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Global Tax Alert

Greece transposes certain EU ATAD provisions into domestic tax legislation

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Executive summary

Greek Law 4607/2019 (the Law), amending several tax provisions, has been published in the *Government Gazette* (FEK A' 65/24-04-2019). The amendments include: (i) transposing certain tax measures of the European Union (EU) Anti-Tax Avoidance Directive (ATAD I) into domestic tax legislation; (ii) revising provisions regarding the prevention of money laundering; and (iii) the imposition of the levy under Law 128/1975 to credits granted by financial institutions.

Detailed discussion

The most important provisions introduced by the Law are:

Transposition of the EU ATAD I rules into the Greek tax legislation in compliance with the Directive

- By virtue of Law 4607/2019 (*Government Gazette* A' 65/24-04-2019) certain provisions of the ATAD I establishing rules against tax avoidance practices that directly affect the functioning of the internal market have been embedded in the Greek legislation.
- Specifically, the new law amended the domestic provisions regarding thin capitalization and controlled foreign companies as well as the general anti-tax avoidance rule. However, the Law did not embed the provisions of ATAD I regarding hybrid mismatches and exit taxation.

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Thin capitalization

- The new provisions maintain the general domestic regime of the thin capitalization rules. In particular, the maximum threshold up to which exceeding borrowing costs are deducted (30% of EBITDA – earnings before interest, taxes, depreciation and amortization), the threshold up to which exceeding borrowing costs are fully deductible (€3 million) as well as the ability to carry forward without any time limitation exceeding borrowing costs that cannot be deducted in the current tax year, are still in force.
- It is noted though that the maximum threshold up to which exceeding borrowing costs are deducted does not apply to exceeding borrowing costs incurred on loans used to fund a long-term public infrastructure project, in cases where the project operator, borrowing costs, assets and income are all in the EU.
- Pursuant to the new provisions, EBITDA is the sum of taxable income, tax-adjusted amounts for exceeding borrowing costs as well as tax-adjusted amounts for depreciation and amortization, while tax-exempt income is not taken into account for such calculation.
- For the purposes of applying the above, exceeding borrowing costs are defined as the difference between a taxpayer's taxable interest revenues and other economically equivalent taxable revenues and the deductible borrowing costs of such taxpayer, while the term "borrowing costs" includes interest expenses on all forms of debt as well as expenses incurred in connection with the raising of finance.
- It is stressed that the new interest limitation rule expressly excludes from its scope several types of financial undertakings (e.g., credit institutions, insurance companies, alternative investment funds, UCITS).

Controlled foreign companies (CFC)

- The CFC provisions have been significantly amended and, therefore, taxpayers should consider a review of all relevant structures of Greek groups to ensure that each structure is compliant with the new CFC rules.
- More specifically, pursuant to the new provisions a foreign legal entity or a foreign permanent establishment is considered a CFC insofar as the following conditions are cumulatively met:
  - The taxpayer's participation (either by itself or together with any associated entities) to the voting rights or the capital or the profits of the entity under examination, as the case may be, exceeds 50%. This criterion applies only to the extent that the entity under examination is a legal entity. For a corporation to be considered an associated entity based on the above, a participation percentage of 25% is required instead of the normally applicable 33% (as per art.2 of the Greek Income Tax Code).
  - The actual corporate tax paid abroad by the entity under examination (legal entity or permanent establishment) on its profits is lower than the difference between the tax that would be due by such person in Greece and the actual corporate tax paid on its profits.
  - More than 30% of the net income before taxes realized by the entity under examination falls within one or more of the categories of income mentioned in the Law 4607/2019. Such categories include passive income (dividends, interest, royalties), income from the disposal of shares, income from financial leasing, income from insurance, banking and other financial activities as well as, under certain conditions, income from invoicing entities, while income from moveable assets and from real estate property are no longer included in these categories.
  - In contrast to the prior regime, the factor of whether the shares of the entity under examination are traded in a regulated market is no longer a criterion for the application or the exemption from the CFC rules.
  - As long as the above-mentioned requirements are met, the non-distributed income of the CFC under examination is included in the taxpayer's taxable income and is taxed according to the Greek corporate tax rate (if the taxpayer is a Greek legal entity) or according to the relevant schedular tax rates for individuals (plus special solidarity tax, if the taxpayer is a Greek individual tax resident). Any foreign corporate tax paid by the CFC is credited against the Greek tax (up to the maximum of the Greek tax assessed).
  - In cases where a CFC distributes profits or the taxpayer disposes of its participation in such a CFC entity, the tax due by the taxpayer based on the above is calculated after deducting from the tax base amounts that have already been taxed.
  - The new provisions do not apply to CFCs established in the European Economic Area, as long as such entities perform substantial economic activity, supported by employees, equipment, assets and premises, as evidenced by relevant facts and circumstances.

General anti-tax avoidance rule (GAAR)

- The new provisions introduced the term "principal purpose" of an arrangement (principal purpose test) as a determining factor on whether such an arrangement will be considered as genuine and, consequently, will be considered by the tax authorities. Should an arrangement be considered as non-genuine, the relevant tax liability is calculated based on the provisions that would have been applicable if such arrangement was not in place.
- For the purposes of tax determination, the Tax Administration ignores an 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 objective or purpose of the applicable tax law, are not genuine.
- For the purposes of determining whether such arrangements are genuine not all relevant data and circumstances of each case are considered, while the extent as to which the arrangement in question is being implemented for valid commercial reasons that reflect the economic reality, is used as a criterion for this determination. In this context, the Tax Administration examines whether each arrangement falls within certain circumstances (e.g., the arrangement is applied in a manner which is not consistent with usual business conduct, or it leads to a significant tax advantage, which does not reflect the business risk assumed by the taxpayer).
- The aforementioned provisions of Law 4607/2019 are applicable to income received and expenses occurred during tax years commencing as of 1 January 2019 onwards.

Amendment of provisions regarding prevention of money laundering

- Law 4607/2019 amended certain provisions of Law 4557/2018 regarding the prevention and repression of money laundering and terrorist financing.
- The main amendments are:
  - The term "Beneficial Owner" does not include not only entities listed on a regulated market but also entities listed on a Multilateral Trading Facility, to the extent that the latter are subject to disclosure requirements equivalent with those of entities listed on a regulated market.
  - Entities that are obliged to gather and maintain, at a special register, information regarding their beneficial owners include not only entities having their registered seat in Greece but also entities performing taxable business activities in Greece.
  - Entities listed on a regulated market or a Multilateral Trading Facility maintain, instead of the special register mentioned above, a record of notifications of Law 3556/2007, which shall be updated each time an event reportable to the Capital Market Commission takes place, without being obliged to register such record to the Central Register of Beneficial Owners.

Imposition of levy of Law 128/1975 to credits granted by financial institutions

- According to Law 4607/2019, the levy of Law 128/1975 is imposed not only on loans and credits granted by credit institutions but also on credits granted by financial institutions operating in Greece or abroad.
- Especially with regards to foreign financial institutions, the new provisions expressly provide that the levy of Law 128/1975 applies to individuals or legal entities that are obliged to submit a tax return.
- The provisions regarding imposition of levy of Law 128/1975 to credits granted by financial institutions are in force as of 1 May 2019.

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