

Tax Flash Law 4321/2015

March 2015

On 21 March 2015 L.4321/2015 was enacted, which includes some tax provisions, the most important being the introduction of significant procedural requirements for the deductibility of corporate expenses. The new provision, which leaves a lot of issues open to interpretation, can create significant practical implications at the level of the enterprises. Given that the issuance of a Ministerial Decision is expected, without which the provision cannot be practically implemented, said Ministerial decision should resolve all the open issues and, to the extent possible, abolish the obligation for the withholding of 26% tax in clear cases of “ordinary” transactions.

Scope of the provision

- As an introductory remark, it should be noted that, despite the respective announcements at the media, the provision does not refer only to triangular transactions. On the contrary, the scope of the provision is quite broad.
- More specifically, corporate expenses (*an important issue to be considered is whether said expenses include also purchases of products, raw materials, fixed assets, etc.*) paid to individuals or legal persons (entities), shall not be recognized as deductible, in case those individuals or legal persons (entities), are:
 - a. tax residents in a non-cooperative state, as stipulated in art.65 of the corporate income tax code;
 - b. tax residents in a country with beneficial tax regime as stipulated in art.65 of the corporate income tax code;

To the extent that the provision poses restrictions on transactions with EU member States, which are considered as States with preferential tax regimes (Ireland, Cyprus, Bulgaria), a consideration is raised whether the provision is compatible with the fundamental EU freedoms, as also indicated in the report issued by the Special Scientific Committee of the Greek Parliament.

- c. are “de facto” associated companies without the tax payer being compliant with the TP documentation rules at the time of the transaction or the issuance of the respective invoice;

The scope of the application of the aforementioned provision is unclear to the extent that the term “de facto” associated entities seems to deviate from the general term “associated entities” provided in article 2 of the corporate income tax code.

- d. do not have the required organization and substance (either on their registered seat or to an affiliated entity) to perform the business activity for which the invoice was issued.

The wording of cases (c) and (d) seems to refer also to transactions between domestic entities, despite the general impression that the

provision applies only to non-cooperative States or States with beneficial tax regimes.

Conditions for the deductibility of the expenses – 26% withholding tax

- The deductibility of the expense is subject to the payment of a 26% “withholding” tax.

As commented by the Special Scientific Committee of the Greek parliament in its report, the term “withholding” is not accurate since the tax paid does not appear to be, in essence, a tax that burdens the income received by the foreign company. On the contrary is a type of “guarantee” that the tax payers will demonstrate that the requirements for the deductibility of the expenses, as the case might be, are met.

The qualification of the tax as “withholding” is important, since it is crucial for the application of other tax provisions.

Indicatively:

What is the penalty in cases of the non-payment of the tax: non deductibility of the expense or, in addition, the imposition of penalties for not payment of withholding tax? are the international tax law provisions (Double Tax Treaties) and EU Directives superseding domestic legislation, which result to no withholding tax due, applicable?

- In addition, especially for case (c), the tax payer should demonstrate that the transactions with the “de facto” associated entities are in compliance with all the requirements set by domestic legislation prior to the transaction *(despite the fact that the transfer pricing file should be drafted within four months following the end of the fiscal year)*. For case (d), the tax payer should demonstrate that the contracting party has all the required organization and substance for the performance of similar business transactions.

To be noted that due to the general wording of the provision, case (d) seems to apply to every transaction and not only to the transactions with persons/entities established in non-cooperative States or States with beneficial tax regimes. However, such approach is incompatible with the intended scope of the provision.

Refund of the withholding tax

- In case the tax payer, within three months from the time that the transaction took place demonstrates that the latter is an ordinary transaction effected at market prices, the withholding tax is refunded by the Greek state with no cost for the latter.

It is not clear whether the tax will be refunded within three months or whether the three months threshold is set for the demonstration by the tax payer that the aforementioned conditions are met.

Issuance of a Ministerial Decision

- The procedure for the implementation of the aforementioned provision will be defined by the Ministerial Decision to be issued in this respect.

Taking into account the unclear issues and the questions that are raised by the aforementioned provision, its implementation doesn't seem feasible prior to the issuance of the Ministerial Decision. In any case, as indicated by the competent Minister, the Ministerial Decision to be issued will outline the transactions which are considered as clearly ordinary and fall out of the scope of this provision (especially with respect to the withholding of the 26% tax).

It is also of crucial importance that the respective Ministerial Decision determines the criteria and the supporting documentation that the enterprises should file with the tax authorities to support the deductibility of the expense.

Art. 19: Abolishment of the penalties for overdue payment of the tax

- From the date of the publication of the law, i.e. 21.3.2015, the penalties for the overdue payment of the tax provided in article 57 of the CTP, are abolished. Going forward in cases of overdue payment of the tax, only the late payment interest will be due as provided in art. 53 of the CTP (interest rate for main refinancing operations in addition to 5.75% annually –today 8.56%).

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*This information is intended only as a general update for interested persons and should not be used as a basis for decision making. For further details please contact PwC:
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