

GREECE:

Application of Double Taxation Treaties in Settlement of Tax Disputes

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INTRODUCTION

On 10 April 1985 the Ministry of Finance adopted a new procedure (the so-called "Tax-Refund System") for the application of bilateral inter-governmental treaties (hereafter Treaties) for the avoidance of double income taxation and the prevention of fiscal evasion. To date, Greece has concluded 14 such Treaties (see box).

This article describes the new procedure and highlights certain legal and practical points. Additionally, it examines another procedure, provided expressly by the Treaties, for the settlement of tax disputes arising from their application (the so-called "Mutual Agreement Procedure").

TAX-REFUND SYSTEM

I. The new procedure

The new procedure was established by Ministry of Finance Regulation No. E 7911/120/Pol. 79/10.4.1985 (hereafter the Regulation) after mutual agreement with the countries that have concluded double taxation treaties with Greece. (See Bulletin of Tax Legislation, hereafter BTL, No. 841/1985, p. 460.)

At the outset, it should be emphasized that this procedure does not mean that the existing Treaties are no longer applicable, but rather aims (as its stated objective) at the "correct application" of these Treaties through a three-step process, which, in summary, is as follows:

1. In any case that a foreign person (physical or legal), resident of a contracting country, earns income from Greek sources, this income shall "always at first stage" be taxed according to the internal, i.e. domestic, legislation. An exception to this rule is made by the Regulation for interest, for which the provisions of the relevant Treaty are still directly applicable. Two more such exceptions were later determined by the

Ministry of Finance in its Regulation of No. E 1947/107/Pol. 177/29.5.1986. These additional exceptions are as follows:

(a) In the case of Greek publishing houses, when they use photographs or slides of exhibits of various foreign museums, libraries or other cultural institutions (based in a contracting country) for the illustration of their scientific publications and pay certain fees (rights/royalties) thereof, then with respect to the income tax (if any) on said fees, the relevant Treaty shall be "directly applicable" provided that it is established that said institutions are tax residents of a contracting country.

In this respect, along with the relevant tax declaration, a tax certificate (as described in para. 2(a) below) must be submitted to the competent Greek tax authority. In the case of situations involving the United Kingdom and Cyprus, said certificate shall additionally state that the above institutions are subject to income tax for the whole amount of said fees or that they are subject to tax only for the sum remitted to said countries. Further, a copy of the invoice issued by said institutions must be also submitted.

(b) The relevant Treaty is also "directly applicable" when Greek public (civil) services or public enterprises pay fees to foreign public services of contracting countries "for the supply of technical assistance in general". In this respect, along with the relevant tax declaration, a copy of the contract signed between said parties thereto must be submitted to the competent Greek tax authority (see also para. 2(c) below).

2. In turn, the foreign beneficiary (hereafter called the Claimant) is entitled, of course, to claim the application of the favorable provisions of the relevant Treaty (which under certain conditions, i.e. primarily when the Claimant maintains no permanent establishment, provide for reduced tax rates or a tax exemption altogether). To this end, the Claimant may submit to the

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Ministry of Finance (Income Tax Division, Section D) in Athens a duly certified claim (petition) requesting said application of the Treaty. The claim must be accompanied by the following documents:

- (a) a certification by the competent (according to the respective Treaty) tax authority of the relevant country, stating that the Claimant was, on the due dates, a tax resident of that country within the meaning of the Treaty;
- (b) a declaration by the Claimant stating that it is the beneficial (true) owner of the said income. For this purpose a printed form has been prepared by the Ministry of Finance covering both (a) and (b) above, as well as requiring certain other information;
- (c) in case there is a contract (or other agreement) signed between the Greek and foreign company, then this contract, duly translated and certified, must also be submitted; and
- (d) a certificate from the Greek company (paying the income) stating the amount and nature of the income, the tax withheld and paid over to the public treasury, and the name and location of the tax authority to which the relevant tax declaration has been submitted. This tax declaration, along with the tax-payment receipt, should be attached to the certificate. In case of payment of dividends by the Greek company, the above certificate should also state the nature and number of the shares.

3. Thereupon, the Ministry of Finance inspects *prima facie* the above documents and in turn transmits them to the competent tax authority, which then examines whether the factual circumstances of the particular case, in combination with the above documents, justify the application of the beneficial provisions of the respective Treaty. If so, then the tax withheld, over and above the tax (if any) applicable pursuant to the relevant provisions of the Treaty, shall be refunded to the Claimant.

II. Legal points

1. The Regulation stipulates specifically that the said application of the internal tax laws is "provisional" until it is established, as explained above, that the beneficial provisions of the relevant Treaty are applicable to the particular case, i.e. cases where, in the end, the Treaty shall apply. This is dictated by the constitutional principle of supremacy of international agreements over opposite internal laws. In particular, Art. 28, para. 1 of the Constitution of 1975 provides that international agreements, after having been ratified by law and becoming effective, constitute an integral part of the domestic Greek law and take precedence over any opposite provision of a law (prior or subsequent), provided, however, that the other country observes the "condition of reciprocity".

In addition, Art. 6, para. 3(c) of L.D. 3843/1958 provides that income, exempt from income tax by virtue of an agreement ratified by law, is exempt from such tax (see also Art. 15, para. 3 of L.D. 1077/1971).

2. Pursuant to the above, in the case of a Treaty, the term "permanent establishment" is, *inter alia*, interpreted according to the relevant definition contained in the Treaty, e.g. in Art. II, para. 1(i) of the Greek-American Treaty, and not according to Art. 5, para. 1 of L.D. 3843/1958, which defines "permanent establishment" for domestic law purposes (Ministry of Finance Regulation No. A 437/1961). Such different interpretation of the term permanent establishment has been upheld by the following decisions of the Council of the State (C.S.): 647/1983, 1331-2/1980 and 1314-5/1980.

It also should be pointed out that the definition of permanent establishment in the Treaties contains, *inter alia*, the following standard provision:

The fact that a company which is a resident of one of the States controls or is controlled by a company which is a resident of the other State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

Such a provision can be found, for example, in Art. 5 para. 7 of the Greek-Dutch Treaty; C.S. decisions 987-8/1985 and 647/1983.'

3. The above claim must not be filed later than 31 December of the third year following the year in which the said tax has been paid (see Arts. 91 and 93 of L.D. 321/1969).

III. Practical comments

1. According to the Regulation, banks are directed to: (i) request the documents proving the payment of the corresponding tax before remitting the income in foreign currency abroad (see para. I, 2(d) above); and (ii) remit, in all cases, to the Claimant "the difference between the income to which it is entitled and the tax withheld".

2. It is advisable that the tax declaration (mentioned in para. I, 2(d) above) be submitted by the Greek company with an express reservation of the Claimant's rights under the respective Treaty, as per Art. 5 of L.D. 3629/1956 in combination with Art. 39 of Law L. 1473/1984 (see also BTL No. 856/1985, p. 1169).

3. In case the payment of income is effected several times per year, then the refund may be obtained by submitting a single claim for the whole amount of payments of that year.

4. It should be pointed out that the refund shall be made in the name of the Claimant, and not in the name of the Greek company which has withheld (and paid over to the Treasury) the tax.

5. Lastly, since the refund, when made, will be in

1. For an official English translation of the Greece-Netherlands Tax Treaty, see *Supplementary Service w European Taxation*, Sec. C.

drachmae, the matter of the foreign exchange risk should be borne in mind, i.e. the exchange fluctuations that may take place between the date of the tax withholding and the date of the tax refund.

MUTUAL AGREEMENT PROCEDURE

I. A typical "Mutual Agreement Procedure" clause, included in many recent Treaties concluded by Greece provides as follows:

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under para. 1 of Art. 23 (the "non-discriminatory treatment" article-editor), to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.
2. The competent authority shall endeavor, if the objection appears to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view toward the avoidance of taxation not in accordance with the Convention.
3. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.
4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a Commission consisting of representatives of the competent authorities of the Contracting States.

(See Article 24 of the Greek-Swiss Treaty).-

II. With the exception of the Treaty with the United Kingdom, similar clauses are included in every other Treaty³. Needless to say, in every case the particular requirements and provisions of each such clause should be consulted.

III. According to Ministry of Finance Regulation No. N 8390/3/80/Pol. 62/23.3.1981 (which adopted the opinion of the Legal Council of the State (en bane) No. 507/1980), the Claimant has recourse in both (i)

the legal remedies available in the domestic legislation of the contracting countries, and (ii) the "Mutual Agreement Procedure" provided for in the respective Treaty. The "agreement" reached in cases where there is a treaty, takes precedence over any contrary provision of domestic law, and even over any contrary judicial decision, by virtue of the constitutional principle of supremacy of the treaty provisions (as explained in para. II, 1 above). Of course, this applies always on the condition of reciprocity.

In the event that income taxes are imposed on the Claimant by a tax authority or court decision and, upon the Claimant's relevant request, the competent authorities of the contracting countries determine that the imposition of said tax was not justified according to the respective Treaty, then the "decision" of the said authorities is enforceable and as a result the tax imposed shall be cancelled or, if it has already been paid, shall be refunded. As to the claim for refund, it should be noted that it is subject to the relevant time bar according to domestic law (see para. II, 3 above), with the clarification that this time bar commences not from the payment of the said taxes but from the date of issuance of the above "decisions" of the said authorities (see C.S. decisions: 118/1977, 3677/1976, and 964-1027/1975).

Double taxation treaties

Greece has concluded double taxation treaties with the following countries (in chronological order):

1. United States of America (L.D. 2548/1953)
2. United Kingdom (L.D. 2732/1953)
3. Sweden (L. 4300/1963)
4. France (L.D. 4386/1964)
5. India (L.D. 4580/1966)
6. Italy (L. 23/1967)
7. Federal Republic of Germany (L. 52/1967)
8. Cyprus (L. 573/1968)
9. Belgium (L.D. 117/1969)
10. Austria (L.D. 994/1971)
11. Finland (L. 1191/1981)
12. Netherlands (L. 1455/1984)
13. Hungary (L. 1496/1984)
14. Switzerland (L. 1502/1984)

2. For an official English translation of the Greece-Switzerland Tax Treaty, see Supplementary Service to European Taxation, Sec. C.

3. Said clauses can be found in the following treaty articles: Art. 17 of the Greek-American Treaty; Art. 25 of the Greek-Austrian, Greek-Finnish and Greek-Belgian Treaties; Art. 26 of the Greek-French and Greek-Hungarian Treaties; Art. 27 of the Greek-Dutch Treaty; Art. 20 of the Greek-German Treaty; Art. 24 of the Greek-Italian Treaty; Art. 19 of the Greek-Indian Treaty; Art. 23 of the Greek-Cypriot Treaty and Art. 28 of the Greek-Swedish Treaty.