Recent Greek & EU Tax Highlights

Decrease of the Greek Personal Income Tax rate and Withholding Tax rate on dividends

According to an amendment added to a recently passed bill (that has not yet been published in the Government Gazette), the Greek Personal Income Tax rate and Withholding Tax rate on dividends has been decreased from 15% to 10%. This amendment covers the fiscal period from 1.1.2019 onwards. This development results in a lower tax burden for shareholders who are Greek tax residents, in combination with the gradual decrease of the Corporate Income Tax rate to 25% until 2022.

Circular E.2018/2019 interprets the underlying corporate tax credit provisions of several Double Tax Treaties that have been concluded by Greece

The Independent Authority for Public Revenue ('IAPR') has recently issued the Circular E.2018/2019 that interprets the "underlying corporate tax credit" rule found in 11 out of the 57 DTTs concluded by Greece[1]. According to this rule, when a Greek tax resident receives dividends from a company resident in the other contracting state, Greece should grant a credit for the corporate tax paid by the company resident in the other contracting state (apart from any withholding tax on dividends). Such an "underlying corporate tax credit" constitutes a method of relief from both international and economic double taxation and may result in relatively low effective tax rates on the foreign corporate profits earned by shareholders resident in Greece.

The DTTs of some of the most important trading partners of Greece, e.g. Cyprus, UK, Albania, include an underlying corporate tax credit rule. Until today, the Greek Tax Administration has not issued any binding guidance on the application of these rules, apart from a non-binding letter regarding the application of the Greek-Cypriot DTT[2]. Thus, the recently issued Circular E.2018/2019 sheds light to a long-disputed issued, by taking a positive approach for the shareholders with equity investments in those 11 jurisdictions. In particular, the abovementioned Circular clarified that Greece should grant relief to a shareholder who received foreign-sourced dividends, for the corporate tax paid by the company that distributed such dividends, as well as for any withholding tax on dividends. Yet, the Circular has set certain documentation requirements for claiming such credit.

Despite the taxpayer-friendly interpretation of this Circular, there are still certain issues that remain unsolved. Thus, the Circular has not mentioned whether the underlying corporate tax credit may be credited against the Greek special solidarity contribution, which is a tax covered by the DTTs concluded by Greece, according to the recent decision 2465/2018 of the Greek Council of State[3]. Additionally, the Circular has not made any reference to the "tax sparing rules" that exist in 8 of the

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[1] The DTTs with Albania, Armenia, China, Cyprus, Estonia, Georgia, Latvia, Lithuania, Slovenia, the United Kingdom and Uzbekistan.

[2] ΔΟΣ Α 1051902 ΕΞ 2016

[3] See also Circular E.2009/2019

abovementioned DTTs[4]. According to those "tax sparing" provisions, Greece should grant a tax credit for any foreign creditable tax (withholding that or underlying corporate tax) that has not been levied by the other contracting state, because of a tax exemption or reduction enacted as an incentive. The potential granting of a sparing tax credit by IAPR could result in a very low effective tax rates on certain foreign equity investments. From the above, we can deduce that the application of the tax credit provisions of the aforementioned DTTs cannot still be characterized by absolute certainty, despite the positive guidance provided by the Circular E.2018/2019.

The long awaited amendment of the tax treatment of the VAT corresponding to the rebates assessed to pharmaceutical companies

Decision 1035/25.01.2019 ('Decision') of the Head of the Independent Authority for Public Revenue ('IAPR') has been published in the National Gazette No.235/05.02.2019, amending Circular POL. 1115/2016, which provides for the tax treatment of the clawbacks paid by pharmaceutical companies in accordance with the provisions of L. 4052/2012. By means of the aforementioned Decision, pharmaceutical companies shall issue credit invoices corresponding the amounts of the quarterly assessed rebates paid to the Social Security Organisations ('S.S.O.') and respectively proceed to the reduction of the taxable amount for VAT purposes. Consequently, the amounts of the VAT corresponding to the rebates which must be paid to the S.S.O. by pharmaceutical companies will not be ultimately borne by the latter, as the taxable base on which VAT is calculated will be accordingly reduced.
The newly enacted Decision satisfies a long -standing request[5] of pharmaceutical companies, which, until now, were not entitled to a reduction of the taxable amount corresponding to the VAT of the rebates paid to S.S.O. In addition, the approach adopted by the IAPR complies with the general VAT rules according to which the taxable amount shall correspond to the consideration paid to the supplier in return for the supply provided[6], whereas in cases of price reduction further to the supply, the taxable amount shall be reduced accordingly[7].

In similar cases, such as the case of rebates relating to the provision of healthcare services by diagnostic centers or to the timely payment of the rebates paid by pharmacies, the Tax Administration had already provided guidance[8] which explicitly referred to the specific rebates as price reductions, thus providing for a specific mechanism for the reduction of the VAT taxable amount through the issuance of credit invoices accordingly reduced by the amount of the VAT corresponding to the rebate. The same approach had been adopted by the Greek Tax Administration as regards the amounts of clawback paid to EOPYY[9]. This led to an unjustified inconsistency in the tax treatment of similar cases.
It is quite interesting that the preamble of the Decision refers to the need to remedy such inconsistent approach. It also refers to the Decisions of the Council of State[10] which have ruled as an *obiter dictum* that the rebates constitute a mandatory discount provided by the pharmaceutical companies.
The Decision provides for the tax/accounting treatment of the rebates assessed to pharmaceutical companies by means of art. 35 par. 3 of L. 3918/2011 (as in force). Despite such reference, the wording of the Decision refers solely to the rebates paid to the S.S.O. and not to the ones paid to hospitals, even though the latter are included in the provision of the aforementioned article, which could be a point of interest, taking into account the various types of rebates that have been introduced in the Greek legislation.

CJEU rules on the interpretation of the concepts of tax abuse and beneficial ownership in the context of the Interest and Royalties Directive and the Parent-Subsidiary Directive

The Court of Justice of the European Union ('CJEU') issued two judgments on the interpretation of tax abuse and beneficial ownership aspects of the Interest and Royalties Directive ('IRD')[11] and the Parent-Subsidiary Directive ('PSD')[12]. The six cases that were decided by the CJEU (and were examinee jointly) had been referred by the High Court of Eastern Denmark. They concerned the investment in Denmark through complex corporate structures in which the ultimate shareholders (established in Luxembourg, USA, Bermuda, Cayman Islands, Jersey) established

[4] The DTTs with Albania, Armenia, Cyprus, Estonia, Latvia, Lithuania, Slovenia and Uzbekistan.
[5] The Hellenic Association of pharmaceutical companies had addressed several letters to the Ministry of Finance and the Independent Authority of Public Revenue requesting the legislative regulation of the specific matter.
[6] See Article 73 of the VAT Directive (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax).
[7] See Article 73 of the VAT Directive.
[8] See Circulars POL. 1191/2014 and 1078/2012 respectively.
[9] See Circular POL. 1115/2016.
[10] See Decisions 3447, 3448, 3449 and 2450/2015 of the Council of State.
[11] Joint cases C-115/16 (N Luxembourg 1), C-118/16 (X Denmark), C-119/16 (C Danmark I) and C-299/16 (Z Denmark)
[12] Joint cases C-116/16 (T Danmark) & C-117/16 (Y Denmark)

subsidiaries in Denmark through conduit companies established in various EU jurisdictions (Sweden, Luxembourg, Cyprus) in order to take advantage of the beneficial provisions of the IRD, the PSD, the relevant double tax treaties ('DTTs'), and the statutory provisions of the domestic tax systems of the jurisdictions involved. The Danish tax authorities had denied the application of the withholding tax ('WHT') exemption on the interest and dividend payments (due to the application of the IRD and the PSD) made by the Danish subsidiaries, based on anti-abuse grounds, as well as on the beneficial ownership of the IRD and subject-to-tax clauses embodied in the IRD and the PSD. The CJEU upheld this decision of the Danish tax authorities, making several important statements and clarifications.

First, the Court ruled that the application of the WHT exemption of the IRD and the PSD may be denied by the national tax authorities based on a general anti-abuse principle of EU Law, even if there is no such domestic or DTT anti-abuse provision. In particular, the CJEU stated for the first time in a direct tax case that EU law cannot be relied on for abusive or fraudulent ends. This constitutes a shift with the previous case law of the CJEU regarding direct taxation cases (see case Kofoed[13]), although it has been established for long in the field of VAT (see among others case Halifax[14]) and general EU Law (see among others case van Binsbergen[15]). Although all member states should have had incorporated a General Anti-abuse Rule ('GAAR') by the 31st of December 2018, due to the entry into force of the Anti-tax Avoidance Directive ('ATAD'), a judicially constructed GAAR can be grounded on those decisions, at least as far as the EU Direct Tax Directives are concerned.

Second, the CJEU interpreted the beneficial ownership clause of the IRD with reference to the equivalent notion found in the OECD Model Tax Convention ('OECD MTC'), concluding that the WHT exemption is restricted only to the beneficial owners of interest payments. Thus, if the beneficial owner of an interest payment is not established in the European Union, then the WHT exemption of the IRD may be denied. In the context of the PSD (which does not contain a beneficial ownership provision), the beneficial ownership of a dividend payment is relevant for determining the abusive character of a corporate structure in which a shareholder established outside of the EU receives EU-sourced dividends through a conduit company established in the EU. Moreover, in denying the application of the WHT exemption of the IRD and the PSD, the national authorities do not need to name the entities which actually are the beneficial owner of the relevant payments.

Third, the abovementioned decisions clarified the content of the 'subject-to-tax' clauses of the IRD (also found in the PSD). In particular, the beneficial owners of the interest payments, who should be established in the EU, should be subject to income tax (or an equivalent or identical tax) without being exempt. The Court found that the specially regulated Luxembourgish entities having the status of of *société d'investissement en capital à risque* ('SICAR', risk capital investment company) do not qualify for an exemption from WHT, as long as they are exempt from corporate income tax on the interest payments they receive.

Those cases may be relevant to investors who have invested in Greece through EU-established conduit companies. The Greek Income Tax Code ('ITC') has not explicitly inserted the beneficial ownership close provided in the IRD; however, the abovementioned cases have indicated that beneficial ownership is also relevant for determining the abusive character of investing through a conduit company. Further, the principle that EU Law cannot be relied on for abusive or fraudulent ends may be important particularly for cases that occurred before the entry into force of the Greek GAAR or the GAAR of the PSD. Finally, there are many specially regulated funds and other entities that enjoy beneficial tax treatment in the jurisdictions of their residence, which may not qualify for a WHT exemption. Undoubtedly, the approach adopted by the CJEU in those cases will alter the way the PSD and the IRD are used in international tax planning structures.

The Council of State rules in favor of the businesses' right to claim refund of the VAT amounts corresponding to unpaid debts

The Council of State ('Court'), the Greek Supreme Administrative Court, very recently rendered its decision 355/2019 ('Decision'), ruling that the undertakings are entitled to claim refund of the VAT amounts of unpaid invoices issued to counterparties which have been subject to insolvency proceedings.

Dec. 355/2019 is a landmark decision in the sense that the Court acknowledges for the very first time that the Greek VAT Code is not in line with the EU VAT Directive[16], due to the fact that it excludes the taxpayers' possibility to request refund of the amounts of VAT corresponding to debts that have been totally or partially unpaid.

The reasoning of the Court has been heavily based on fundamental VAT principles and on the jurisprudence of the CJEU, mainly the Enzo Di Maura case[17]. Pursuant to the Court's decision, the taxable base corresponds, in principle, to the consideration actually received by the supplier for the provision of goods/services; consequently, the Tax Authority cannot collect from the taxpayer a VAT amount higher than the one paid to the latter. The EU VAT Directive gives member states the possibility to derogate from the possibility to reduce the taxable base in cases of partial or total nonpayment of the consideration; such discretion has been granted in view of the inherent

[13] Case C-321/05
[14] Case C-255/02
[15] Case 33/74

[16] Council Directive 2006/112/EC
[17] Case C-246/16

uncertainty of whether nonpayment is definitive. If, on the other hand, member states were to exclude altogether the possibility to reduce the taxable base, this would infringe the fundamental principle of the neutrality of VAT. According to such principle, VAT subjects should not be burdened with any VAT incurred in the course of their business, given that they act effectively as an agent, collecting the VAT on behalf of the State. Domestic provisions, which deprive the VAT subject of the possibility to reduce the taxable amount, take into account the inherent uncertainty of whether nonpayment of the so far unpaid invoices has indeed become definitive. Nevertheless, such uncertainty could be well taken into account by providing for the possibility to reduce the taxable base in cases whereby the VAT subject reasonably argues that the debt won't, most probably, be paid, while providing, in parallel, for the possibility to re-estimate the amount of the taxable base should there be any payment of the consideration.

According to the Court, member states should be allowed to derogate from the rules regulating the taxable base to the strictly necessary degree, in the sense that the measures adopted by the latter affect to the minimum the goals and the principles of the EU VAT Directive and that they are not used in a manner that jeopardizes the principle of VAT neutrality. The member state's possibility to derogate, intended to compensate the inherent uncertainty of the nonpayment, should not go beyond such uncertainty, thus excluding altogether the correction of the taxable base, given that this would infringe the EU fundamental principles of proportionality and equality, as well as the principle of the VAT neutrality. Further, the fundamental goal for fiscal harmonization, pursued by the EU VAT Directive would be undermined as well. Consequently, the relevant provisions of the Greek VAT Code (art. 19 par. 5a of L. 2859/2000) should be interpreted in light of the aforementioned principles, thus granting to the taxable person the possibility to reduce the taxable amount in the event that, after the conclusion of a transaction, the latter reasonably argues that the total amount or part of the consideration will most probably not be received due to the fact that their counterparty has been subject to insolvency proceedings (bankruptcy, reorganization, special administration). The VAT subject should be in the position to adequately substantiate before the Tax Authorities or the Administrative Courts that the debt will definitely be paid and that nonpayment will most probably last for a long period of time. However, in case of a subsequent total or partial payment of the consideration, the taxable basis may be re-evaluated. The aforementioned interpretation does not prevent the Tax Authorities from adjusting the VAT deductions made by the insolvent party, thus recovering the amounts of input VAT originally deducted by the latter for the transactions in question.

Dec. 355/2019 is of big importance for a great number of undertakings, since, in the context of the financial crisis, a lot of businesses have been burdened with the VAT amounts of invoices that were left unpaid. In this connection, the relevant guidance of the Independent Authority for Public Revenue ('IAPR') is much anticipated in order to set the administrative framework for undertakings to lawfully pursue the VAT amounts corresponding to bad debts.

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