ZEPOS & YANNOPOULOS

November 2022

Recent Corporate & International Tax News

Significant developments

During the last months there have been many interesting developments in domestic and international tax that may affect businesses; we have selected and summarised in this newsletter the most noteworthy.

A. Corporate finance

B. Mergers & Acquisitions

C. Domestic intra-group transactions

D. Cross-border trade & investment

A. Corporate finance

Re-introduction of stamp duty on loans and other financing arrangements

In an effort to neutralise the effect of recent landmark decisions of the Greek Supreme Court ruling that the imposition of stamp duty on interest bearing loans was illegal, VAT law has been amended in a manner so as to allow the imposition of stamp duty. In specific, pursuant to art. 172 of Law 4972/2022, interest-bearing loans, other financing arrangements and contractual interest thereon have been included in the exceptions of transactions that, although within the scope of VAT, may be subject to stamp duty. To be noted that non-interest-bearing loans were subject to stamp duty from the outset.

The aforementioned provision has a retroactive effect from 1.1.2021 but it allows taxpayers to pay the relevant stamp duty until 31.12.2022 without incurring any late payment penalties.

New deadlines for payment of stamp duty

The deadline for paying stamp duty has been extended by virtue of art. 51 of Law 4955/2022. The change is applicable in respect of documents concluded from 14.07.2022 onwards. Under these rules, stamp duty on loans where at least one of the contracting parties is a company or merchant is payable until the end of the month following the month of the relevant book entry, instead of the previously applicable fortnight. This special provision is applicable irrespective of whether a loan is granted under a written agreement or not. Stamp duty in all other cases is payable until the end of the month following the month of the relevant document's date, instead of the previously applicable five days.

Application of the general anti-abuse rule to a share issue at premium to a 100% shareholder

The tax administration's Dispute Resolution Directorate has recently rejected a company's administrative appeal challenging the assessment by tax auditors of capital accumulation tax in relation to an issue of shares at a substantial amount of premium above par to an existing shareholder that held 100% of the company. The matter is particularly noteworthy as it is a rare instance where such tax, or, for that matter, any tax, is assessed as a result of application of the general anti-abuse rule. Premium above par is not subject to capital accumulation tax whereas premium in the case at issue was, as observed by the Directorate, set at 2,300% of the shares' nominal value.

Through its decision No 2746/2022, the Directorate ruled that the tax audit was correct in finding that the taxpayer had engaged in an artificial arrangement in the sense of article 38 of the Code of Tax Procedures. According to the decision, the sole purpose of such arrangement was the avoidance of payment of the capital accumulation tax, that would otherwise be due had the company issued shares at par, an arrangement which would have equally allowed it to receive the intended financing.

The Directorate implied also that due to the existence of losses which can under the currently applicable legislation be offset with premium, the taxpayer could eventually never become liable to capital accumulation (by not having to eventually capitalise the premium).

It is noteworthy that the Directorate analysed, mostly on the basis of citations of accounting board opinions and scholarly writings on the doctrines of economic justification of premium, as well as on the basis of its own reading of a previously issued decision of the Council of State, the Supreme Administrative Court of Greece, in relation to share premium, the situations in which, in accordance with its view, a share issue at above par would be justified commercially. These situations required essentially the pre-existence or emergence of multiple shareholders. The Directorate considered that none of these situations where present in the case under review. The Directorate also seemed to consider the dire economic situation of the company, as a factor negating the justification of issuance of shares at above par.

On the other hand, the Directorate did not seem to examine separately whether the tax advantage in the case in question defeated the object or purpose of the applicable tax law, a constituent element for application of the general anti-abuse rule.

Introduction of group ratio and other changes to the interest limitation rules

Recent legislative amendments by virtue of art. 56 of Law 4916/2022 introduced the novel, for Greek tax purposes, concept of group ratios in relation to the application of the rules restricting under conditions the annual deduction of exceeding borrowing costs above Euro 3,000,000 to 30% of EBITDA. In accordance with the recent amendments, companies which are part of consolidated groups as per Greek GAAP may deduct all their exceeding borrowing costs, where the ratio between their share capital and total assets is equal to or higher or lower by no more than 2% from the group ratio, provided that the method of valuation of all assets and liabilities is the same as in the consolidated financial statements. These companies can also deduct exceeding borrowing costs to the extent of application to the taxpayer's EBITDA of the group ratio of exceeding borrowing costs (in respect of lending from third parties) over group EBITDA.

B. Mergers & acquisitions

Extension until 31.12.2024 of the recognition of losses on transfers of participations in EU subsidiaries

Upon enactment, with effect from 1.1.2020, of an income tax exemption in respect of capital gains arising from the transfer of participations in qualifying EU subsidiaries, losses from such transfers could be recognised for income tax purposes only if finalised until 31.12.2022 provided that the relevant participations had been valuated until 31.12.2019 and that the losses had been recorded in books or audited financial statements. By virtue of art. 89 of Law 4941/2022, losses can now be recognised if finalised until 31.12.2024.

Extension of exemption of capital gains from sales of shares to permanent establishments of EU/EEA persons

The Greek tax authorities have clarified in circular E. 2047/2022 that the income tax exemption in respect of capital gains arising from the transfer of shares in qualifying EU subsidiaries by Greek tax resident legal persons should be equally applicable to Greek permanent establishments of non-resident EU/EEA legal persons when transferring qualifying participations, in conformity with the EU freedom of establishment principle.

New rules on deduction of acquisition expenses

New rules have been introduced in relation to the deduction of expenses incurred to finance the acquisition of participations. Art. 10 of Law 4935/2022 provides that in case of acquisition of participations in another company, the acquiring company is allowed to deduct all expenses which are incurred for the purpose of acquiring such participations provided that the following conditions are met:

- the total turnover of the company whose participation is acquired and that of the acquiring company, is equal to or greater than 450,000 Euro, according to the latest approved and published financial statements or, where applicable, the latest income tax returns, and
- the total amount of expenses which are deductible, does not exceed 30% of the average turnover of the acquiring company during the last three years before the acquisition of the participation.

The above conditions for the recognition of expenses do not need to be met if the acquiring company has been established in less than 1 year or has no other activity apart from the participation.

The relationship of these new rules with the provisions in the Greek Income Tax Code restricting the deductibility of expenses incurred to finance participations in EU qualifying subsidiaries giving rise to tax exempt dividends and capital gains has not been addressed.

C. Domestic intra-group transactions

Introduction of corresponding adjustments with respect to transactions between Greek associated parties

sions allowing a Greek taxpayer to request a corresponding adjustment to its profits, following a primary transfer pricing adjustment in the context of a tax audit of an associated entity taxable in Greece, have been introduced in the Income Tax Code and the Code of Tax Procedures by virtue of art. 171 of Law 4972/2022. Such corresponding adjustment may be sought through filing an amending corporate income tax return within a three-month deadline, starting from the date of notification of the tax assessment act to the associated entity. The relevant refund or setoff is only effected under the condition that the associated entity has paid the tax assessed as a result of the primary adjustment.

As regards tax payment, the Greek tax administration is allowed to claim back taxes refunded in the context of such corresponding adjustments, following the outcome of litigation or of administrative dispute resolution of a case. Corresponding adjustments referring to controlled transactions between Greek taxable entities may be sought not only in relation to tax assessments taking place on or after the entry into force of the relevant legislation, i.e., 23.9.2022, but also in cases of primary adjustments that have taken place earlier but are currently pending before the Dispute Resolution Directorate or the court. With respect to pending cases, the relevant amending tax returns shall be filed by 23.12.2022.

D. Cross-border trade and investment

New Double Tax Treaty between Greece and France

A new tax treaty was signed on 11 May 2022 with France, replacing the previously existing treaty which was one of the oldest tax treaties for both countries. The new treaty is modelled after the 2017 edition of the OECD Model Tax Convention which had incorporated treaty-related measures resulting from the work on the OECD/G20 BEPS Project against base erosion and profits shifting. The treaty thus includes a preamble against treaty-shopping arrangements for tax evasion and avoidance. The relevant Convention and Protocol have been ratified by virtue of Law 4984/2022 whereas they will enter into force once notification procedures are completed.

As regards dividends, the new treaty provides for a new withholding tax exemption. In specific, dividends may be exempt from withholding tax if their beneficial owner is a company that has directly held at least 5% of the paying company's capital for a period of at least 24 months. Otherwise, a withholding tax of up to 15% may apply. Therefore, in view of the currently applicable domestic rate of 5%, Greek source dividends shall be subject to 5% Greek withholding tax when paid under the treaty to a resident of France, except where the above exemption applies.

Interest may be taxed under the new treaty at a maximum of 5% withholding tax, whereas under the currently applicable treaty the maximum rate is 10%. Thus, given the Greek domestic rate of 15%, the new treaty provides a further advantage. Also, exemptions from the imposition of such withholding tax are available if, for instance, interest is paid in connection with bank loans or in connection with the sale on credit of industrial, commercial, or scientific equipment, or in connection with the sale on credit of goods or merchandise between two enterprises.

The Protocol extends to collective investment vehicles the treaty benefits in respect of interest and dividends to the extent of holdings held by residents of either Greece or France or by residents of a State having signed with Greece or France an administrative assistance convention for the prevention of tax avoidance and evasion.

Royalties may be taxed at a maximum of 5% withholding tax (with the domestic rate being 20%). The definition of royalties for the purposes of the treaty is in line with the OECD Model Tax Convention (and therefore does not include the use of or the right to use industrial, commercial or scientific equipment, as under the broader domestic definition).

A noteworthy change in relation to existing Greece treaties is that the definition of permanent establishment, being modelled after the 2017 edition of the OECD Model Tax Convention, is widened to include situations such as the existence of an agent playing the principal role leading to the conclusion of contracts as well as provisions to prevent taking advantage of auxiliary and preparatory activities exemptions through fragmentation of a cohesive operating business into several small operations.

In relation to capital gains, the new treaty provides the conditions under which capital gains derived by a resident of Greece or France may be taxed by the other State, respectively. Namely, this would be the case if such capital gains arise from:

- the alienation of immovable property situated in the other State;
- the alienation of movable property forming part of the business property of a permanent establishment in the other State;
- the alienation of shares, rights, or similar interests if, at any time during the 365 days preceding their alienation, such shares, rights, or similar interests derived more than 50% of their value directly or indirectly from immovable property situated in the other State (excluding immovable property own-used by a company, trust, or entity).

Under the new treaty, income derived by a resident of Greece or France from immovable property situated in the other State respectively may be taxed in that other State.

Finally, on the procedural front, the treaty incorporates into its actual terms the obligation to furnish a duly ratified certificate of tax residence in order for residents to avail themselves of the benefits of the treaty as regards the taxation of dividends, interest and royalties. The issuance of a certificate of tax residence is a long-standing requirement of the Greek tax authorities in tax treaty application procedures.

Transitional rules for dividends taxation in anticipation of potential renewal of Greece-UK Treaty

A transitional provision regarding dividend taxation covering distributions between UK and Greek legal entities has recently been introduced by virtue of art. 27 par. 1 of Law 4965/2022. According to it, dividends collected within the year 2021 by a legal entity that is tax resident in Greece from a legal entity that is tax resident in the UK, are exempt from income tax provided that the former holds at least 10% of the value or number of the share or core capital or voting rights of the distributing legal person and that such percentage is held for at least 24 months. Conversely, dividends distributed withing the year 2021 to a legal entity that is tax resident in the UK, are exempt from withholding tax provided that such legal entity holds at least 10%, based on value or number, of the share capital or profits or voting rights of the Greek distributing legal person and that such percentage is held for at least 24 months.

In accordance with the relevant explanatory memorandum, the rationale of this provision is to address the unfavorable tax treatment of intra-group dividends due to Brexit in view of the negotiations for the conclusion of a renewed Double Tax Treaty between Greece and the UK.

Double Tax Treaty between Greece and Singapore

A tax treaty with Singapore that had entered into force on 14 March 2022 is to apply from 1st January 2023 onwards. The relevant Convention and Protocol had been ratified by virtue of Law 4879/2022.

As regards dividends, the treaty provides for a maximum withholding tax of 10% or 5% under certain conditions and therefore currently does not effectively eliminate the 5% domestic withholding tax on Greek source dividends.

Interest and royalties may under the treaty be taxed at a maximum of 7.5% withholding tax. Thus, given the Greek domestic rates of 15% and 20% respectively, the treaty allows a reduction in respect of interest and royalties of Greek source. An exemption from the imposition of such withholding tax on interest is available if the beneficial owner of the interest is a bank.

Similar provisions as with the new treaty with France apply in relation to income from immovable property and capital gains, with the exception of special rules concerning property rich companies whose shares are traded on a recognised stock exchange.

For further information please contact

Maria Zoupa
Partner

m.zoupa@zeya.com

Daphne Cozonis
Partner

d.cozonis@zeya.com

Ioanna Tapeinou
Senior Associate

i.tapeinou@zeya.com

Established in 1893, Zepos & Yannopoulos is one of the leading and largest Law firms in Greece providing comprehensive legal and tax services to companies conducting business in Greece.

280, Kifissias Ave., 152 32
Halandri, Athens, Greece
Tel.: (+30) 210 69 67 000
Fax: (+30) 210 69 94 640

www.zeya.com
subscribe
LinkedIn