

Tax Short Cuts

Current tax information for Austria by EY

Energy Cost Subsidy II - start of the application period

Content

- 01 Energy Cost Subsidy II - start of the application period
- 04 Budget Accompanying Act 2024 - Government Bill
- 05 ECJ: Free subscription gifts for taking out a magazine subscription can be ancillary supplies
- 05 Ordinance: Electronic submission of records in accordance with Sec 18a VAT Act
- 06 Austrian Supreme Administrative Court: No VAT exemption pursuant to Sec 6/1/11/a VAT Act in the absence of certification of private educational institutions

Applications for the Energy Cost Subsidy II (Energiekostenzuschuss II, EKZ II) have been possible since 9 November 2023. Also, the aws has published the draft directive (102 pages in length), FAQs (further 37 pages) and a calculation template and has started to assign individual application time slots (usually starting on 9 November 2023). According to the draft directive, the application window ends on 7 December 2023 at the latest.

The necessary approval by the European Commission and the national consensus are still outstanding. The application can therefore be submitted before the final directive is available. The EKZ II is a non-repayable subsidy, there is no legal entitlement. The additional costs caused by the increased energy costs are only partially subsidized.

Businesses with a permanent establishment in Austria are eligible for the subsidy. State-owned businesses, territorial authorities, newly founded businesses, businesses in the energy supply and oil and gas sectors, freelance professions, non-entrepreneurial parts of non-profit organizations and political parties, businesses in insolvency and businesses that are or have been granted subsidies for the same eligible costs by other public legal entities are not eligible for funding.

The eligible period is the entire calendar year 2023 and is divided into two periods from 1 January 2023 to 30 June 2023 (period 1) and 1 July 2023 to 31 December 2023 (period 2). The application refers to both periods. The individual settlement period for funding period 2 starts on 15 February 2024 at the earliest and end on 6 June 2024 at the latest. Subsequent corrections or amendments to submitted settlements are not permitted.

Energy Cost Subsidy II - start of the application period

A new requirement in all subsidy stages compared to EKZ I is that the EBITDA in the period applied for must be negative or at least 40% lower than in the same period in 2021, otherwise the subsidy is limited to EUR 125,000 per period. If no EBITDA loss or reduction in EBITDA can be demonstrated for a subsidy amount of more than EUR 125,000 per period, the subsidy can be voluntarily capped at EUR 125,000. In the case of the EBITDA reduction method, the total grant is additionally limited to the amount that would result in the EBITDA of the requested period exceeding 70% of the EBITDA of the same period in 2021. In the case of the EBITDA loss method, the total grant is limited to the amount that would result in the EBITDA of the requested period exceeding zero.

Energy intensity is not a requirement in stages 1 and 2; it only has to be demonstrated from stage 3 onwards.

The application covers both subsidy periods. The actual costs must be stated for period 1, which form the basis both for calculating the subsidy for period 1 and for determining the limit for the subsidy amount for period 2. For the actual determination of the subsidy amount for period 2, a separate actual cost statement must be submitted in 2024.

The subsidy intensity for EKZ II increased as follows compared to EKZ I:

- ▶ Stage 1: from 30% to 50%;
- ▶ Stage 2: from 30% to 50% of the additional costs that exceed 1.5 times the energy costs in 2021 (the eligible quantity is capped at 70% of the energy consumption in 2021);
- ▶ Stage 3: from 50% to 65% of the additional costs that exceed 1.5 times the energy costs in 2021 (the eligible quantity is capped at 70% of the energy consumption in 2021);
- ▶ Stage 4: from 70% to 80% of the additional costs that exceed 1.5 times the energy costs in 2021 (the eligible quantity is capped at 70% of the energy consumption in 2021);
- ▶ Stage 5 (new): 40%; (the eligible quantity is capped at 70% of the energy consumption in 2021)

The limits for the subsidy amount were increased as follows (for the limits, any EKZ I already granted must also be taken into account; the limits apply per business or per group):

- ▶ Stage 1: from EUR 400,000 to EUR 2 million;
- ▶ Stage 2: from EUR 2 million to EUR 4 million;
- ▶ Stage 3: from EUR 25 million to EUR 50 million;
- ▶ Stage 4: from EUR 50 million to EUR 150 million;
- ▶ Stage 5 (new): EUR 100 million

At stage 1, electricity, natural gas, fuel, heating/cooling, heating oil, wood pellets and wood chips are eligible. In the other stages, only electricity, natural gas and heat/cooling generated directly from electricity and natural gas are eligible.

Energy Cost Subsidy II - start of the application period

For grants that exceed EUR 2 million in total (i.e. EKZ I and EKZ II), businesses must provide an employment guarantee with the obligation to maintain an average of at least 90% of the full-time equivalents available on 1 January 2023 by 1 January 2025.

In all stages, the applicant must commit to adjust withdrawals and profit distributions to the economic situation within seven months of publication of the (final?) directive.

The draft directive also contains a future-oriented restriction on the payment of bonuses to board members and directors (limit of 50% of bonus payments for the 2021 fiscal year). The restriction does not apply to bonus payments already paid or granted to board members or directors for the current fiscal year prior to the date of first publication of this directive.

Furthermore, there is an obligation of good tax behavior (no abuse of law within the meaning of Sec 22 Austrian Federal Fiscal Code, limitations in connection with interest or license payments to low-taxed affiliated companies, CFC rule and switch-over, no domicile or branch in a country on the EU list of non-cooperative countries and territories for tax purposes or predominantly generating passive income there, restrictions due to convictions under financial criminal law in the last five years).

The business to be subsidized must commit to the following energy saving measures for the period beginning with the granting of the subsidy until 31 March 2024:

- ▶ Lighting: No lighting between 22:00 in the evening and 06:00 in the morning;
- ▶ Refraining from heating in the outdoor area of business premises;
- ▶ External doors: Prohibition on keeping entrance areas to heated, publicly accessible business premises permanently open.

Furthermore, when applying for EKZ II, a report by the tax advisor/auditor/accountant must be uploaded to the aws subsidy manager. The report must include the following statements:

- ▶ Statement on the sector classification;
- ▶ Classification as an energy-intensive business (only required from stage 3);
- ▶ Statement on the determination of the energy costs;
- ▶ Statement on sample checks of energy costs;
- ▶ Statement on the determination of EBITDA when applying for a subsidy of more than EUR 125,000 per period.

The calculation template must be used (excel file, available on the aws website).

Your EY tax specialists are happy to support you with the eligibility requirements, the required statements and submission of the application. The allocation of the subsidy is ranked according to the receipt of applications, considering budgetary availability.

The draft of the directive, the FAQs and the calculation template are available under the following link (German version only): <https://www.aws.at/ukraine-krieg-sonder-foerderungsprogramme/aws-energiekostenzuschuss-2/>

Budget Accompanying Act 2024 - Government Bill

*Value Added Tax Act
Employer Contribution Act*

On 18 October 2023, the Council of Ministers adopted the government bill for the Budget Accompanying Act 2024. The government bill provides for the following changes, among others:

Amendment of the Value Added Tax Act

For supplies, intra-community acquisitions, imports and installations of photovoltaic modules that occur after 31 December 2023 and before 1 January 2026, the tax is to be reduced to 0% under the following conditions:

- ▶ The supplies or installations are made to or the intra-Community acquisitions or imports are made by the operator;
- ▶ The bottleneck power of the photovoltaic system is no more or will not exceed 35kW (peak);
- ▶ The photovoltaic system will be operated on or in the vicinity of buildings that are used for residential purposes, by public corporations or by corporations, associations and asset funds that serve charitable, non-profit or religious purposes.

This temporary tax exemption shall not exclude the right to deduct input tax.

Employer contribution

The employer contribution for persons in marginal employment is to be increased by 3 percentage points to 19.4% as of 1 January 2024.

Unemployment insurance contribution

The unemployment insurance contribution is to be reduced by 0.1 percentage points to 2.3% (for apprentices) and 5.9% (for other insured persons) as of 1 January 2024.

Further legislation remains to be seen.

The government bill for the Budget Accompanying Act 2024 can be found under the following link (German version only): https://www.parlament.gv.at/dokument/XXVII/I/2267/fname_1588950.pdf

ECJ: Free subscription gifts for taking out a magazine subscription can be ancillary supplies

Value Added Tax Act

In its judgment of 5 October 2023 (Case C-505/22, Deco Proteste), the ECJ ruled that free subscription gifts in the form of a tablet or smartphone with a unit value of less than EUR 50 is to be regarded as an ancillary supply to the main service, which consists of the supply of magazines (conclusion of a subscription without a contractual obligation), and not as a disposal of goods free of charge.

In order to determine whether one single supply is at hand, it follows from ECJ's case law that it has to be checked from the perspective of the average consumer if a supply (in the specific case, the subscription gift) constitutes for customers an end in itself or merely a means of better enjoying the principal supply. The body of evidence relied on for the assessment of whether one single supply is given comprises various elements.

In the present case, the ECJ held that the granting of the free subscription gifts does not have an independent purpose from the perspective of the average consumer. According to the ECJ, the subscription gift and the supply of magazines constitute one single supply, with the sole purpose of the gifts being to create an incentive to take out a magazine subscription. In addition, the gift allows the new subscribers to benefit, under the best possible conditions, from the service provider's main supply (access to the digital version of the magazine). It is irrelevant that some subscribers cancel the contract immediately after receiving the subscription gift.

Ordinance: Electronic submission of records in accordance with Sec 18a VAT Act

Value Added Tax Act

The "Federal Act on the Reporting of Payment Data by Payment Service Providers 2023 - CESOP Implementation Act 2023" obliges payment service providers to keep sufficiently detailed records of certain cross-border payments. The ordinance issued in this regard, Federal Law Gazette II 265/2023, regulates how to electronically submit these records. Pursuant to Sec 1 of the ordinance, payment service providers or their fiscal representatives must submit or make available CESOP records electronically in the CESOP portal in FinanzOnline (<https://finanzonline.bmf.gv.at/fon/>) via a web service or by manual upload.

The submission or provision of the records by means of the online procedure can be carried out in accordance with Sec 2 of the ordinance using a transmission point, whereby this transmission point must carry out the electronic submission in the CESOP portal in FinanzOnline by means of a web service or by manual upload.

Ordinance: Electronic submission of records in accordance with Sec 18a VAT Act

The ordinance enters into force on 1 January 2024. The first record submission by the payment service providers to the CESOP portal must be made by 30 April 2024 and includes records relating to the first quarter of 2024.

Austrian Supreme Administrative Court: No VAT exemption pursuant to Sec 6/1/11/a VAT Act in the absence of certification of private educational institutions

Value Added Tax Act

In its decision of 6 September 2023 (Ro 2021/15/0021) the Austrian Supreme Administrative Court dealt with the application of the VAT exemption provision regulated in Sec 6/1/11/a VAT Act in the absence of certification of a private provider of general educational services for children and adolescents.

Unlike the Federal Fiscal Court (12 August 2021, RV/5100801/2020), the Supreme Administrative Court rejected the applicability of the VAT exemption provision for the language school for children and adolescents in question, which did not have official certification within the meaning of Sec 1/9 of the Austrian VAT Education Services Regulation, due to an alleged absence of a certification authority which could provide the corresponding certification.

The Administrative Court annulled the contested decision of the Federal Fiscal Court by claiming that there was no violation of the principle of neutrality when all private language institutions for children and adolescents operate in similar circumstances. The Supreme Administrative Court further stated that there are no concerns regarding the EU conformity of the Austrian certification system for private educational institutions within the meaning of the Austrian VAT Education Services Regulation.

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