

The Challenges of Prosumers

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Abstract. *In response to the difficulties and disruptions in the world energy market caused by Russia's invasion of Ukraine, the European Commission presented the REPowerEU plan¹. REPowerEU is a plan to: saving energy; production of clean energy; diversification of our energy sources. It is backed by financial and legal measures to build the new infrastructure and energy system that Europe needs². This proposal includes a legal obligation to install solar panels on new buildings and encourages countries to cut red tape, provide incentives and inform citizens about how they can become prosumers. It is truly a revolutionary proposition³. On the national level, "Taking into account the new AFM Green House Photovoltaic 2021 program, assuming the maintenance of the growth trend recorded in 2021 in the number of prosumers, it is forecasted for the end of 2022 the existence of about 30,000 prosumers", stated the representatives of the National Authority of Energy Regulation (ANRE). The growth enjoyed by the market of small energy consumers who have made the leap to their own small-scale production is astonishing⁴.*

Keywords: economic activity, independent natural person, income tax, authorization, VAT

JEL Classification: M41, K32, H21

1. Introduction

At the EU level, the Renewable Energy Directive (reformed) and the Internal Electricity Market Directive defined several types of prosumers and established the rights and obligations of each one. But the biggest challenge for the prosumer came in May with the proposed REPowerEU plan and its rooftop solar initiative: "Renewable energy is the cheapest and cleanest energy available and can be generated in the EU, reducing our need for energy imports. The Commission proposes to increase the EU's 2030 target for energy from renewable sources from the current 40% to 45%. The REPowerEU plan would bring total renewable energy generation capacity to 1 236 GW by 2030, compared to 1 067 GW by 2030 as envisaged in the 2030 'Get ready for 55' legislative package. Additional investment is needed worth €210 billion by 2027 to phase out fossil fuel imports from Russia, for which European taxpayers currently pay almost €100 billion a year.

¹ (https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/repowerEU-affordable-secure-and-sustainable-energy-europe_ro).

² (https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/repowerEU-affordable-secure-and-sustainable-energy-europe_ro)

³ idem

⁴ <https://www.anre.ro/>

2. Research methodology:

We used throughout the research the qualitative analysis of the relevant national and international fiscal principles, in a doctrinal context; the empirical method used for the interpretation of case studies using specific applicable elements identified within the research objectives; the participatory observation method used in the interpretation of empirical research results, respectively in the expression of opinions during the research;

At the same time, reasoning, analysis, synthesis, interpretation were used throughout the research.

3. Objectives of the research

Starting from the premise that the activities of prosumers - especially in the case of natural persons, although currently regulated, can be improved, considering the novelty of the activity and the major interest of the field of activity, the following research objectives were established:

- I. Identification of the critical aspects related to the regulation of the field and the implementation of the economic and fiscal legislation specific to prosumers;
- II. Identification of the ECJ jurisprudence applicable to prosumers;
- III. Making proposals to solve the economic and fiscal regulation flaws;

I. The stage of knowledge

I.1. Regulation – general framework

Law no. 123/2012 of July 10, 2012⁵ - the electricity and natural gas law, in force starting from September 1, 2022, defines in article 3 point 95. the notion of prosumer - respectively "the final customer who carries out his activities in his own space located in a determined area or in other spaces in the immediate vicinity or in a mobile unit equipped with electrical energy production systems during regenerative braking and that produces electrical energy from renewable sources for its own consumption, whose specific activity is not the production of electricity, which consumes and may store and sell electricity from renewable sources produced in its building, including an apartment block, a residential area, a shared service site, commercial or industrial or in the same closed distribution system, provided that, in the case of autonomous non-household consumers of energy from renewable sources, these activities do not constitute ac their primary trade or professional activity".

The quality of prosumer is certified according to the applicable regulations (ANRE Order no. 15/23.02.2022 – Annex 1 - terminology), which means holding the ATR (technical approval for connection).

Prosumers are those who not only consume energy from the electrical network, but also produce and deliver energy from renewable sources. They produce for their own consumption and inject the surplus into the grid, for a fee, based on a sales-purchase agreement with their electricity supplier⁶.

⁵ Law no. 123/2012 of July 10, 2012, published in the Official Gazette of Romania, Part I, no. 485 of July 16, 2012.

⁶ <https://www.enel.ro/enel-energie/ro/Prosumatori.html>

The framework contract for the sale and purchase of electricity produced in power plants from renewable energy sources with an installed power of no more than 200 kW per point of consumption and delivered to the network, applicable starting from May 1, 2022, is provided in Annex no. 2 to the Methodology approved by ANRE Order no. 15/23.02.2022⁷.

ANRE ORDER no. 15/2022 of February 23, 2022 for the approval of the Methodology for establishing the rules for the sale of electricity produced in power plants from renewable sources with an installed power of no more than 400 kW per place of consumption belonging to prosumers (published in the Official Gazette of Romania, Part I, no. 215 of March 4, 2022) - within - APPENDIX 1 to the methodology: regarding the model framework contract has the following relevant clauses.

The contracting parties

"Between, prosumer natural person/legal person, with domicile/headquarters in, address, county/district, postal code, telephone, fax, e-mail, identity document/fiscal code, entered in the trade register at no., IBAN, opened at, holder of Connection Certificate no., issued by, legally represented by, having the capacity of seller, on the one hand, and, electricity supplier, based in, Address, county, postal code, telephone, fax, fiscal code, registered in the trade register at no., IBAN no., opened at, holder of ANRE License no., legally represented by, having the quality of buyer, on the other hand.

ART. 7

(1) For the entire duration of the contract, the amount to be paid by the buyer for each contractual month, calculated according to the provisions of art. 6, is provided in the invoice issued by the seller, in compliance with the provisions of the Fiscal Code in force.

(2) The measurement data required for the preparation of the invoice by the seller shall be transmitted on the same date and in the same format as the measurement data transmitted in order to settle his electricity consumption provided for in annex no. 3 to the framework contract for the provision of the electricity distribution service concluded between the concessionaire distribution operator and the supplier, approved by order of the ANRE president.

(3) The financial regularization is carried out by the buyer, by compensating the invoice issued by the prosumer as the seller, in accordance with the provisions of art. 6, and of the invoice issued by the electricity supplier based on the supply contract, related to the same contractual month, according to the regulations applicable in the fiscal field.

(4) By applying the compensation mechanism provided for in para. (3):

a) the electricity supplier as the buyer pays the positive difference between the value of the invoice issued by the prosumer as the seller according to this contract and the value of the invoice issued by the electricity supplier based on the supply contract, within the term established in the supply contract of electricity for the invoice issued by the supplier; or

⁷ ANRE order no. 15/23.02.2022, published in the Official Gazette of Romania, Part I, no. 215 of March 4, 2022

b) the prosumer as a seller pays the positive difference between the value of the invoice issued by the electricity supplier based on the supply contract and the value of the invoice issued by the prosumer as a seller according to this contract, within the term established in the contract for the supply of electricity for the invoice issued by the electricity supplier.

Final provisions:

If by a normative act (law, Government ordinance, emergency Government ordinance, Government decision, ANRE regulation, directly applicable EU regulation) provisions contrary to the clauses of this contract are issued, the provisions of the normative act shall apply from the date of entry in force thereof, and the parties have the obligation to take over the amendment/completion in an addendum to the contract".

I.2. Tax provisions

(1) INCOME TAX - prosumers - natural persons

In general, the average consumption of a thermal power plant is 4.5 Kw, and the suppliers of electric thermal power plants provide single-phase power plants (which have a thermal power of less than 9 kW) and three-phase power plants (which exceed the power of 9 kW), so that we can consider that the installed power of 27 Kw is sufficient for the majority of consumers, taking into account the other household consumptions.

Prosumers, NATURAL PERSONS, other than those organized under GEO no. 44/2008 regarding the development of economic activities by authorized natural persons, individual enterprises and family enterprises⁸ (n.n. other than PFA, II, IF), for the income obtained from the sale of electricity to the electricity suppliers with which the respective prosumers have concluded supply contracts of electricity, if the power plants producing electricity from renewable sources that they own have an installed electric power of no more than 27 kW per place of consumption, they are exempt from paying income tax according to art. 60 point 6 of the Fiscal Code⁹.

It would appear from the tax code that the UNIQUE Declaration regarding income tax and social contributions owed by natural persons - Cap. I "Data on realized revenues" IS NOT SUBMITTED for revenues from the sale of electricity by prosumers, NATURAL PERSONS, other than those organized according to GEO no. 44/2008¹⁰, to the electricity suppliers with whom the respective prosumers have signed contracts for the supply of electricity, if the power plants producing electricity from renewable sources that they own have an installed electric power of no more than 27 kW per place of consumption, according to art. 122 para. (4) lit. j) From the Fiscal Code¹¹.

Controversial aspects found:

a) Contrary to this provision, in our opinion, for CASS (Chap. I - section 3 - Data Regarding the Social Insurance Contribution and the Social Health Insurance Contribution Due) the single declaration (Form 212) must be submitted, because otherwise it is not possible to declare the calculation base of CASS (according to the extract below):

⁸ GEO no. 44/2008, published in the Official Gazette of Romania, Part I, no. 328 of April 25, 2008.

⁹ LAW no. 227/2015, published in the Official Gazette of Romania, Part I, no. 688 of September 10, 2015

¹⁰ GEO no. 44/2008, idem

¹¹ LAW no. 227/2015. idem

legislation in the field of social security, as well as the agreements regarding the social security systems to which Romania is a party, for that there is an obligation to declare in Romania: [...] b) income from INDEPENDENT ACTIVITIES, defined according to art. 67¹⁸, with the exception of those from the sale of electricity by prosumers, NATURAL PERSONS, other than those organized according to GEO no. 44/2008¹⁹, approved with changes and additions by Law no. 182/2016²⁰ (n.n. PFA, II, IF), to the electricity suppliers with whom the respective prosumers have concluded electricity supply contracts, if the power plants producing electricity from renewable sources that they own have the electricity installed by no more than 27 kW per place of consumption";

Obs.: the regulation above also includes, in practice, the inclusion of household prosumers in the category of independent activities.

- CAM, according to art. 220 index 2 para. (1) from the Fiscal Code²¹: "The insurance contribution for work is due for income from wages and wages assimilated to wages, defined in art. 76 para. (1) - (3)²², as the case may be, granted by the taxpayers provided for in art. 220 lit. a)²³, respectively made by the natural persons provided for in art. 220 lit. b)²⁴ .", so that CAM is not due for the income of prosumers, considering that these incomes are assimilated to income from independent activities;

(3) Regarding CASS

In the situation provided for in art. 60 point 6²⁵ (exemptions from the payment of income tax for prosumers), there is introduced the case of "natural person prosumatories, other than those organized according to the Government Emergency Ordinance no. 44/2008²⁶, for the income obtained from the sale of electricity to energy suppliers electricity with which the respective prosumers have concluded electricity supply contracts, if the power plants producing electricity from renewable sources that they own have an installed electric power of no more than 27 kW per point of consumption".

However, CASS IS DUE, because in art. 155 para. (1) lit. b) the Fiscal Code²⁷ does not make an exception for independent income, as in the case of CAS. According to art. 155 para. (1) of the Fiscal Code²⁸, taxpayers to the social health insurance system, provided for in art. 153 para. (1) lit. a)-d)²⁹, respectively, Romanian citizens, foreign citizens and stateless persons, citizens of member states and border workers, owe, as the case may be, CASS for income from Romania and outside Romania, in compliance with the applicable European legislation in the field of social security, as well as of the agreements regarding the social security systems to which Romania is a party, for which there is an obligation to declare in Romania, made from the following categories of income: [...] b) income from independent activities, defined according to art. 67³⁰.

¹⁸ Idem

¹⁹ Idem

²⁰ Law no. 182/2016, published in the OFFICIAL GAZETTE NO. 828 of October 19, 2016

²¹ Law no. 227/2015

²² Idem

²³ Idem

²⁴ Idem

²⁵ Idem

²⁶ O.U.G no. 44/2008

²⁷ Law no. 227/2015

²⁸ Idem

²⁹ Idem

³⁰ Idem

CASS is due, according to art. 155 para. (2)³¹ and if they are made by natural persons in the situations provided for in art. 60 points 1 – 4³² (persons with severe or severe disabilities). Therefore, in our opinion, CASS is due in the situation provided for in art. 60 point 6³³, namely in the case of "natural person prosumatories, other than those organized according to the Government's Emergency Ordinance no. 44/2008³⁴, for the revenues obtained from the sale of electricity to the electricity suppliers with whom the respective prosumers have concluded contracts of supply of electricity, if the power plants producing electricity from renewable sources that they own have an installed electric power of no more than 27 kW per place of consumption".

CASS is not due: natural persons listed in art. 154 para. (1) from the Fiscal Code³⁵ (children, young people, husband, wife and parents without their own income, dependent on an insured person, etc.).

If CASS is owed, CASS is calculated, according to art. 174 para. (1) of the Fiscal Code³⁶, by the NATURAL PERSONS provided for in art. 170 para. (1)³⁷ by applying the 10% contribution rate provided for in art. 156³⁸ on the annual basis of calculation mentioned in art. 170 para. (4)³⁹. The ANNUAL basis for calculating the CASS in the case of people who earn income from those provided for in art. 155 para. (1) lit. b) - h)⁴⁰ represents the equivalent of 12 minimum gross salaries per country, in force at the time of submission of the declaration provided for in art. 120, according to art. 170 para. (4) of the Fiscal Code⁴¹.

(4) VAT - prosumers - natural persons with a maximum of 27 Kw per place of consumption

In accordance with the Decision given in Case C - 219/12 Fuchs, "Article 4 paragraphs (1) and (2) of the Sixth Directive 77/388/EEC of the Council of May 17, 1977 on the harmonization of the legislation of the member states relating to taxes on the figure business - the common value added tax system: the unitary basis of assessment, as amended by Council Directive 95/7/EC of April 10, 1995, must be interpreted in the sense that the operation of a photovoltaic installation located on or near a building with residential use, designed in such a way that the amount of electricity produced, on the one hand, is always lower than the total amount of electricity consumed privately by the operator and, on the other hand, it is delivered to the network in exchange for certain revenues of continuity, falls under the notion of "economic activities" in the sense of this article"⁴². Thus, this person is considered a taxable person for VAT purposes and if he exceeds the registration ceiling for VAT purposes (300,000 lei according to art. 310 paragraph (1) of the Fiscal Code⁴³), he will have to register for VAT purposes. Therefore, there is no VAT exemption for the production of green energy, but only for the utilization of green certificates.

³¹ Idem

³² Idem

³³ Idem

³⁴ O.U.G no. 44/2008

³⁵ Law no. 227/2015

³⁶ Idem

³⁷ Idem

³⁸ Idem

³⁹ Idem

⁴⁰ Idem

⁴¹ Idem

⁴² <https://www.taxlawapp.eu/Web/rechts.php?mode=content&id=62012CJ0219&language=RO>

⁴³ Law no. 227/2015

Prosumers, natural persons, other than those organized according to GEO 44/2008⁴⁴, do not keep records for the deliveries of electricity made to the electricity suppliers with whom the respective prosumers have signed contracts for the supply of electricity, UNLESS the power plants producing electricity from renewable sources that they own have an installed electrical power of no more than 27 kW per place of consumption, according to art. 321 para. (1 index 1) from the Fiscal Code⁴⁵. Prosumers are exempted from the obligation to issue the invoice, with the exception of the case where the beneficiary requests the invoice, for electricity deliveries made by prosumers, natural persons, other than those organized according to GEO 44/2008⁴⁶ (n.n. PFA, II, IF), to the suppliers of electricity with which the respective prosumers have signed electricity supply contracts, if the power plants producing electricity from renewable sources that they own have an installed electric power of no more than 27 kW per place of consumption. This is the case, for example, of a delivery to the apartments in the block.

Note:

If the person is considered a taxable person for VAT purposes and if he exceeds the registration ceiling for VAT purposes (300,000 lei according to art. 310 paragraph (1) of the Fiscal Code⁴⁷), he will have to register for VAT purposes. - so it is obligatory to issue the invoice as well.

(5) Directive no. 2022/542

The Council of the European Union has adopted a directive that allows member states to reduce value added tax (VAT) on certain products and services that are consistent with EU environmental and health policies. Directive no. 2022/542 was published in the Official Journal of the European Union on April 5⁴⁸. According to the new provisions, member states will have the freedom to apply a VAT rate of 0% to 5%.

Solar panels for residential use will also benefit from this tax exemption, along with pharmaceuticals, contraceptives and protective hygiene products, medical protection products, transport and passenger transport services, books, newspapers and print and media publications digital, among others.

"The Member States shall communicate to the VAT Committee the text of the main provisions of domestic law and the conditions for applying the reduced rates referred to in the first paragraph by July 7, 2022 at the latest.⁴⁹ "

It is not implemented at this moment even though the deadline has passed.

II. The status of the aspects regarding the implementation of the regulations

II.1. ANRE: Prosumers with installations up to 200 kW will be quantitatively compensated

Prosumers with installations up to 200 kW will be quantitatively compensated until December 31, 2030, and those with installations between 200 and 500 kW will sell energy at the average price in the PZU. ANRE representatives say that they encourage

⁴⁴ O.U.G no. 44/2008

⁴⁵ Law no. 227/2015

⁴⁶ O.U.G no. 44/2008

⁴⁷ Law no. 227/2015

⁴⁸ Council Directive (EU) 2022/542 of 5 April 2022 amending Directives 2006/112/EC and (EU) 2020/285 as regards value added tax rates, OJ L 107, 6.4.2022, p. 1 -12

⁴⁹ Idem

the increase in the number of prosumers through the new rules approved for the sale of electricity produced in power plants from renewable sources with an installed power of no more than 400 kW⁵⁰.

Thus, prosumers who own power plants producing electricity from renewable energy sources with installed electrical power of no more than 400 kW per place of consumption and who do not benefit from the promotion system through green certificates can sell through the provided compensation/regularization mechanisms to art. 73, 1 para. (3) or (4) from Law no. 123/2012, as the case may be, the electricity produced from them and delivered in the electricity networks to the electricity suppliers with whom they, as final consumers, concluded/conclude electricity supply contracts.

Thus, prosumers who own power plants producing electricity from renewable energy sources with installed electrical power of no more than 400 kW per place of consumption and who do not benefit from the promotion system through green certificates can sell through the provided compensation/regularization mechanisms to art. 73, 1 para. (3) or (4) from Law no. 123/2012, as the case may be, the electricity produced from them and delivered in the electricity networks to the electricity suppliers with whom they, as final consumers, concluded/conclude electricity supply contracts⁵¹.

At the request of prosumers who produce electricity in electricity production units with an installed power of up to 200 kW per point of consumption, the electricity suppliers with whom they have concluded contracts for the supply of electricity are obliged to include in the prosumers' invoice a quantitative compensation between the electricity produced and delivered in the network and that consumed, and to report the difference in electricity between the amount delivered and that consumed in the prosumers' invoices, in the situation where the amount of energy produced and delivered in the network is greater than the amount of electricity consumed, prosumers being able to use the amount of electricity carried forward for a maximum period of 24 months from the date of invoicing⁵².

Conclusion regarding natural person prosumers with installed power of over 27 kW per place of consumption: in the case of an installed power of up to 200 kW per place of consumption, it is no longer an operation exempt from income tax, CAS and CASS and it no longer works exemption from submitting the single declaration.

II.2. Legal entity prosumer - general aspects

According to Law no. 123/2012 on electricity and natural gas⁵³, with subsequent amendments and additions, the prosumer represents the final customer who carries out his activities in his own space located in a specific area or in other spaces located in the immediate vicinity or in a mobile unit equipped with electricity production systems during regenerative braking and which produces electricity from renewable sources for its own consumption, whose specific activity is not the production of electricity, which consumes and which can store and sell electricity from renewable sources produced in his building, including an apartment block, a residential area, a shared service location, commercial or industrial or in the same closed distribution system, provided that, in the case of autonomous non-domestic consumers of energy from renewable sources, these activities do not constitute their primary commercial or professional activity.

⁵⁰ <https://www.anre.ro/>

⁵¹ Idem

⁵² Idem

⁵³ Law no. 123/2012 on electricity and natural gas

Considering the above, it turns out that the prosumer must not have the main activity of producing electricity, but among the secondary activities, the CAEN code specific to electricity production must be found.

According to the 2022 Methodology for establishing the rules for the sale of electricity produced in power plants from renewable sources with an installed electric power of no more than 400 kW per place of consumption belonging to prosumers, approved by A.N.R.D.E Order 15/2022⁵⁴, in the case of prosumers, legal entities, the electricity supplier performs the compensation between the invoice issued for the electricity consumed from the electricity networks by the prosumer as a consumer and the invoice issued in the name and on the account of the prosumer for the electricity produced from renewable sources and delivered to the electricity network based on the prior agreement and the procedure of acceptance concluded between the parties according to the regulations applicable in the fiscal field, as follows:

- in the invoice issued by the electricity supplier in the name and on the account of the prosumer, according to the provisions of para. (3) lit. c), the electricity produced from renewable sources and delivered to the electricity networks is invoiced, without exceeding the amount of electricity consumed from the prosumer electricity network, during the invoicing period, based on the records of the meters measuring the electricity produced and delivered/consumed from the electrical networks and, if applicable, including the electricity measuring meters located in the prosumer's installations, multiplied by the price stipulated in paragraph (3) lit. a), the application of VAT to the value resulting from this multiplication, carried out as the case may be, according to the legal provisions in force in the fiscal field;

-in the invoice issued by the electricity supplier for the electricity consumed from the prosumer's electrical networks as a consumer, the quantity of electricity consumed from the prosumer's electrical network is clearly highlighted, based on the records of the meter for measuring the electrical energy consumed from the electrical networks, multiplied by the price stipulated in para. (3) lit. b) point (i), as well as the other components provided for in paragraph (3) lit. b) point (ii)-(viii).

II.3. Applicability of excise duties

According to art. 335 and 358 of the Fiscal Code⁵⁵, electricity with NC code 2716 is subject to harmonized excise duties under the conditions regulated in Title VIII of the Fiscal Code⁵⁶.

Electricity is subject to excise duties and excise duties become payable at the time of supply of electricity, as the case may be, by producers, distributors or redistributors to final consumers in Romania.

Thus, an entity that produces electricity for its own use is considered both a producer and a final consumer.

As an exception to the provisions of art. 338⁵⁷, the consumption of electric energy used to maintain the capacity to produce, transport and distribute electric energy, within the limits set by the regulatory authority in the field, is not considered to be an excise duty generating fact.

⁵⁴ <https://www.anre.ro/>

⁵⁵ Law no. 227/2015

⁵⁶ Idem

⁵⁷ Idem

Authorized economic operators in the field of electricity have the obligation to register with the competent authority before carrying out the activity with electricity, under the conditions stipulated in the methodological norms.

In the case of the production of electricity for own consumption, excise duties become payable at the time of consumption. Economic operators in this situation have the obligation to draw up a self-invoice for excise purposes by the 25th of the month following the one in which their own consumption was recorded.

We specify the fact that, according to art. 399 para. (1) lit. m) of the Fiscal Code⁵⁸, electricity produced from renewable energy sources is exempt from excise duties.

Exemption from the payment of excise duties is granted directly for electricity produced from renewable energy sources that is supplied directly to a final consumer. By renewable energy sources we mean sources such as: wind, solar, geothermal, wave, tidal, hydro energy, biomass, waste fermentation gas, sludge fermentation gas from wastewater treatment plants, biogas and others also.

The exemption is granted based on the notification sent by the electricity producer to the territorial customs authority. Household consumers producing electricity that benefit from the exemption do not have the obligation to notify the territorial customs authority.

We specify that the notification is drawn up according to the model provided in annex no. 23. Within 5 working days from the transmission of the notification, the territorial customs authority communicates to the applicant the registration in the special register created for this purpose at the level of the competent customs authority, if the documents stipulated in the notification have been submitted. Exemption from the payment of excise duties for electricity subject to notification takes effect from the date of registration in this register. The registration date is written on the notification. The validity period of the notification is one year from the date of registration.

After the registration of the notification, a copy of this notification with the registration number will be kept by the electricity producer.

Therefore, electricity with the NC code 2716 is an excise product and the company has the obligation to register as an excise tax payer, to submit monthly declaration 100 and annual excise tax return - Form 120.

In order to be able to benefit from exemption from the payment of excise duties, the company must submit to the territorial customs authority a notification, the model of which is provided in annex no. 23 to Title VIII of the rules of application of the Fiscal Code⁵⁹.

The exemption applies only on the basis of this notification with the registration number.

II.4. Practical aspects

How is the invoice issued by the electricity supplier to the prosumers for the electricity produced from renewable sources and delivered to the electricity networks by them in accordance with ANRE Order no. 194/2019 in the case of natural person prosumers and in the case of legal person prosumers?

⁵⁸ Idem

⁵⁹ GD no. 1/2016 of January 6, 2016 - Part I for the approval of the Methodological Norms for the application of Law no. 227/2015 regarding the Fiscal Code, published in the Official Gazette of Romania, Part I, no. 22 of January 13, 2016

Answer: Art. 14 of Law no. 220/2008⁶⁰, republished, with subsequent amendments and additions, provides that prosumers who own electricity production units from renewable sources with an installed power of no more than 27 kW per point of consumption can sell the electricity produced and delivered in the electricity network to suppliers of electricity with which they have signed electricity supply contracts, according to ANRE regulations.

The price:

The electricity suppliers are obliged, at the request of the prosumers with whom they have concluded electricity supply contracts, to purchase the electricity produced at a price equal to the weighted average price recorded in the Market for the Next Day in the previous year⁶¹.

Prosumers, natural persons, other than those organized according to the Government Emergency Ordinance no. 44/2008 regarding the development of economic activities by authorized natural persons, individual enterprises and family enterprises, approved with amendments and additions by Law no. 182/2016⁶², they can carry out the activity of selling electricity produced in the electricity production units they own, without registering and authorizing their operation.

In the electricity bill, the prosumers provided for in paragraph (6) benefit from the electricity suppliers with whom they have concluded electricity supply contracts from the regularization service between the value of the electricity delivered and the value of the electricity consumed from the network.

By derogation from Law no. 227/2015 regarding the Fiscal Code⁶³, with subsequent amendments and additions, and from Law no. 207/2015 regarding the Fiscal Procedure Code⁶⁴, with subsequent amendments and additions, prosumers, natural persons, are exempted/exempted from paying all fiscal obligations related to the amount of electricity produced for self-consumption, as well as the surplus sold to suppliers.

Art. 5 of ANRDE Order 226/2018, as amended by Order no. 194/2019⁶⁵ provides that the financial regularization provided for in art. 14 para. (6⁴) from Law no. 220/2008⁶⁶, republished, with subsequent amendments and additions, between the value of the electricity produced from renewable sources and delivered to the electricity grids and the value of the electricity consumed from the electricity grids is realized as follows:

- in the case of natural person prosumers, by the electricity suppliers, in each electricity bill issued to them, based on the values measured by the meters measuring the electricity delivered to the electricity grids/consumed from the electricity grids and, if applicable, including of the electricity measuring meters located in the prosumer installations;

⁶⁰ Law no. 220/2008 of October 27, 2008, republished, for the establishment of the system for the promotion of energy production from renewable energy sources, published in the Official Gazette of Romania, Part I, no. 577 of August 13, 2010

⁶¹ <https://www.anre.ro/>

⁶² Law no. 182/2016

⁶³ Law no. 227/2015

⁶⁴ Law no. 207/2015 regarding the Fiscal Procedure Code, Official Gazette of Romania, Part I, until August 31, 2022.

⁶⁵ ORDER no. 194/2019 of October 1, 2019 for the amendment of some orders of the president of the National Energy Regulatory Authority regarding the sale of electricity produced in power plants from renewable sources with an installed power of no more than 27 kW belonging to prosumers, M.Of.: 805 from 04.10.2019

⁶⁶ Law no. 220/2008

- electricity suppliers clearly highlight in their energy invoices with a minus sign the amount of electricity produced from renewable sources and delivered by prosumers in the electricity networks, based on the records of the meters measuring the electricity produced and delivered, multiplied by the price stipulated in art. 1 paragraph (1), the application of VAT to the value resulting from this multiplication, carried out as the case may be, according to the legal provisions in force in the fiscal field;

- if the total value of the current electricity bill results with a minus sign, then this value covers the debits registered by the natural person prosumer based on the electricity supply contract, if applicable;

- if the total payment amount of the bill is negative, then the electricity supplier proceeds as follows:

a) carry over the amount of no more than 100 lei until the next electricity bill is issued;

b) pay the prosumer the entire amount, if it is greater than 100 lei, within 15 days from the date of issuing the invoice;

Example:

For natural persons, the electricity supplier will issue an invoice in which it will highlight the value of the energy sold and the value of the energy purchased from the prosumer, this natural person being highlighted with a minus sign.

- invoice issuing:

4111 = %

707 energy value sold plus

707 purchased energy value minus

4427 result from the invoice

- In the case of legal entity prosumers, according to the regulations applicable in the fiscal field, by offsetting the following invoices:

- an invoice issued by the prosumer for the electricity produced from renewable sources and delivered to the electricity networks, according to the specific provisions of the sale-purchase contract of the electricity produced in the power plants from renewable energy sources provided for in art. 1 paragraph (1) and delivered in the electrical network concluded between the prosumer and the supplier;

- an invoice issued by the electricity supplier for the electricity consumed from the electricity networks by the prosumer as a consumer.

Example:

In the case of legal entities, the following is issued:

- an invoice from the electricity supplier with the amount of electricity consumed by the prosumer, which is recorded:

411 Customers = %

707 Income from the sale of goods

4427 VAT collected

An invoice issued by the prosumer with the amount of electricity delivered by him, which the energy supplier records:

%

=

401

Suppliers

628 Other expenses with services performed by third parties

(4426) Deductible VAT

Offsetting the debt with the debt

401 Suppliers = 411 Customers

III. Conclusions and proposals

Regarding the way in which the activity of prosumers up to 27 Kwh is economically and fiscally regulated, in our opinion, the exemption regarding the failure to submit Declaration 212 should be cancelled, respectively the activity should be recognized as an independent activity, the recognition requirements of this activity being fulfilled according to art. . 7 point 3 definition of independent activity from the Fiscal Code⁶⁷:

3.1. Does the natural person have the freedom to choose the place and way of carrying out the activity, as well as the work schedule?

Answer: Yes

3.2. Does the natural person have the freedom to carry out the activity for several clients?;

Answer: No

3.3. Are the risks inherent in the activity assumed by the natural person carrying out the activity?;

Answer: Yes

3.4. The activity is carried out by using the patrimony of the natural person who carries it out;

Answer: Yes

3.5. The activity is carried out by the natural person by using his/her intellectual capacity and/or physical performance, depending on the specifics of the activity;

Answer: Yes

3.6. Is the natural person part of a professional body / order with the role of representation, regulation and supervision of the profession carried out, according to the special normative acts that regulate the organization and exercise of the respective profession?;

Answer: No

3.7. Does the natural person have the freedom to carry out the activity directly, with hired personnel or through collaboration with third parties under the conditions of the law?;

Answer: Yes

Overall: 5/7

Otherwise, we consider that there is a derogatory and discriminatory fiscal treatment introduced even by the Fiscal Code, both in terms of the regulation of the way economic activities are carried out, as well as through the fiscal treatment.

According to art. 67 Fiscal Code⁶⁸, "Income from independent activities includes income from production activities, trade, service provision and income from liberal professions, made individually and/or in a form of association, including from adjacent activities".

According to point 6 (1) of the Methodological Norms⁶⁹ "In application of the provisions of art. 67 of the Fiscal Code, natural persons who realize these incomes individually and/or in a form of association established according to the legal provisions

⁶⁷ Idem

⁶⁸ Idem

⁶⁹ Law no. 207/2015

and which does not give rise to a legal entity, in order to carry out activities in the purpose of obtaining income".

In our opinion, all the legal conditions for carrying out the activity are fulfilled, the quality of prosumer being certified according to the applicable regulations (ANRE Order no. 15/23.02.2022 - Annex 1 - terminology⁷⁰), which means holding the ATR (technical approval of connection). We mention that the Technical Connection Notice constitutes the written notice, valid only for a certain location, which is issued by the network operator at the request of a consumer, on the possibilities and conditions of connection to the electrical network.

Method of achieving the research objectives:

1. Identification of the critical aspects related to the regulation of the field and the implementation of the economic and fiscal legislation specific to prosumers;

Answer: fulfilled

2. Identification of the ECJ jurisprudence applicable to prosumers;

Answer: fulfilled

3. Making proposals to solve the economic and fiscal regulation flaws;

Answer: fulfilled

Regarding the way of achieving the research objectives, we must at the same time note that there are still a number of unanswered questions for the situation of natural persons (prosumers) with max. 27 Kw per place of consumption, questions that can constitute topics for continued research, respectively:

1. In the event that the tax exemption (exception) for prosumers up to 27 KW is cancelled, how will the realized income be taxed, in the sense that the recognized income is equivalent to the value of the green energy delivered to the network or the net value (after reducing self-consumption) ?

2. Is the same question valid today in the sense that the exemption should not be granted only up to the level of self-consumption, and not for excess income?

3. What happens to the capital made available by the prosumer (investment in panels) from the point of view of excess income taxation?

4. Based on the jurisprudence - the Decision given in Case C - 219/12 Fuchs, the provisions of Art. 11: Special provisions for the application of the Fiscal Code⁷¹ can be applied, according to which the fiscal authorities may not consider a transaction that does not have an economic purpose, adjusting its fiscal effects, or can I reframe the form of a transaction / activity to reflect the economic content of the transaction / activity?. As they are regulated now, practically these activities do not have an economic purpose in the sense of the fiscal code.

5. Isn't the fiscal code artificially introducing a more favorable fiscal situation?

Additionally, in relation to the way of achieving the research objectives, on a doctrinal level, to the question of whether the approach to the topic in this study is doctrinally justified, beyond the current provisions invoked, our answer is selective, respectively:

We think so, especially in light of the following doctrines:

- Physiocracy because it promotes the elimination of interventionism and the promotion of the natural laws of the market;

⁷⁰ ANRE order no. 15/23.02.2022

⁷¹ Law.no.227/2015

- The classical school as it establishes the foundations of capitalism in the economy and society;

We think not, especially in light of the following doctrines:

- Keynesianism: Promotes state intervention in critical moments for the economy;
- Marxism: method of socioeconomic analysis from the left to the extreme left that uses a materialist interpretation of historical development;
- Liberalism: as it defends the freedom of the individual, as well as a minimal intervention of the state.

Finally, even if we agree with the measure of exempting the income of prosumers up to 27 Kwh, for reasons related to energy independence, sustainable and social development, from the perspective of the economic activities of independent persons, we cannot agree with the way implementation of this economic and fiscal policy, invoking the arguments presented in this study.

Metaphorical conclusion: green or gray energy?

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