

Tax rules impacting cross-border activities; transposition of ATAD & other developments

A number of changes have been introduced by virtue of the new tax law ratified a few days ago by the Greek parliament, impacting tax aspects of cross-border activities. Changes include:

- Introduction of exit taxation and hybrid mismatches rules by transposition of the EU ATAD.
- Revisions to the APA framework to allow for a roll-back effect, under conditions.
- Transposition of the EU Dispute Resolution Directive to extend the scope of cross-border tax disputes resolved through MAP proceedings, beyond transfer pricing.

Greece transposes the rules of the EU Anti-Tax Avoidance Directive_Volume 2

By virtue of articles 48 et seq. of the recent tax law, Greece transposed a set of rules provided under the EU Anti-Tax Avoidance Directive (“**ATAD**”) in relation to exit taxation (art. 5 ATAD) and hybrid mismatches (art. 9 and 9B ATAD). The rules on hybrid mismatches have been transposed as per the amendments introduced by Directive (EU) 2017/952 (“**ATAD 2**”) regarding hybrid mismatches with third countries.

This is the second set of ATAD rules that are being transposed into national legislation, following the transposition of the first set in April 2019, including the interest barrier rule (currently set out in art. 49 ITC), the controlled foreign corporation rule (currently set out in art. 66 ITC), and the general anti-avoidance rule (currently set out in art. 38 Law 4174/2013).

The transposition of these rules comes after the launch of an infringement procedure by the European Commission in relation to Greece’s failure to implement the Directive by 31 December 2019.

Contrary to the first set of rules, the rules concerning exit taxation and hybrid mismatches apply exclusively to corporate taxpayers and not to individuals.

I. Exit Taxation Rule

- An exit tax liability shall in principle arise over unrealised gains upon the transfer of assets between a permanent establishment (PE) and its head office, the transfer of tax residence of a company or entity or the transfer of activities of a PE, towards an EU member state or third country, to the extent that Greece essentially loses its right to tax the assets/taxpayers involved thereafter.
- A taxpayer shall be subject to corporate income tax on the amount of such gains calculated as per the market value of the transferred assets, as at the time of exit, less their value for tax

purposes. The tax rate to be applied shall be the one applicable to business profits as at the FY of the exit.

- A relevant exit tax return shall be filed three days in advance of the transfer; exit tax shall become due and payable on the basis of the exit tax return.
- A deferral option is granted to taxpayers involved in the transfer towards EU or EEA member states; the deferral shall entail the payment of the amount over five interest-free instalments. The first instalment needs to be paid at the time of filing of the exit tax return.
- Greek tax authorities are allowed to request for a guarantee as a condition for deferring the payment, in cases of demonstrable and actual risk of non-recovery, and to revoke the deferral under certain circumstances.
- In a reverse scenario, where Greece assumes the position of the recipient state, it shall be obliged to accept a step-up of the value of transferred assets to the value established by the member state of origin of the taxpayer or the PE, unless this does not reflect the market value.
- The market value shall be determined by auditors or independent certified valuers, or by reference to the book value of the taxpayer, or by reference to transfer pricing principles.
- The rules shall apply to any transfer realised from 01 January 2020 onwards.

II. Hybrid Mismatches Rules (Art. 66 B ITC)

- The rule provides for Greece's obligation to disallow a deduction, include income or limit a tax relief, in order to address situations of:
 - mismatches arising from conflict in the characterisation of financial instruments, payments and entities, or from the allocation of payments; and
 - hybrid transfers, imported mismatches and other cases of mismatches with double deduction outcomes, including cases involving dual tax residency.
- In implementing this article, tax authorities are required to use the applicable explanations and examples in the OECD BEPS report on Action 2 to the extent that they are consistent with the provisions of the directive and EU law.
- Greece may not abstain from taxing income in certain mismatches resulting in a deduction/non-inclusion, i.e. in cases of payments to a reverse hybrid, to entities of one or more PEs, to disregarded PEs and to deemed payments between head office and a PE.
- Greece opted for the exclusion of certain financial instruments from the application of anti-hybrid rules until 31 December 2022.
- The anti-hybrid rules shall apply from 01 January 2020.

Advance Pricing Arrangements; Roll back effect & other amendments

Greece introduced amendments to the legislative framework provided for advance pricing arrangement ("APA") programs, in order to, *inter alia*, meet the BEPS Action 14 Minimum Standard concerning the prevention of disputes. Following the relevant recommendation set out in the MAP Peer Review Report (Stage 1), Greece now provides for the roll-back of bilateral or multilateral APAs in cases where the relevant facts and circumstances in the earlier fiscal years are the same. Taxpayers filing for an APA may submit a relevant roll-back request, provided that the earlier fiscal years have not been time-barred and that there is no tax audit mandate communicated to the taxpayer with respect to the relevant fiscal years.

- As set out by the legislature, the roll-back request shall not impair the tax auditors from performing a tax audit on such fiscal years, and the APA may not be rolled-back to the extent that a final assessment is issued in this respect.
- Taxpayers having filed bilateral or multilateral APA requests may also qualify for the roll-back under said conditions.

On another note, it is now clearly stated that the filing of amending tax returns pursuant to an APA decision shall not entail late payment interest and penalties, to the extent that these are filed within a deadline of thirty (30) days starting from the date of notification of the APA decision to the taxpayer. This clarification is welcomed by the stakeholders, who may qualify for an exemption from late payment interest and penalties even in cases where relevant amending tax returns have already been filed prior to the enactment of the new tax law.

Finally, the new law explicitly provides for an indicative 18-month deadline for the issuance of a unilateral APA decision; this amendment reflects the stance already assumed by the Greek tax authorities, that in terms of bilateral or multilateral APAs, such timeframe was not applicable.

Greece transposes the EU Tax Dispute Resolution Directive

By virtue of the new tax law ratified a few days ago, Greece transposed the EU Tax Dispute Resolution Directive. The new rules move beyond transfer pricing to cover all cases of cross-border tax disputes between Greece and other EU member states arising out of the interpretation and application of Double Taxation Conventions (“DTCs”). The provisions are also applicable to individuals.

III. Settlement procedure in a nutshell

As a first step, the taxpayer facing tax disputes that arise from the application of a DTC submits a complaint to the tax authorities of the EU countries concerned.

Should the complaint be accepted by one of the tax authorities, a mutual agreement procedure (“MAP”) is initiated by the two Member States which must try to resolve the dispute amicably within **two years**.

If no solution has been found at the end of this two-year period, the taxpayer can request the setting up of an Advisory Commission to deliver an opinion according to the following procedure:

- The Advisory Commission is set up no later than **120 days** after receipt of the taxpayer's application; if the above deadline expires, the taxpayer has the right to appeal under national law.
- The Advisory Commission must adopt a decision on the admissibility and acceptance of the complaint, within **6 months** of the complaint's rejection, which is binding for the tax authorities.
- The tax authorities of both member states concerned may agree to set up an Alternative Dispute Resolution Commission instead of an Advisory Commission.
- The tax authorities of both member states must reach a final agreement within **6 months** from the notification of the opinion of the Advisory Committee or the Alternative Dispute Resolution Committee.

- The final decision is **binding** on the tax authorities of both Member States and **enforceable** if (a) it is accepted by the taxpayer and (b) the taxpayer renounces its right to domestic remedies or remedies already exercised.

The filing of an appeal before the competent Greek Administrative Court concerning the disputed matter does not preclude the filing of the complaint under the abovementioned procedure. However, the dispute resolution procedure shall end in case an irrevocable national court decision of any of the member states concerned is issued.

The new framework in principle applies to complaints submitted following publication of the law in the Government Gazette, relating to tax disputes concerning years starting on or after 01 January 2018.

A Decision by the Governor of the Independent Authority for Public Revenue shall determine the implementation of the above procedure and any other relevant matter.

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