

Tax Flash

Ministerial Circulars 1037/2015, 1039/2015 & 1042/2015

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Ministerial Circulars 1037/2015, 1039/2015 & 1042/2015 provide important clarifications concerning the tax treatment of dividends/ interest/ royalties, intercompany payments and thin capitalization.

Ministerial Circular 1037/2015 – Thin capitalization

Scope of application

- Clarifications are provided concerning the application of the thin capitalization provisions which provide for the non-deductibility of interest expenses exceeding 60% / 50% / 40% / 30% of EBITDA for tax years beginning on 1.1.2014 / 1.1.2015 / 1.1.2016 / 1.1.2017 respectively.

If interest expenses are lower than the applicable threshold (€ 3,000,000 or € 5,000,000 for tax years beginning from 1.1.2014 up to 31.12.2015), they are fully deductible from the gross income of the company, subject to the limitations provided by article 23 of the ITC.

There are uncertainties as to the interpretation of the term "net interest expenses" that are capped based on the above threshold to the extent that the indicative example provided in the Ministerial Circular takes into account only debited interest and not net interest expenses (based on which non-deductible expenses are calculated).

It is also unclear whether article 23 applies only to interest expenses that do not fall within the thin capitalization limitations.

Interest expenses

- Interest expenses do not include loan expenses and capitalized interest.

The term "interest expense" as used in the Ministerial Circular seems to include only interest paid and not all accrued interest expenses of the respective tax year. Moreover, it remains to be clarified which cases are covered by the term "interest that is capitalized".

Determination of EBITDA

- Earnings before interest, taxes, depreciation and amortization (EBITDA) are determined based on the accounting results of the company as adjusted in accordance with the provisions of the Income Tax Code.

The Ministerial Circular does not clarify whether tax exempt income (e.g. exempt intercompany dividends) should be also taken into account for the determination of the EBITDA.

**Carry -
forward of
interest
expenses**

- It is clarified that the amount of interest expenses carried forward each tax year (without time limitation) cannot exceed the amount resulting from the percentage of EBITDA reduced by interest expenses in excess of the same year.

The above limitation is in line with the rationale that the maximum amount of deductible interest expenses is the percentage of EBITDA as determined each tax year.

**Intercompany
loans**

- It is clarified that in this case the arm's length principle (TP provisions) apply first.

Ministerial Circular 1039/2015 – Intercompany payments

Tax exemption of intercompany dividends

- Dividends paid by Greek, EU and Swiss companies to Greek companies and permanent establishments of EU companies are tax exempt provided that all other requirements are met (inter alia 10% participation, 25% participation for Switzerland, for two (2) years).

Dividends paid/ received by legal entities without legal personality are not tax exempt e.g. distribution of profits from joint ventures to their members.

Dividends distributed by a Greek company to a Greek company are taxable in case the participation is less than 10%.

Non deductibility of expenses related to participations

- It is explicitly clarified that finance costs and interest on loans for the acquisition of participations that distribute tax exempt dividend are not tax deductible.

The timing and way of application of this provision is still unclear; for example, it remains to be clarified whether it is required that a distribution has actually taken place in the relevant tax year so as for the relevant expenses not to be tax deductible.

Another practical issue arising concerns the determination of the expenses related to such participation, especially in case where the purpose of the loans is not explicitly mentioned or in case of refinancing of the previous loans with new ones. This is a quite complex issue that should be examined by Groups with Greek parent companies.

Letter of guarantee

- The method of calculation of the amount of the letter of guarantee required to be submitted in order to obtain the temporary tax exemption on intercompany dividends in case of non-fulfillment of the minimum holding period is provided.

In case of non-fulfillment of the two years period, the letter of guarantee shall be forfeited and corporate income tax is retroactively imposed, with the penalties provided by Law 4174/2013 (Code of Tax Procedure).

In case no letter of guarantee is filed, it is possible to benefit from the tax exemption at the time of fulfillment of the condition of the minimum holding period by filing an amending tax return for the relevant tax year.

Tax credit in case of taxation

- It is clarified that in case of non-application of the exemption the company can credit, both the corporate income tax and dividend withholding tax in case of domestic or EU subsidiary or only the dividend withholding tax in case of a third country subsidiary.

It is not clear to which cases this provision applies, especially as regards EU subsidiaries to the extent that a percentage of less than 10% does not render the distributing company a "subsidiary" and in case of non-fulfillment of the minimum two year holding period, the letter of guarantee provision applies.

**Exemption from
withholding tax
on dividends,
interest and
royalties**

- The exemption from 10%/ 15% and 20% on dividends, interest and royalties applies on payments by Greek companies to Greek, EU and Swiss related companies, provided that all other conditions are met.

**Branch of
foreign
companies**

- The fulfillment of the conditions for the exemption from 10% withholding on dividends received by a permanent establishment of a foreign company are examined at the level of the foreign company (head office).

It is explicitly clarified in Ministerial Circular 1042/2015 that profits remitted by a permanent establishment to its foreign head office are not subject to the 10% withholding tax.

**Letter of
guarantee**

- The method of calculation of the amount of the letter of guarantee, as well as the procedure for refund of the tax withheld due to the non-fulfillment of the minimum holding period requirement are clarified.

The amount of the letter of guarantee is calculated based on the rate provided in the respective Double Tax Treaty (DTT), if lower than the one provided in the domestic legislation.

Definition of dividends

- The definition of dividends which are subject to 10% withholding tax is clarified. Indicatively interest on preference shares, distribution of profits by trusts and offshore companies and BoD fees and remuneration paid to employees out of profits are included therein.

Prohibition of distribution of reserves by an Extraordinary General Meeting (GM)

- It is clarified that distribution of profits from extraordinary reserves formed in the balance sheet of the closing fiscal year by Societes Anonymes and Limited Liability Companies cannot be decided by an Extraordinary GM.

The Ministerial Circular seems to also cover corporate law issues, but in essence, it confirms the positions adopted by the tax authorities in the past.

Foreign source dividends – individuals

- It is clarified that foreign source dividends paid to individual Greek tax residents shall be included in the annual income tax return regardless of whether they are remitted in Greece or remain abroad.

In case the 10% tax has already been paid (self-payment or withholding by an intermediary financial institution), such tax shall be declared in the annual income tax return and be offset with the corresponding tax; to be noted that such withholding is no longer required.

Interest

- The definition of the term interest which is subject to 15% withholding tax is clarified. Indicatively late payment interests due to a contractual obligation or to a court decision are included therein.

Exemption from 15% withholding tax on interest

- Interest on transferred receivables acquired by securitization companies of Law 3156/2003 and interest on loans and interbank deposits received by domestic or foreign credit institutions are exempt from the 15% withholding tax.

It is clarified, though, that the 15% withholding tax (or lower under a Double Tax Treaty (DTT) applies on interest on corporate bonds received by legal persons / entities which are not Greek tax residents and do not maintain a permanent establishment in Greece, including domestic and foreign credit institutions. It is reminded that a tax exemption also applies to interest on bond loans and Treasury Bills of the Greek State received by Greek individuals or foreign individuals or legal persons without permanent establishment in Greece.

Royalties

- The definition of the term royalties is clarified and examples of payments falling under the scope of this provision are provided (e.g. payments for the use of software etc.).

It is clarified that in case of mixed contracts including fees for the provision of services as well as royalties, an allocation of the amounts related to royalties should be effected based on the relevant contract or any other available data evidencing sufficiently such allocation.

It is not clarified what should be the tax treatment in case such allocation is not possible.

**Documentation –
filing of the tax
return**

- Procedural issues regarding the filing of tax returns, as well as of the various supporting documentation that should be either filed along with the tax return or stored or provided to the persons indicated by the law (e.g. custodian in case of listed shares) in order for a favorable tax treatment or tax exemption to apply are clarified.

**Exhaustion of the
tax liability**

- The 10% withholding tax on dividends, 15% on interest and 20% on royalties exhausts the tax liability of Greek and foreign individuals and foreign legal persons/ entities without a permanent establishment in Greece.

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