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TAX BRIEFING: Monthly Insight

Recent Developments in Tax Legislation

Law 4441/2016 clarifies the framework for State Aid which aims to increase investment in the private sector and Ministerial Circular POL 1181/2016 provides clarifications on the tax treatment of hybrid profit participating loans and the abuse of the Parent-Subsidiary Directive.

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A. Clarifications on the Incentives Framework for Private Investments in Greece

Law 4441/2016 (Government Gazette Issue no A' 227/ 06.12.2016) amending Law 4399/2016 (Government Gazette Issue no A' 117/ 22.06.2016) on tax incentives for private investment in Greece, provided clarifications on eligible expenses and the types and amount of State Aid. The new provisions include the following:

1. forestry and logging as well as land and pipeline transport are excluded from State Aid schemes;
2. the job creation cost subsidy is granted separately and not in conjunction with other forms of State Aid and is provided to cover only the wage cost of new jobs within the framework of regional aids;
3. the aid for start-up expenses is doubled only in the case of the establishment of innovative Small and Medium Enterprises (SMEs); and
4. the aid for machinery and equipment includes expenses for the modernisation of special infrastructure.

If the decision on the completion of the investment plan and the initiation of production has been published in the Government Gazette before 22 June 2016, the relevant State Aid applications are not subject to the provisions regarding the payment of the grant in installments.

B. Hybrid Profit Participating Loans and Abuse of the Parent-Subsidiary Directive

Ministerial Circular POL 1181/2016 provided clarifications on the tax treatment of hybrid profit participating loans

and the abuse of the Parent-Subsidiary Directive, in particular:

1. In order to avoid situations of double non-taxation resulting from mismatches in the tax treatment of profit distributions between Member States, the amended Income Tax Code provides that intra-group dividends received by Greek parent legal entities are not tax exempt to the extent that such profits are deductible by the subsidiary.

   This restriction determines the tax treatment of profit participating loans (PPLs) between affiliated legal entities located in different Member States, whereby the parent entity contributes to its subsidiary capital instead of granting a loan (for example, by being the bondholder of a bond loan convertible into shares issued by the subsidiary). The hybrid mismatch problem occurs if the PPL is treated as equity in the country of the parent entity at the same time as debt in the country of its subsidiary. In order to avoid double non-taxation, the interest paid to the parent entity (payee) by the subsidiary (payer) on the basis of the PPL may not be tax exempt in the state of the parent entity to the extent that the amount of interest is deductible by the subsidiary.

   The characterisation of a financial instrument as a PPL by the Member State of the entity making the payment is taken into account and is applicable to the categorisation of the financial instrument by the Greek tax authorities.

2. As a means of tackling aggressive tax planning and the abuse of the Parent-Subsidiary Directive, Law 4378/2016 introduced a general anti-abuse rule in Article 72 of the Income Tax Code. This provides that the benefits of tax exemptions for dividends paid by Greek legal entities to their EU parent entities, or received by Greek legal entities from their EU subsidiaries, are not granted to the extent that these are arrangements put into place solely to obtain an advantage that is not justified by solid business reasoning reflecting the economic reality. For example, in cases where:

   a. a Greek Parent company transfers to an EU subsidiary its shares in another non-EU subsidiary (the third country having entered into double tax treaties with both Member States);

   b. the withholding tax on dividends paid by the non-EU subsidiary to the EU subsidiary is lower than the withholding tax on dividends paid to the Greek parent company; and

   c. there is a share buyback clause,

   the Greek tax authorities may consider that the transfer of shares is not genuine, irrespective of whether the consideration is at arm's length.

   Similarly, when a post box company established in a third country transfers to an EU subsidiary the total amount of the shares of a Greek subsidiary (the third country having entered into double tax treaties with both Member States), the Greek tax authorities may consider that the transfer of shares is not genuine if the Greek withholding tax on dividends paid by the Greek subsidiary to the post box company is higher than the tax paid on the basis of the double tax treaty between the third country and the other Member State.

This Briefing is intended to provide general information and is not meant to constitute a comprehensive analysis of the matters set out herein or to be relied upon as legal advice. It is not meant to create a lawyer-client relationship. Legal and other professional advice should be sought before applying any of the information in this Briefing to a specific situation.