involved as a necessary component of an intermediate product in the treatment of waste or exhaust air.

1.5. Electricity supplier

1.5.1. New regulation of the power supply status for customer systems: complex legal situation for own generators in the electricity tax law

On 01.01.2018, new versions of the Electricity Tax Act and the Electricity Tax Ordinance came into force. Among other things, the legislature is pursuing the goal of establishing clear criteria for the differentiation between utility companies (generally subject to electricity tax) and final consumers by referring to the energy law term "customer plant".

Pursuant to Section 2 No. 1 StromStG, utility companies are basically those who provide electricity. Exceptions to this rule are contained in Section 1a StromStV. The previous exceptions are linked to the fact that there is a proximity relationship between the parties involved in a tenancy, lease or similar relationship. The new regulation moves away from this in that it introduces the existence of a customer investment

within the meaning of the Energy Industry Act as a further exception category. This makes the distinction between supplier and end user considerably more complex.

The distinction between supplier and final consumer is significant in that the supplier status not only has beneficial effects on liquidity but also entails numerous obligations, including the obligation to file a tax return, apply for a supplier's licence and record keeping obligations. If the classification is incorrect and supplier obligations are neglected as a result, additional payment obligations arise. The legal situation to date has often been problematic in cases where operators of industrial plants - such as own generation plants and plant networks - have erroneously not classified themselves as suppliers.

The revised version of Section 1a StromStV is intended to clarify the situation with the extended exceptions to the care status and to reduce the administrative expenses in connection with customer installations. This was only partially successful.

First of all, the term defined in Section 3 nos. 24a and 24b of the Energy Industry Act (EnWG) for customer investment or the customer investment for the company's own internal supply contains several elements requiring interpretation: For example, the criterion of a "spatially contiguous area" requires a physical network connection between different business locations - and the question of whether it is one or more customer installations is a regular question of demarcation. The criterion that the energy plant must not be relevant to ensure effective and undistorted competition also opens up scope for interpretation. Finally, in practice, the question often arises as to whether an energy plant is made available to the customer free of discrimination and free of charge, as required by law, if the use of the plant is included in the fee within the framework of a rental or lease agreement.

Accordingly, if there is a customer plant, the new Section 1a StromStV distinguishes between plant operators who only use electricity from the public grid and supply it within their customer plant (new Section 1a (1a) Sentence 1 StromStV) and operators who supply electricity from their own generation plant (new Section 1a (6) and (7) StromStV). In the case of plants, a distinction is again made between generation plants below and above 2 MW, and in the case of generation plants above 2 MW between green power plants (PV, wind, biomass) and other plants. The final consumer status is now clearly regulated, at least for non-owner-generated operators of customer systems (Section 1a (1a) Sentence 1 StromStV). Differently with own generators: According to Section 1a (6) Sentence 1 StromStV operators of plants under 2 MW can fall out of the utility status as final consumers, but they are still valid as suppliers "only for the produced and then produced electricity" - whereby the final consumer status is limited to the received electricity. Here, a mixed status of the plant operator can arise, which will lead to new demarcation issues. Moreover, despite the customer's plant, operators of plants with a capacity of more than 2 MW remain suppliers (Section 1a (7) StromStV).

Since exceptions to these new exemptions to the supply status of customer installations can be permitted upon request (Section 1a (8) StromStV) and the legal fiction of classification as final consumer is optional under the new StromStV, we recommend that in cases of doubt a review.

2. Energy law

2.1. New at WTS

2.1.1. Legal advice on energy law at the interface with tax law

Dr. Sabine Schulte-Beckhausen joined the WTS team as a partner on 1 November 2017. She has over 20 years of consulting experience in the energy sector. WTS is thus expanding its integrated tax and legal advice, particularly in the fields of energy, electricity and value-added tax law, by providing well-founded legal advice on the adjoining energy law.

Dr. Sabine Schulte-Beckhausen comes from a large international law firm and has extensive industry and consulting experience in the energy sector as a result of her previous work with the Association of Municipal Companies and a renowned German bank. In recent years, it has specialised in advising energy suppliers, industrial companies, start-ups and plant operators. Recently, she has accompanied various battery storage projects, innovative business models in energy trading and control energy marketing, heating concepts as well as cooperations between flexibility and e-mobility providers. In addition to her professional activities, she is a guest lecturer in energy law at the Ruhr West University of Applied Sciences (Mülheim a. d. Ruhr).

Her main areas of expertise include regulatory and contractual issues at all stages of energy value creation in the fields of electricity, gas and heat, including at the interface with tax law.

Dr. Sabine Schulte-Beckhausen

Partner
attorney-at-law
Phone + 49 (0) 221 348936-213
Sabine.Schulte-Beckhausen@wts-legal.de

2.1.2. Energy law at WTS

- Electricity, natural gas and heat supply contracts
- Energy trading contracts (e. g. framework agreements, EFET, intraday trading, bi-balance group cooperation)
- Contracts on balancing energy marketing, battery storage marketing, load management
- Direct marketing EEG and KWKG
- Self-sufficiency models, on-site provision, contracting contracts
- Gas storage utilization
- Grid contracts (grid connection, grid usage, customer installations)
- Special grid fees for electricity and gas
- Limitation of EEG levy, restructuring of energy-intensive companies
- Cooperation agreements, e. g. between industry and new energy suppliers
- Legal questions on energy efficiency
- Energy supply of commercial real estate, e. g. computer and shopping centres
- Special energy law issues in transactions (especially M&A, project financing)

3. Seminar Energy and Electricity Tax & Energy Law

We hereby cordially invite you to our annual seminar "Energy and Electricity Tax & Energy Law" on 12.04.2018 in the Maritim Hotel Düsseldorf. Experts from jurisprudence, teaching, industry and consulting give lectures on current topics of energy and electricity tax and energy law.

In the tradition of the last 10 years, we will inform you about all relevant changes in legislation and ordinances as well as the current case law. The new restrictive administrative opinion on tax relief for thermal waste and exhaust air treatment is currently under discussion. In addition, the focus will be on practical questions concerning the new EnSTransV reporting obligations (including the new online registration portal) and the new official forms for the calendar year 2018, as a result of the decree on the tax code issued by the Federal Ministry of Finance on 23 May.In 2016, there will also be an increase in the implementation of internal tax control systems (tax ICS) in the area of energy and electricity tax in order to comply with the requirements of the decree on application in the event of a correction of tax returns and relief requests. In addition, as in recent years, practice-relevant interfaces to energy law will be illuminated.

Topics of the seminar

- Current case-law of the BFH on energy and electricity tax law
- Energy tax: Amendments to the Energy Tax Act on 01.01.2018 and new: Amendments to the Energy Tax Implementing Ordinance on 01.01.2018
- Electricity tax: Amendments to the Electricity Tax Act on 01/01/2018 and new: Amendments to the Electricity Tax Implementing Ordinance on 01/01/2018
- Restriction of the tax relief for the thermal waste or exhaust air treatment according to Section 51 (2) No. 1 EnergieStG as of 01/01/2018
- Discussion points in practice: Reporting obligations under the Energy and Electricity Tax Transparency Ordinance (EnSTransV) and new official forms 2018
- Loss of relief claims due to formal or procedural errors
- Internal tax control system / Tax Compliance Management: Implementation of a tax ICS in the area of energy and electricity tax
- Energy law interfaces in electricity tax law: forwarding to third parties, supplier status for customer systems and integration of storage facilities

Our speakers

- Prof. Dr. Harald Jatzke, Judge at the Federal Finance Court
- Prof. Dr. Sabine Schröer-Schallenberg, University of Applied Sciences, Department of Finance
- Government Director Matthias Bongartz, Federal University of Applied Sciences, Department of Finance
- Dipl. -Finanzwirt (FH) Knut Milewski, Bayer AG
- Dipl. -Finanzwirt (FH) Ottmar Böhm, thyssenkrupp AG
- Lawyer Dr. Karen Möhlenkamp, WTS
- Lawyer Dr. Sabine Schulte-Beckhausen, WTS
- Dr. Christoph Palme, WTS

Conference venue/time

Düsseldorf - 12.04.2018 - 09:30 - 17:00

MARITIM Hotel Düsseldorf

Maritim-Platz 1,40474 Düsseldorf, Germany

Lecture language is German

Registration fee

The participation fee is € 450, - plus VAT (incl. seminar documents, drinks). Invoices will be sent after the seminar. You will receive a confirmation of registration after registration. The registration is binding. In case of a later cancellation of the event, which you have to make in writing, we will gladly accept substitute participants. Otherwise we also incur costs, which we have to charge: up to two weeks before the date € 75, afterwards the full fee.

editors

WTS Steuerberatungsgesellschaft mbH
www.wts.de | info@wts.de

Contact/editorial office

Dr. Karen Möhlenkamp | P +49 211 200 50-817 | karen.moehlenkamp@wts.de
Bertil Kapff | P +49 211 200 50-669 | bertil.kapff@wts.de

München

Thomas-Wimmer-Ring 1-3 | 80539 München
T +49(0) 89 286 46-0 | F +49 (0) 89 286 46-111

Düsseldorf

Peter-Müller-Straße 18 | 40468 Düsseldorf
T +49 (0) 211 200 50-5 | F +49 (0) 211 200 50-950

Erlangen

Allee am Rötelheimpark 11-15 | 91052 Erlangen
T +49 (0) 9131 97002-11 | F +49 (0) 9131 97002-12

Frankfurt

Taunusanlage 19 | 60325 Frankfurt am Main
T +49 (0) 69 133 84 56-0 | F +49 (0) 69 133 84 56-99

Hamburg

Brandstwiete 4 | 20457 Hamburg
T +49 (0) 40 320 86 66-0 | F +49 (0) 40 320 86 66-29

Köln

Sachsenring 83 | 50677 Köln
T +49 (0) 221 348936-0 | F +49 (0) 221 348936-250

Kolbermoor

Carl-Jordan-Strasse 18 | 83059 Kolbermoor
T: +49 (0) 8031 87095-0 | F: +49 (0)

Regensburg

Lilienthalstraße 7 | 93049 Regensburg
T: +49 (0) 941 383873-0 | F: +49 (0) 941 383873-130

Stuttgart

Büchsenstraße 10 | 70173 Stuttgart
T: +49 (0) 711 6200749-0 | F: +49 (0) 711 6200749-99

Disclaimer

This WTS information does not constitute advice and is provided for the sole purpose of presenting selected topics in general. The information and representations contained herein do not claim to be complete nor are they suitable to replace advice in individual cases.

No liability is assumed for the correctness of the contents. If you have any questions regarding the topics mentioned herein or other technical issues, please contact your WTS representative or one of the above-mentioned contacts.