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2016/0245 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

authorising the Republic of Poland to continue to apply a measure derogating from Articles 26(1)(a) and 168 of Directive 2006/112/EC on the common system of value added tax

EXPLANATORY MEMORANDUM

Pursuant to Article 395(1) of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereafter 'the VAT Directive'), the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures for derogation from the provisions of that Directive in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance.

By letter registered with the Commission on 8 February 2016, Poland has requested an extension of the derogation from Article 168 of the VAT Directive in order to continue to restrict the right to deduct the input tax on expenditure connected with certain motor vehicles. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 6 June 2016 of the request made by Poland. By letter dated 8 June 2016, the Commission notified Poland that it had all the information necessary to consider the request.

1. CONTEXT OF THE PROPOSAL

Article 168 of the VAT Directive provides that a taxable person is entitled to deduct VAT charged on purchases made for the purpose of taxed transactions. Article 26(1)(a) of the same Directive requires the use of goods forming part of the assets of a business for private purposes to be a supply of services for consideration if the VAT on the goods was eligible for deduction.

This system allows for the recovery of initially deducted VAT in relation to the private use.

In the case of motor vehicles, this system can be difficult to apply for a number of reasons, notably because it is difficult to identify accurately the split between business and non-business use. Where records are kept, they add an additional burden to both the business and the administration in maintaining and checking them. The number of vehicles concerned means that even small-scale individual evasion has the capacity to grow into significant sums.

The percentage restriction requested is 50%. This is based on Poland's own assessment and, under the terms of the proposal, would be reviewed upon any request by Poland for extension beyond 2019.

Poland is currently authorised on the basis of Council Implementing Decision 2013/805/EU[1] to restrict to 50 % the right to deduct VAT on the purchase, intra-Community acquisition, import, hire or lease or other agreements of similar nature concerning certain motor vehicles other than passenger cars, up to a maximum of PLN 6 000. That Decision shall expire on 31 December 2016.

Poland informs that the grounds for this application for a derogation have not changed and are similar to those described in the previous request. The application for a derogation is a continuation of the arrangements provided for in the aforementioned Council Decision.

The restriction would apply only to motor vehicles which are not used exclusively for business purposes and to expenditure related to those vehicles.

This derogation also involves partially restricting the right to deduct to 50% of input tax on purchases of fuel for the motor vehicles caught by the derogation and on other operating expenditure, including the repair and maintenance of those vehicles, and on the expenditure

[1] Council Implementing Decision 2013/805/EU of 17 December 2013 authorising the Republic of Poland to introduce measures derogating from point (a) of Article 26(1) and Article 168 of Directive 2006/112/EC on the common system of value added tax (OJ L 353, 28.12.2013, p. 51)

on supplies or services provided in connection with those vehicles and their use, including expenditure for alterations or assembly of parts in those vehicles (with the exception of expenditure for alterations or assembly of parts in those vehicles which are used exclusively for business purposes, for example, assembly of a taximeter).

Poland indicates that motor vehicles caught by this derogation can, by virtue of their design, also easily be used for non-business purposes.

Certain types of motor vehicles are excluded from that restriction and would therefore be subject to the normal rules, namely any vehicle with more than 9 seats (including the driver's) and with a total maximum weight of more than 3500 kilograms. This mainly restricts the field of application to passenger cars, vans, pick-ups and motorbikes. The derogation would also not affect vehicles exclusively intended for resale or to be made available for use for consideration under a hire, rental or leasing contract or other contracts of similar nature or vehicles designed for the carriage of at least ten persons including the driver.

Poland has requested that it is allowed to continue to limit until 31 December 2019 the initial deduction to a set percentage and in turn relieve businesses from accounting for VAT on the private use. This derogation removes the need to keep detailed private mileage records for each car and to account for the VAT on the private use. The derogation is therefore essentially to be considered as a simplification measure. This has the benefit of simplifying the system for all concerned and ensuring that a percentage of the tax, which might have otherwise been evaded, is collected.

On the basis of the information provided by Poland, it appears that the average business use of mixed-use company cars is still around 50%. The requested extension therefore appears to be justified. Derogations are normally granted for a limited time as to allow an assessment whether the special measure is appropriate and effective. Any extension should therefore be limited in time in order to assess whether the conditions, on which the derogation is based, would still be valid.

It is therefore proposed that the request will be granted until 31 December 2019 and to request Poland to present a report by 1 April 2019 including a review of the percentage restriction applied in case a further extension would be envisaged beyond 2019.

The derogation would not, except to a negligible extent, affect the overall amount of the tax revenue of the Member State collected at the stage of the final consumption.

- **Consistency with existing policy provisions in the policy area**

Article 176 of Directive 2006/112/EC stipulates that the Council shall determine the expenditure on which the VAT is not deductible. Until such time, it authorises Member States to maintain exclusions, which were in place on 1 January 1979. There are therefore a number of "stand still" provisions restricting the right to deduct in relation to motor vehicles.

Notwithstanding previous initiatives to establish rules on which categories of expenditure may be subject to a restriction on the right to deduct[2], such derogation is appropriate in the awaiting of a harmonisation of these rules at EU level.

[2] COM (2004) 728 final - Proposal for a Council Directive amending Directive 77/388/EEC with a view to simplifying value added tax obligations (OJ C 24, 29.1.2005, p.10) withdrawn on 21 May 2014 (OJ C 153 21. 05. 2014, p. 3)

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

Article 395 of the VAT Directive.

• Subsidiarity (for non-exclusive competence)

Considering the provision of the VAT Directive on which the proposal is based, the proposal falls under the exclusive competence of the European Union. The subsidiarity principle therefore does not apply.

• Proportionality

The Decision concerns an authorisation granted to a Member State upon its own request and does not constitute any obligation.

Given the limited scope of the derogation, the special measure is proportionate to the aim pursued, i.e. to prevent certain forms of tax evasion of avoidance and to simplify the VAT collection in a specific sector.

• Choice of the instrument

Proposed instrument: Council Implementing Decision.

Other means would not be adequate for the following reason:

Under Article 395 of Council Directive 2006/112/EC, derogation from the common VAT rules is only possible upon authorisation of the Council acting unanimously on a proposal from the Commission. A Council Implementing Decision is the most suitable instrument since it can be addressed to an individual Member State.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

• Stakeholder consultations

This proposal is based on a request made by Poland and concerns only this Member State.

• Collection and use of expertise

There was no need for external expertise.

• Impact assessment

The proposal is designed to counter VAT evasion and to simplify the procedure for charging tax and has, therefore, a potential positive impact for both businesses and administrations. The solution has been identified by Poland as a suitable measure and is comparable to other past and present derogations.

4. BUDGETARY IMPLICATIONS

The proposal will have no negative implication for the EU budget.

5. OTHER ELEMENTS

The proposal includes a sunset clause; an automatic time limit which is set at 31 December 2019.

In case Poland would consider another extension of the derogating measure beyond 2019, a new evaluation report should be submitted to the Commission together with the extension request no later than 1 April 2019.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[3], and in particular Article 395 thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Article 168 of Directive 2006/112/EC establishes a taxable person's right to deduct VAT charged on supplies of goods and services received by him for the purposes of his taxed transactions. Point (a) of paragraph 1 of Article 26 of that Directive contains a requirement to account for VAT when a business asset is put to use for the private purposes of the taxable person or his staff or, more generally, for purposes other than those of his business.

(2) Implementing Decision 2013/805/EU[4] authorised Poland until 31 December 2016 to restrict the right to deduct VAT on the purchase, hire, rent or lease of certain motorised road vehicles and expenditure related thereto and to relieve the taxable person from accounting for VAT on the non-business use of vehicles covered by the restriction.

(3) By letter registered with the Commission on 8 February 2016, Poland requested authorisation to continue to apply special measures concerning certain motorised road vehicles and expenditure related thereto, derogating from those provisions laid down in Directive 2006/112/EC which govern a taxable person's right to deduct VAT paid on the purchase of goods and services and those which require tax to be accounted for on business assets used for non-business purposes.

(4) In accordance with the second subparagraph of paragraph 2 of Article 395 of Directive 2006/112/EC, the Commission informed the other Member States of the request made by Poland by letter dated 6 June 2016. By letter dated 8 June 2016, the Commission notified Poland that it had all the information necessary to consider the request.

(5) In accordance with the second subparagraph of Article 3 (2) of Decision 2013/805/EU, Poland submitted, together with the extension request, a report to the Commission on the application of that Decision, including a review of the percentage restriction

[3] OJ L 347, 11.12.2006 , p. 1.

[4] Council Implementing Decision 2013/805/EU of 17 December 2013 authorising the Republic of Poland to introduce measures derogating from point (a) of Article 26(1) and Article 168 of Directive 2006/112/EC on the common system of value added tax (OJ L 353, 28.12.2013, p. 51).

applied on the right of deduction. Based on currently available information, Poland believes that a rate of 50% is still justifiable. At the same time, to avoid double taxation, the requirement for accounting for VAT on the non-business use of a motor vehicle should be suspended where it has been subject to this restriction. These measures can be justified by the need to simplify the procedure for charging VAT and to prevent evasion through incorrect record keeping and false tax declaration.

(6) Certain types of motor vehicles are excluded from the scope of the special measures as - due to their nature or the type of business they are used for - any non-business use is considered as negligible. Therefore, the special measures should not apply to vehicles with more than 9 seats (including the driver's) and with a total maximum weight of more than 3 500 kilograms. In addition, the restriction to the right of deduction shall not apply to VAT charged on any expenditure that is entirely related to the taxable person's business.

(7) The restriction to the right of deduction under the special measures should apply to VAT paid on the purchase, intra-Community acquisition, importation, hire or leasing of specified motorised road vehicles and on expenditure related thereto, including the purchase of fuel.

(8) The extension of these derogating measures should be limited in time to allow for an evaluation of their effectiveness and of the appropriate percentage; Poland should therefore be authorised to continue to apply the measure for a limited period, until 31 December 2019.

(9) Where Poland considers a further extension of the derogating measures beyond 2019 is necessary, a report on the application of the measures in question, which includes a review of the percentage applied, should be submitted to the Commission together with the extension request no later than 1 April 2019.

(10) The derogation will only have a negligible effect on the overall amount of tax collected at the stage of final consumption and will not adversely affect the European Union's own resources accruing from VAT.

(11) Implementing Decision 2013/805/EU should be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Implementing Decision 2013/805/EU is amended as follows:

Article 3 is replaced by the following:

"Article 3

1. This Decision shall expire on 31 December 2019.

2. Any request for the extension of the measures provided for in this Decision shall be submitted to the Commission by 1 April 2019. Such request shall be accompanied by a report including a review of the percentage restriction applied on the right to deduct VAT on the basis of this Decision."

Article 2

This Decision shall apply from 1 January 2017.

Article 3

This Decision is addressed to the Republic of Poland.

Done at Brussels,

For the Council
The President