

Tax Flash

April 2019

The Greek Parliament has adopted the Law, which transposes the Directive laying down rules against tax avoidance practices (ATAD) and expands L.128/1975 duty's scope.

A. ATAD transposition

Articles 11 to 14 of the Law transpose into national legislation ATAD provisions regarding thin capitalization rules, Controlled Foreign Companies (CFC) rules, as well as the general anti-abuse rule, whose application is mandatory for EU member states as from 01/01/2019.

Amendment of article 49 of I.T.C. regarding thin capitalization

Thin capitalization refers to the situation in which a company is financed through a relatively high level of debt compared to equity. Thin capitalization rules aim to limit the amount of deductible interest expenses, up to thirty per cent (30%) of the earnings before interest, tax, depreciation and amortization (EBITDA), according to article 49 of the Income Tax Code (I.T.C.).

Even though the pre-existing thin capitalization rules have been considered by the European Commission as equally effective to Article 4 of the ATAD and, thus, could remain unaltered until 31/12/2023, the provisions of article 49 of the I.T.C. are restated, so as to transpose in full the relevant ATAD provisions into national legislation, with effect from 01/01/2019.

The following should be noted regarding the new provisions:

- There is no change to the limitation of maximum exceeding borrowing costs up to thirty per cent (30%) of EBITDA
- The full interest deductibility limit remained at three million euro (3,000,000)
- EBITDA is still calculated based on the taxable profits before taxes, interest, depreciation and amortization. It is also explicitly clarified that tax exempt revenues should not be taken into account
- The definition of 'borrowing costs' is expanded, including, apart from interest on loans, *inter alia*, other costs economically equivalent to interest and expenses incurred in connection with the raising of finance (e.g. payments under profit participating loans, imputed interest on convertible bonds and zero coupon bonds) as well as the finance cost element of finance lease payments and the capitalized interest included in the balance sheet value of a related asset

Companies shall therefore accurately re-calculate their borrowing costs, taking into account that borrowing costs may now include amounts that were not included under the previously applicable provisions.

- The possibility to carry forward without time limitation the exceeding borrowing costs, which cannot be deducted in the current tax period, has been retained
- The exception of financial undertakings is now also expanded to other companies of the financial sector, apart from credit institutions (e.g. insurance and reinsurance undertakings, pension institutions, etc.)
- The exclusion of the exceeding borrowing costs incurred on loans used to fund long-term infrastructure projects (as part of a concession contract or a Private

Amendment of article 66 of I.T.C. regarding Controlled Foreign Companies (CFCs)

Public Partnership), where the project operator, borrowing costs, assets and income are all in the E.U., is provided

With the new provisions, the Greek I.T.C. is fully harmonized with ATAD, thus safeguarding the implementation of BEPS Action 3 results, in order to limit the artificial deviation of income to companies and permanent establishments based in third countries as well as within the E.U.

The following should be noted regarding the new provisions:

- Foreign permanent establishments, whose profit is not taxed or is tax exempted in Greece, are also regarded as CFCs

Given that Greece has opted for the credit, instead of the exemption, method to eliminate double taxation in all applicable Double Tax Treaties (DTTs), the scope of this provision seems to be rather limited.

- The participation condition with a percentage of over fifty per cent (50%) of voting rights, capital or profits of the CFC has been retained
- It is now explicitly stated that for the determination of the taxpayer's participation percentage together with other related parties, the latter are first identified and then their percentages are added together

The scope of this provision is expanded, given that for the determination of CFCs the percentage for a person to be regarded as a related party is set at twenty-five per cent (25%). However, in article 2 of the I.T.C. the said percentage has been set at thirty-three per cent (33%). Therefore, it is possible that companies which are not regarded as related for the application of other provisions (e.g. transfer pricing), are regarded as such for the application of CFC rules.

- The exclusion of listed companies has been abolished
- Regarding the categories of income forming the non-distributed income of CFCs, the thirty per cent (30%) condition is retained. However, both income from financial leasing and income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises, and add no or little economic value, are included. On the contrary, rental income from both movable and immovable property ceases to be taken into consideration
- Regarding the minimum tax paid abroad rule, until recently only CFCs based in a country with preferential or non-cooperative regime were subject to tax. However, with the new provisions, the sole criterion is the actual tax paid abroad - regardless of the country of establishment - to be less than half of the tax that would be payable in Greece based on the I.T.C. provisions

As it is explicitly stated that for the application of the above-mentioned computation the tax that would be payable in Greece shall be determined according to the Greek I.T.C., taxpayers should re-calculate the CFCs' payable tax based on the I.T.C. provisions, in order to compare the tax that would be payable in Greece.

- The new provisions expressly state that, in case the legal person or legal entity or permanent establishment incurs losses in a fiscal year, these are not included in the taxpayer's taxable base, however may be set off against future profits, under the conditions set in par.4 of article 27 of the I.T.C.

Given that article 27 par.4 provides that, under certain conditions, losses incurred by a foreign permanent establishment may be recognized when they become final (e.g.

(closure of a branch) it may be concluded that losses incurred by a CFC are not taken into account for the application of article 66.

- In order to avoid double taxation, the cases of profit distributions made by CFCs and the disposal of shares in CFCs are regulated, while also the possibility to credit the tax paid abroad by related companies is provided, in case of indirect participation and up to the amount of the Greek corresponding tax
- Finally, the said provisions will not apply to E.U./E.E.A. located legal persons, legal entities and permanent establishments that carry on a substantive economic activity (i.e. supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances). Furthermore, the non-exclusion of CFCs having residence for tax purposes or permanent establishment in third countries has been retained

Greece did not opt to transpose in its national law the possibility to exclude the CFCs being resident or situated in a third country that is not party to the E.E.A. Agreement. As a result, even companies which are located in countries having a high nominal tax rate may be regarded as CFCs, if the actual tax paid abroad is less than half of the tax that would be payable in Greece based on the I.T.C. provisions

- According to the explanatory memorandum, the burden of proof that the CFC, which is located in a E.U./E.E.A. country, does not carry on a substantive economic activity, lies with the Tax Authorities

Amendment of Article 38 of C.T.P. regarding the General Anti-Abuse Rule (GAAR)

The previously applicable GAAR provisions have been restated by adopting ATAD's definition. However, the indicatively enumerated conditions for the determination of a non-genuine arrangement or of a series of arrangements have been retained.

Regarding GAAR's context, it is provided that Tax Authorities shall ignore any arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or the purpose of the applicable tax law, are not genuine, having regard to all relevant facts and circumstances. Furthermore, according to the explanatory memorandum, the burden of proof as to whether a non-genuine arrangement exists, lies with the Tax Authorities, while, for the interpretation of the provision, the relevant case-law of the European Court of Justice and the Commission Recommendation 2012/772/EU will be supplementary taken into account.

The amended GAAR definition introduces the "main purpose" concept of obtaining a tax advantage; therefore, the intention of the taxpayer should be examined in order to apply the GAAR.

Furthermore, it is important to highlight the fact that the GAAR, which encompasses arrangements being put into place both within Greece as well as cross-border (within or out of the E.U.), remained part of the Code of Tax Procedures (C.T.P.), rather than of the I.T.C. Therefore, it may be applied to all taxes falling into the scope of the C.T.P.

It is also noted that the GAAR aims to deal with abusive tax practices, which are not handled by specific provisions. Hence, it does not affect the application of specific anti-abuse rules, such as the provisions regarding CFCs, the anti-abuse rule of the Parent – Subsidiary Directive etc.

Finally, regarding GAAR's applicability in relation to DTTs, the explanatory memorandum clarifies that, in case a DTT contains a specific rule against tax avoidance, such as the Principal Purpose Test, then, to the extent that the artificial arrangement was put into place for obtaining an advantage provided by the DTT, these provisions supersede the GAAR and apply exclusively. In any other case, the GAAR



applies and a DTT's benefits are not granted if it is found that an arrangement or a series of arrangements have been put into place for the main purpose or one of the main purposes of obtaining a tax advantage.

As stipulated by the provision itself, for the implementation of the GAAR, as well as for any other related matter, the Governor of the Independent Authority for Public Revenue is authorized to publish a relevant decision. However, the explanatory memorandum states that GAAR's application will not be widespread, as it should only apply in some exceptional cases of artificial tax avoidance arrangements.

B. Expanded scope of the L.128/1975 duty

Article 63 of the Law stipulates that the L.128/1975 duty will also be imposed on granting of credits of any kind, on their balances and on any equivalent financial contract granted by financial institutions within the meaning of point 26 of par.1 of art. 4 of Regulation (EU) No 575/2013 operating in Greece or abroad. In case of foreign financial institutions, the duty will be incurred by the individuals or legal entities obliged to file an income tax return. It is also noted that the currently applicable provisions regarding the exemption of credit institutions, shall also apply for the financial institutions.

*The new provision expressly expands the imposition of the said duty on financial institutions, including, *inter alia*, factoring, leasing, payment services and issuing of electronic money companies. To be noted that the Council of State has ruled (Decision 3164/2014) that financial institutions did not fall within the scope of the previously applicable provision.*

Entry into force

The said provision shall enter into force on the first day of the month following the Law's publication in the Government Gazette.

It is important to note that each individual case needs to be examined based on its own merits, and that the above-mentioned general principles might not necessarily capture all possible eventualities. Our expert advisors are in a position to advise you on the implications arising from a Greek perspective in relation to your specific case.

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