



MERGERS AND ACQUISITIONS

Greece

Taxation of Cross-Border
Mergers and Acquisitions

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TAX

Greece

Introduction

Greek legislation provides a number of tax incentives for mergers and acquisitions (M&A) of business entities for the purpose of creating larger and more efficient entities. With respect to cross-border mergers and acquisitions, Greece has enacted Law 2578/1998 (amended by Law 3517/2006) that implemented the European Union (EU) Merger Tax Directive (Directive 90/434/EU as amended by Directive 2005/19). However, due to the lack of a company law framework for cross-border mergers until the end of July 2009, the relevant provisions of L. 2578/1998 were not practically applicable apart from those relating to the exchange of shares, the transfer of assets and the cross-border merger for the formation of a European company.

On 28 July 2009 law 3777/2009 cross-border mergers of companies was enacted, implementing the provisions of EU Directive 2005/56 of 26 October 2005 in relation to cross-border mergers of companies of different Member States, with the purpose of expanding the scope for EU enterprises to restructure within the EU market.

This chapter addresses three fundamental decisions which face a prospective purchaser.

- What should be acquired: the target's shares, or its assets?
- What will be the acquisition vehicle?
- How should the acquisition vehicle be financed?

Taxation is a major factor for selecting the structure of the transaction. Company law and accounting issues are also highly significant. These areas are outside the scope of this chapter, but some of the key points that arise when planning the steps in a transaction plan are summarized later in the chapter.

Recent Developments

New Company Law Framework for Cross-Border Mergers

The provisions of law 3777/2009 mentioned above apply to mergers of one or more Greek companies with one or more companies established according to the law of another EU Member State and having their registered

addresses within the European Union, or when the company resulting from the cross-border merger has its registered address in Greece. However, this law does not apply to cross-border mergers involving UCITS (that is, companies which raise investment of capital from the public for the purpose of spreading investment risk and whose unit parts are redeemable by participants on demand, directly or indirectly through the company's assets).

The following type of companies can benefit from the provisions of the new law: societies anonymes (AEs), limited liability companies (EPEs), partnerships limited by shares, European companies (SE, whose registered addresses are in Greece, and joint stock companies with legal personalities that possess separate assets, that cover any of the company's liabilities and which are, according to national legislation, subject to warranty conditions, such as those provided in the EU Directive 68/151/EU regarding the protection of the shareholders' and third parties' interests. Cross-border mergers of companies with different legal forms that fall under the scope of the directive are also permitted (such as a Greek AE with a German GmbH).

This law applies to mergers by absorption, mergers with the formation of a new company, and absorption by a company that holds all the securities/shares of the absorbed company.

New Provisions for Transfer Pricing Documentation

Two new laws have been introduced in Greece for auditing transfer pricing in intercompany transactions. The first law (Law 3728/2008) was introduced by the Ministry of Development and applies to companies whose financial periods end after the day the law was published in the Government Gazette (18 December 2008).

The second law (Law 3775/2009), which was introduced by the Ministry of Finance, amends the Greek Income Tax Code and applies to companies whose income or expenses arise during financial years for which the obligation to file an income tax return arises as of 1 January 2011 and onwards.

More details on the above-mentioned laws are provided below under the heading Other Considerations.

Thin-Capitalization

Further to a recent amendment of the Greek Income Tax Law the accrued interest on loans or credits paid or credited to related enterprises can be deducted, on the condition that the relation of these loans or credits to the net assets of the enterprise does not exceed the ratio of three-to-one on average per fiscal year. Accrued interest on loans and credits exceeding this ratio are not deductible.

These new provisions apply to loan agreements or credits concluded from and after the publication of the law in the Government Gazette (21 July 2009). More details are provided under the heading Deductibility of Interest.

Asset Purchase or Share Purchase

A foreign company may acquire a Greek company either by purchasing the majority or the total number of its shares (parts, in case of limited liability companies) or by purchasing the company's business assets and liabilities. These two methods for cross-border acquisition have different tax consequences.

Whether a transfer of assets constitutes, for tax purposes, a transfer of individual assets or a transfer of a business is a question of fact. One has to take into consideration not only the related legal documents, but also the facts surrounding the business activity to be transferred. Certain criteria may be used to reach a conclusion, such as whether the transferred segment can be fully and independently operational after the transfer, whether the specific segment constitutes an independent segment from a functional and management point of view, whether such independence was supported by separate accounting, whether the transferred activity can be carried out by the purchaser, whether the transferee continues the activity of the transferor, whether the transferor ceases the business activity constituting the subject matter of the transferred business, etc.

An acquisition of assets by an EU-based, non-Greek acquirer may be eligible for exemption from taxation of capital gains realized by the seller, provided the provisions of Law 2578/1998, as amended by Law 3517/2006, which incorporated in Greek tax legislation the provisions of EU Directive 90/434 as amended by Directive 2005/19 (the EU Merger Directive), are applicable.

Purchase of Assets

The purchase of assets offers the buyer the option to buy only those assets that are useful to its business activity. If the Greek vendor realizes a gain from the sale of assets, it will be taxable in the hands of the Greek company as part of its ordinary business income at the normal corporate tax rate. The taxable gain is the difference between the sale price and the net book value of the asset. The purchasing company will have to pay real estate transfer tax at a rate ranging from 7 percent to 11 percent (plus a local authority surcharge of 3 percent), when real estate is transferred, subject to the comments under the heading Transfer Taxes.

Purchase Price

The purchase price for the sale of individual assets is considered to be the price stipulated in the sale agreement (provided the nature of the transactions is not challenged; not deemed to be a transfer of business) and in any case, the agreed transfer value of assets should be at arm's length. For real estate property the transfer value for income and real estate tax purposes must be at least equal to the objective value defined according to specific formulae. If there are shares among the assets the taxable consideration cannot be lower than the deemed consideration calculated by applying a specific formula.

For income tax purposes the purchase price for the sale of assets qualifying as a transfer of a business will be the higher of the contractual and deemed prices. The deemed selling price is calculated by a formula stipulated by the Ministry of Finance. Again, any consideration should be set at arm's length.

Goodwill

Any capital gain arising for the seller of individual assets is added to the taxable basis of the year in which the sale took place and is subject to taxation at the applicable corporate income tax rate.

No goodwill arises for a Greek tax resident/purchaser of the individual assets upon acquisition of the individual assets, since such assets are booked at their cost of acquisition.

In the case of a transfer (sale) of a business (that is, not of individual assets), capital gains tax at the rate of 20 percent is due on the higher of the contractual and imputed gains. The contractual gain represents the goodwill of the transferred business and is equal to the difference between the agreed price and the net asset value of the business transferred.

Any goodwill arising for a Greek tax resident/purchaser of a business segment will be, in principle, allowed for income tax deduction according to its amortization schedule.

Depreciation

Annual depreciation of fixed assets is compulsory at rates or ranges of rates prescribed by law. Fixed assets of the same category can be treated at a chosen rate, provided that rate is used consistently. If a business in any accounting period does not apply depreciation at the allowable rate, it waives its right to deduct the corresponding amount in the future.

Assets whose cost of acquisition is up to EUR 1,200 may be expensed in the year they were used or first put into operation. Depreciation is taken on a straight-line basis on the acquisition cost of the asset, plus any expenses incurred for improvement or extensions. New machinery and technical production equipment acquired after 1 January 1998 by industrial, handicraft, and mining and quarrying businesses may be depreciated by using either the straight-line method or the declining-balance method. The rates for the declining-balance method are three times the rates prescribed for the straight-line method.

If, in an accounting year, the net-book value of an asset after depreciation is less than 10 percent of the acquisition cost the asset can be fully depreciated in that accounting year.

Depreciation on fixed assets purchased from companies located in countries deemed to be tax havens or offshore locations (referred to herein as offshore companies) is not recognized for deduction.

Research and development (R&D) expenses are fully deductible in the year they are incurred or in equal installments over three years if these expenses relate to tangible assets. When R&D expenses exceed, during an accounting year, the average amount of such expenses incurred during the previous two accounting years, an additional amount equal to 50 percent of the expense incurred during the current accounting year is tax deductible from the net profits. For the latter to apply, the Ministry of Development should certify that the R&D expenses were incurred in a document stipulating the nature of the relevant expenses and when they were incurred.

Tax Attributes

Accumulated tax losses remain with the legal entity in which they arose and are not transferred as part of the

transferred assets (irrespective of whether the transfer qualifies as a transfer of individual assets or a transfer of business).

Value-Added Tax (VAT)

The transfer of individual assets will be subject to Greek VAT at the rate of 19 percent. No VAT applies in the case of a transfer of assets that qualifies as a transfer of a business.

Greek VAT law provides that VAT incurred on the acquisition of capital/investment goods, as defined by the law (including the construction of buildings), can be fully offset in the month of acquisition, on condition that the asset remains in the ownership of the company for five years (beginning from the year the good was first used) and the company is engaged in activities subject to VAT. Furthermore, if the amount of respective input VAT cannot be fully offset against the company's output VAT in the month of the asset's acquisition, it will be refunded by the Greek tax authorities according to a procedure specified by the Ministry of Finance.

However, if an asset is disposed of before the end of the five-year period to an activity not subject to VAT, or ceases to be used by the company, any VAT balance corresponding to the remaining years of the five-year period must be remitted to the Greek tax authorities when filing of the annual VAT return of the year in which the disposal was effected. Alternatively, if an asset is sold before the end of the five-year period, the VAT charged on the sale must be at least equal to the VAT corresponding to the remaining years of the five-year period. If this is not the case, any balance due must be settled on the annual (final) VAT return of the year in which the sale was effected.

If an asset is transferred as part of a business segment, obligations in respect of any VAT remaining under the five-year settlement procedure pass to the acquirer of the business segment.

Transfer Taxes

If the transfer of assets qualifies as transfer of business, 2.4-percent stamp duty is imposed on the higher of the net asset value of the business and the selling price. The cost of stamp duty may be borne either by the seller or the purchaser depending on the agreement between the contracting parties. In the absence of such an agreement, the stamp duty is borne by the purchaser.

Real estate transfer tax is levied on the acquisition value of real estate. The tax is computed on the contract price

or the objective value, whichever is higher. The objective value system covers real estate situated in almost every part of Greece and has been adopted to reduce disputes between the tax authorities and the taxpayer on the taxable value of real estate. When there is no objective value, the value is determined by the tax authorities. Real estate transfer tax rates are 7 percent for the first EUR 15,000 and 9 percent thereafter. The tax is increased to 9 percent and 11 percent respectively for real estate located in areas where there is a fire station. A local authority surcharge, equal to 3 percent of the transfer tax, is also levied. Under certain circumstances (purchases of certain agricultural land and primary residences), full or partial exemption from this tax may be obtained. Mergers of real estate companies are exempt from the real estate transfer tax, provided the absorbing real estate company possesses all the shares of the absorbed company.

Law 3427/05 effective from 1 January 2006, replaced real estate transfer tax with VAT and real estate transaction duty. VAT is imposed on the transfer of new buildings (construction licenses issued or revised after 1 January 2006) at the rate of 19 percent, on condition that they are used for the first time. Following this first transfer, every subsequent transfer will be subject to real estate transaction duty. Transfers of old buildings (construction license was issued up to 31 December 2005) and land are not subject to VAT, and real estate transfer tax is only levied on the first transfer of such real estate as of 1 January 2006. Following this first transfer, each subsequent transfer will be subject to real estate transaction duty, which is calculated at the rate of 1 percent of the value of the real estate being transferred and is borne by the buyer.

Purchase of Shares

The sale of shares of Greek corporations not listed on the Athens Stock Exchange is subject to a 5-percent tax levied on the contractual price or the minimum sale price, whichever is higher (the latter being calculated according to a decision by the Ministry of Finance). This tax is borne by the seller of the shares and applies unless a double taxation treaty provides otherwise. For fiscal year 2007 and onward gains realized from the sale of shares not listed on the Athens Stock Exchange received by corporations, limited liability companies and branches of foreign companies are subject to the general income tax provisions with the right to offset the 5-percent tax paid on the transaction.

On the other hand, the sale of shares listed on the Athens Stock Exchange and acquired up to and

including 31 December 2009 is subject to 0.15-percent transfer duty, also borne by the seller.

Gains by individuals or entities of any legal form on the sale of shares listed on the Athens Stock Exchange or foreign stock markets that were acquired from 1 January 2010 onward are subject to tax at 10 percent.

Businesses that maintain double-entry accounting books are required to post the above profits to a special reserve account (different from the special reserve account for profits from the sale of listed shares acquired up to and including 31 December 2009), which will be taxed at the current tax rate on distribution or capitalization. A tax credit is granted for the 10-percent tax withheld at the time the profits were realized. Losses incurred in the same financial year cannot be offset against profits. Losses incurred from the sale of listed shares in each financial year may be offset against the tax free reserve deriving from profits from the sale of listed shares acquired up to and including 31 December 2008. If this is not adequate losses may be offset against the tax free reserve deriving from profits from the sale of listed shares acquired after 1 January 2010.

The acquisition of parts in a Greek limited liability company or partnership is subject to a capital gains tax at the rate of 20 percent imposed on the contractual gain or the deemed gain (calculated by a Ministry of Finance formula), whichever is higher. In addition, the acquisition of a part and the subsequent participation of a foreign entity in a Greek limited liability company or partnership constitutes a permanent establishment (PE), unless a double taxation treaty provides otherwise. The 20-percent tax operates as an advance tax (offsettable against the annual corporate income tax liability), if the seller is a company (AE or EPE) operating in Greece or a Greek branch.

Tax Indemnities and Warranties

In a restructuring by means of a share acquisition, the purchaser assumes the target company's liabilities and it is common practice for special warranty clauses to be included in the sale of shares agreement, by which the seller guarantees usually up to a certain amount any liabilities or taxes that may arise after the acquisition relating to years before the acquisition.

It is also customary for the purchaser to initiate a due diligence exercise, including a review of the target company's tax affairs before conclusion of the transaction.

Tax Losses

Tax losses of companies and branches of foreign companies that maintain double-entry accounting books and of entities maintaining income and expense books may be carried forward and offset against taxable income in the five years following the accounting year in which they were incurred. Losses cannot be carried back. Greek companies with business interests (branches) abroad may offset losses incurred by their foreign interest solely from profits arising from a similar business interest abroad, and not from profits arising from their business activity in Greece.

The concept of group tax relief does not exist in Greece. Companies cannot transfer losses to other companies in the same group.

Crystallization of Tax Charges

The purchaser should be aware of all liabilities transferred to the target company, such as special reserve accounts that were created to capture the benefits of incentive laws on previous restructurings/acquisitions and may be subject to taxation on their distribution by the target company. The purchaser should also be aware that the tax liability for a particular financial year is crystallized at the time of its tax audit. It is, therefore, common practice to arrange a tax audit immediately following the change of ownership.

Pre-Sale Dividend

The pre-sale dividend may be taken through an increase in the consideration or through the payment of an interim dividend prior to the sale. Dividends distributed by Greek corporations to Greek or foreign individuals or legal entities, as well as dividends distributed by foreign entities to individuals who are residents of Greece, are subject to a withholding tax (WHT) of 10 percent which is the final tax liability of the beneficiaries of that income. This tax applies to dividend distributions decided by general meetings of shareholders held from 1 January, 2009 onwards. No tax is withheld when the beneficiary of dividends is a parent company established in another EU country provided the latter is eligible for exemption on the basis of the provisions of the EU Parent-Subsidiary Directive.

On the above basis, the decision on whether a pre-sale dividend should be distributed or not, should be based on the tax liability arising from the expected share transfer profit if there is no distribution compared with the tax liability arising from the distribution of the dividend.

Stamp Duty

No stamp duty applies to the sale of shares.

Choice of Acquisition Vehicle

There are several vehicles options for acquiring either assets or shares in Greece. The choice will depend on the transfer tax and exemptions, the cost of maintaining the acquisition vehicle, corporate income tax issues, and potential exit planning issues. The funding structure is also important, because interest on debt is normally deductible for income tax purposes.

Local Holding Company

Each type of legal entity has certain legal characteristics, as well as specific taxation pros and cons, so the choice will depend on tax, economic, and legal factors. Greek entities are generally classified as follows.

Corporation (Societe Anonyme/Anonimi Etaireia)

- Company law governs the formation
- Qualifying majority for certain decisions
- Shareholders not responsible for the liabilities of the company
- Earnings are taxed at corporate level at 25 percent, to be progressively reduced to 20 percent by 2014
- 10-percent withholding tax (WHT) on dividends approved by general meetings as of 1 January 2009

Limited Liability Company (Etaireia Periorismenis Efthinis)

- Company law governs the formation
- Qualifying majority for certain decisions
- Partners are not liable for the company's obligations
- Earnings are taxed at the corporate level at the rate mentioned above for corporations
- No WHT on distribution of profits

General/Limited Partnership (Omorythmi/Eterorythmi Etaireia)

- Commercial and civil law govern the formation
- General partners are responsible for the liabilities of the partnership; liability of the limited liability partners in limited partnerships confined to the capital they have contributed

- Up to three individual partners, with the largest having up to 50 percent of his/her share of the profits taxed at personal tax rate, which sum is deducted from the entity's profits in arriving at taxable profits taxed at 20 percent

European Company (SE)

- EU legislation (Regulation 2157/2001 and EU directive 2001/86) and local legislation (Law 3412/2005, Presidential Decree 91/2006 and company law) govern the formation and management
- Taxation as Greek corporations

A Greek holding company does not provide any particular benefit for the acquirer of shares in a Greek entity, because no deduction will be available for the debt costs incurred for the acquisition of shares or partnership units. Furthermore, any tax losses of the acquired entity cannot be used by the Greek holding entity, even if the two companies are eventually merged.

Other disadvantages include:

- profits distributed by Greek AE entities to Greek resident parent entities are subject to 10-percent dividend WHT;
- capital concentration tax of 1 percent applies on the nominal share capital of the holding entity;
- any interest for funding the acquisition cannot be used for income tax purposes, because the company will have revenues derived from shareholding (dividends) that are exempt from income tax; and
- share transfer tax of 5 percent applies to the sale value of non-listed shares, capital gains tax of 20 percent applies to capital gains arising from the sale of partnership units, and if capital losses are incurred, they cannot be offset against current year's income tax liability, or refunded.

Foreign Parent Company

A foreign entity may decide to acquire directly the shares or partnership units in a Greek entity to benefit from a deduction in its jurisdiction of debt costs incurred for the acquisition of the participation in Greece. No tax registration in Greece is required merely for purchasing shares, and on sales of shares by non-Greek residents no registration is required, provided the sale is exempt from taxation in Greece in accordance with the

provisions of an applicable double tax treaty. A tax registration of the foreign entity is required for the purchase of partnership units.

Under most of the double tax treaties Greece has entered into to avoid of double taxation, capital gains from the sale of shares and/or partnership units are exempt from Greek income tax.

Since no tax groupings apply in Greece, a foreign entity may decide to acquire an entity directly to benefit from a potential tax grouping relief provided in its country of residence and covering foreign subsidiaries.

No dividend income tax withholding is imposed on profits distributed by Greek AE entities to EU-based affiliates qualifying for the application of the EU Parent/Subsidiary Directive.

Non-Resident Intermediate Holding Company

If the foreign parent entity is resident in a country outside the European Union and there is no double tax treaty to reduce or eliminate the 10 percent WHT, an EU intermediate holding company could be used to benefit from the provisions of Greek income tax legislation according to which an EU parent entity that holds participation in a Greek entity for two consecutive years of at least 10 percent is exempt from the dividend withholding tax on any profits distributed by the Greek subsidiary.

Furthermore, an intermediary holding company may be used when the tax treatment of capital gains on the disposal of shares is more favorable in a jurisdiction other than the parent entity's jurisdiction.

Greek Branch

Acquisition of assets in Greece may be effected through a Greek branch already established. This will have the same result as an acquisition of the Greek assets directly from a foreign entity; that is, the foreign entity ends up with a permanent establishment (PE) in Greece, unless the assets acquired do not constitute a business or are not used for business purposes in Greece. The acquisition of a participation in a Greek company through a Greek branch has the same tax consequences as establishing a Greek holding company.

The tax treatment of a Greek branch is similar to that of a Greek corporation or limited liability company; however, any profits remitted to the head office are not subject to any distribution taxation. It may be possible, depending on the legislation in the jurisdiction concerned, to use losses incurred by a Greek branch

against profits earned by the Head Office. The comments about the sale of a business as a going concern apply to the sale of the Greek branch.

An exemption from capital concentration tax is allowed for capital allocated to the Greek branch by an EU-based Head Office.

L. 2166/1993 recognized the following ways to effect cross-border mergers that involve branches that have been established in Greece by foreign companies:

- the merger by absorption of a branch that has been established in Greece by a foreign company into a Greek corporation or a limited liability company;
- the merger of branches of foreign companies that are established in Greece through the establishment of a Greek corporation or a limited liability company; and
- Greek jurisprudence appears to accept that the tax incentives of Law 2166/1993 should apply to transactions between companies in another member state that have consequences for their establishment in Greece.

The aforementioned mergers are exempt from taxation, if the enterprises involved maintain double-entry accounting books, have prepared at least one balance sheet for a 12-month period, are considered as operating, and comply with certain capital requirements. The merging enterprises are required to prepare a merger balance sheet on a fixed date, which is audited by the tax authorities, certified auditors, or a committee appointed by the Ministry of Development. The merger is accomplished by consolidating the assets and liabilities as they appear in the financial statements. The result is that no capital gains arise and thus no capital gains tax liability.

The following tax advantages arise from the application of L. 2166/1993:

- no revaluation gain arises and, accordingly, no capital gains tax becomes due;
- exemption from stamp duty;
- exemption from real estate property transfer tax; and
- transfer of the tax-free reserves and any potential tax benefits to the receiving company.

Cross border mergers that involve branches established in Greece by foreign companies may enjoy the tax

advantages provided by Law 2578/1998 as amended by Law 3517/2006 that implemented EU Directive 90/434 as amended by EU Directive 2005/19 (Merger Directive), provided the conditions provided in the Directive are met.

Joint Ventures

Joint venture (koinopraxia) in commercial practice in Greece indicates the co-operation of individuals or legal entities for the purpose of pursuing and carrying out a specific project. The joint venture is not recognized by Greek law as a separate legal entity, but it can be recognized as an entity for tax purposes, provided certain conditions are met. Profits realized by the joint venture are subject to 25-percent tax to be gradually reduced to 20 percent by 2014, each participant being jointly and severally liable for the joint venture's tax liabilities.

On the other hand, there are no particular tax benefits in participating in a Greek entity with another investor.

Choice of Acquisition Funding

After deciding to use a Greek entity for the acquisition of assets in Greece, or the acquisition of shares or partnership units in Greek entities, the choice between debt and equity financing will depend on both tax and corporate law implications. The main issues to be considered are summarized below.

Debt

Debt received from a Greek entity may take the form of a bank loan, a corporate loan or a bond. Special considerations arise from corporate law provisions in respect of corporate and bond loans:

- a corporation is not allowed to grant loans to members of the board of directors, persons exercising control over the corporation and their spouses relatives up to third degree, or to companies controlled by the above persons;
- loans to third parties for the acquisition of shares of the corporation may be permissible under certain conditions; and
- bond loans should be issued with at least two bonds and two bondholders, and care must be taken to ensure they not considered to be mere corporate loans.

Stamp duty of 2.4 percent applies on the capital and interest of corporate loans unless they are concluded and executed abroad. In addition, banking loans are subject to special levy of Law 128/1975 calculated at 0.6

percent of the monthly average balance of the loan. Bond loans are exempt from stamp duty and the Law 128/1975 levy.

Deductibility of Interest

In principle interest charges and accrued interest can be deducted from the taxable basis of a Greek taxable entity. The general requirements in Greek income tax legislation that have to be met for interest expenses to be considered deductible are:

- interest has been properly recorded in the official books and records for the period to which it relates;
- the loan must be used for the entity's own business purposes (loans received for on-lending don't qualify);
- the interest rate should be set at an arm's-length;
- proper documentation should be received by the entity claiming deductibility of interest expense; and
- interest payments should arise from a legally valid agreement notified to the Greek tax authorities.

For loans effected from 21 July 2009 accrued interest or credits paid or credited to affiliated enterprises can be deducted on the condition that the relation of these loans or credits to the net assets of the enterprise does not exceed a ratio of 3:1 on average per fiscal year. The above also applies to interest paid or credited to affiliates acting as guarantors of loans granted by other affiliate(s) or banks in the event of default. Affiliated enterprises are considered to be enterprises of paragraph 3 of article 39 of Income Tax Code; namely, those that are related to each other in a relationship of direct or indirect substantial administrative or financial dependence or control. Leasing *societe anonymes* referred to in paragraph 1A (a) of Law 1665/1986 are exempt from the above restriction on the deductibility of accrued interest of loans or credits between affiliated companies.

Withholding Tax on Debt and Methods to Reduce or Eliminate

WHT at the rate of 20 percent is imposed on interest payments on corporate loans concluded with a Greek tax-resident entity. No WHT is imposed on interest payments made on banking loans granted by Greek banks.

Interest payments to non-Greek tax residents are, in principle, subject to 25-percent WHT unless the beneficiary qualifies for the application of the EU

Interest Royalty Directive (under which WHT is reduced to 5 percent for interest paid until 30 June 2013 and zero from 1 July 2013 onwards) or a double tax treaty provides for reduced or zero WHT.

A WHT at a rate of 10 percent is imposed on the bond interest paid to Greek tax-resident bondholders, irrespective of whether or not such bondholders are banks). No WHT is applied to bond interest paid to non-Greek tax-resident bondholders.

With regard to cross-border loan financing, if the interest paid by a subsidiary in Greece to a parent company in a country with which Greece has a double taxation treaty exceeds the arm's-length interest, the advantageous tax treatment (mainly lower WHT rates) will be restricted to the amount of arm's-length interest.

Checklist for Debt Funding

- The use of bank debt may avoid thin-capitalization and transfer pricing problems, but if an affiliate acts as a guarantor for such debt, thin-capitalization, and transfer pricing issues may arise.
- Use of bond loans under the provisions of Law 3156/2003 are exempt from stamp duty and the Law 128/19975 levy, while for a non-Greek tax-resident, the bond interest will be exempt from WHT in Greece.
- A reduction of or exemption from WHT applied on interest could be available for foreign tax-residents under either the EU Interest Royalty Directive, or a relevant double tax treaty.
- Deductibility of interest should be viewed in the light of the general deductibility requirements in Greek tax legislation, the fact that a Greek holding entity will not have taxable income to offset such interest, and there are no tax grouping provisions in Greek tax legislation. Push-down debt options in particular should be considered in this context.

Equity

A purchaser may use equity to fund the acquisition of either shares or assets in Greece. This could be effected by issuing shares, in which case the seller contributes shares in, or assets of, a Greek entity owned by the purchaser, or the transaction can be effected under the provisions of Law 2578/1998 (exchange of shares).

Law 2578/1998, as amended by law 3517/2006, implemented the EU Mergers Tax Directive (Directive 90/434 and Directive 2005/19 amending Directive

90/434) into Greek law and applies to mergers, demergers, partial demergers (transfers of one or more branches of activity), contribution of assets and exchange of shares between companies established in different EU Member States, as well as to the transfer of the registered office of European companies (*societas europaea* or SE) or European cooperative companies (*societas cooperativa europeae* or SCE) from Greece to another EU Member State. The conversion of a branch into a subsidiary falls within the meaning of contribution of a segment.

Accordingly, any gains that arise from a merger, demerger, partial demerger, or contribution of assets by a Greek corporation (AE) or a limited liability company (EPE) to a company resident in another EU Member State is not subject to Greek income tax.

The same exemption applies to the contribution of a permanent establishment (branch) in Greece by a foreign company resident in an EU Member State to a company resident in another EU Member State including Greece. The exemption does not apply to a Greek company that contributes its permanent establishment (branch) situated in another Member State to a company resident in another EU Member State. When the transferred assets of a Greek AE or EPE company also include a permanent establishment (branch) situated in another EU Member State, any gains arising from the transfer of the permanent establishment is subject to Greek income tax. However, the tax that would have been imposed in the other EU Member State if the provisions of this law were not applicable will be offset.

Tax losses of a Greek AE or EPE transferring company may be offset against the taxable income of the permanent establishment of the receiving company in Greece provided that such possibility also applies to reorganizations of domestic companies affected pursuant to Greek Laws 2166/1993 and 2515/1997.

Furthermore, the gain arising in favor of the receiving company due to the cancellation of its participation in the transferring company's capital is not subject to Greek income tax, provided that the receiving company holds a minimum participation in the capital of the transferring company of 10 percent from 1 January 2009 onward.

Special provisions apply to foreign companies which are considered by the Greek tax authorities as fiscally transparent.

The provisions of paragraph 1 of article 3 and paragraphs 2 and 3 of article 6 of L.D. 1297/1972 (that is, exemption of the merger agreement and any other action needed for the implementation of the merger from any tax, stamp duty, or duty in favor of any other third party), as in force, apply to the operations provided for in Law 2578/1998.

In addition, the purchaser may want to use either a Greek holding entity as an acquisition vehicle, which will be funded through capital injections, or may acquire an interest in a Greek entity by participating in a share capital increase (placing) in which existing shareholders waive their rights to participate.

Capital concentration tax at a rate of 1 percent will be imposed on the nominal value of the share capital increase. In addition, in the case of capital increase of Greek AE entities a 0.1-percent competition committee duty also applies.

A 10-percent WHT on dividends applies on profits distributed from Greek AE entities, whereas no WHT tax applies to profits distributed by Greek limited liability entities or Greek branches.

The use of equity may be deemed more appropriate in certain circumstances, such as the following:

- No tax deduction could be obtained for interest charges on debt.
- If there is the intention to inject capital following the acquisition, it may be appropriate to acquire such participation through a share capital increase in which only the purchaser participates. In the case of Greek AE entities participation of a third party in a share capital increase will not give rise to any share transfer tax implications.
- If thin-capitalization restrictions apply to the deductibility of interest.
- If the net asset ratio (nominal share capital divided by net equity) falls under 50 percent, the Board of Directors and General assembly of a Greek AE entity should take action to improve the ratio. If the ratio falls below 10 percent, the company may, under certain conditions, be dissolved by a court decision. In such cases, it may be necessary to proceed with the capital increase to improve the ratio, and avoid an interest expense, which may lead to losses and thus a further worsening of the net asset ratio.

Hybrids

There are no specific tax provisions for the use of hybrid instruments in Greece. The legal and tax treatment of each hybrid instrument should be examined on a case by case basis and special legal and tax advice should be sought to determine its tax treatment in Greece.

Discounted Securities

Discounted securities sold by a Greek entity to a third party will result in the following, depending on the nature of the securities:

- Losses realized on the sale of Greek state and Greek corporate bonds are, in principle, considered negative interest and so reducing the bond interest revenues earned during the year of sale. Deductibility issues may arise if the interest revenues are insufficient to absorb the negative interest to arising.
- Losses realized on the sale of foreign securities should not, in principle, be tax deductible, but could be offset against profits from foreign sources.
- Losses realized on the sale of listed or non-listed shares are not allowed for income tax deductions, but can be recorded in a special reserve account for offsetting against future profits from sales of listed shares.

Deferred Settlement

Any part of the consideration that is deferred will give rise to transaction tax, capital gains tax, indirect tax, and income tax implications on its crystallization. If the crystallization is effected over more than one year the tax implications arising will be triggered each year the deferred consideration is paid, and amending/correcting tax returns will have to be filed with the tax authorities.

Other Considerations

Concerns of the Seller

As mentioned earlier in the chapter, in the event that the business of a company (a corporation or a limited liability company) or a partnership is transferred as a whole, the seller is obliged to pay tax at the rate of 20 percent. Such tax does not extinguish the tax liability, since the relevant income will also be subject to taxation pursuant to the general provisions of Greek tax law.

The sale of shares of Greek corporations not listed on the Athens Stock Exchange is subject to a 5-percent tax, which is borne by the seller as mentioned above, while the sale of shares that are listed on the Athens

Exchange and will be acquired up to and including 31 December 2009 is subject to 0.15-percent transfer duty, also borne by the seller. However, any profit earned from the sale of shares listed on the Athens or a foreign stock exchange that were acquired after 1 January 2010 will be subject to a WHT of 10 percent as already mentioned above.

If a specific asset of a company is sold, any gains realized are deemed as income and included in the taxable profits of the seller.

Company Law and Accounting

Codified Law 2190/1920, as amended, regulates the formation, management, operation, and dissolution of Greek corporations (AE), whereas Law 3190/1955 regulates the above for limited liability companies (EPE). The above laws include provisions on mergers and acquisitions between Greek AE and Greek EPE companies.

As already noted Greek legislation recently implemented EU directive 2005/56 with law 3777/2009, to introduce the legal framework required from a corporate law point of view for cross-border mergers between EU companies. Law 3412/2005 regulates the establishment and operation of the SE in Greece and provides for the cross-border merger of a Greek company with another EU company to form an SE.

There are no specific provisions in Greek company law on mergers between partnerships, but Greek tax law recognizes their existence.

Accounting treatment of transformations (mergers and asset acquisitions) mainly depends on the method used and the legal framework under which the transformation takes place. On this basis the incorporation of the assets or a business acquired in the books of the acquirer may be at net book value or at fair value, depending on the legal structure of the transaction (having an effect on whether or not goodwill arises). In addition the value in which a Greek holding entity will book non-listed shares of a Greek entity depends on the method of acquisition, since purchased shares will be booked at the contractual value and shares received as a contribution in kind will be booked at the value determined by a special valuation committee.

Group Relief/Consolidation

For Greek income tax and VAT purposes no tax grouping provisions exist, and hence no tax group relief is available.

Transfer Pricing

As already mentioned above two regimes are in force (Law 3728/2008 and Law 3775/2009) in Greece for transfer pricing.

Law 3728/2008 has been introduced by the Greek Ministry of Development to implement transfer pricing documentation rules in Greece. It applies to all forms of companies operating in Greece for financial periods ending after 18 December 2008 (the date the law came into force).

The rules are based on the Organization for Economic Cooperation and Development (OECD) arm's-length principle according to which the same or similar terms must apply to transactions between affiliated companies (defined in article 42e of Greek Company Law 2190/1920) as would have applied to the transaction had it been between unrelated parties in similar market circumstances.

There are exemptions in relation to the obligations set by Law 3728/2008, the most important of which are:

- companies operating under any form in Greece with annual turnover of up to EUR 1 million are exempted until turnover exceeds that level for two consecutive years; and
- contracts between affiliated companies for less than EUR 200,000 annually are also exempted.

Companies falling within the scope of new documentation rules have the following obligations:

- they must file a list detailing all intra-group transactions with the Ministry of Development on an annual basis within four months and 15 days following their fiscal year-end; and
- if specifically asked to do so by the Market Supervision Authority of the Ministry of Development, they must submit documentation files within 30 days following the day the request was served.

The documentation required by the Law consists of a Greek documentation file for groups of companies with a foreign parent company and a basic documentation file for Greek groups of companies. Documentation files must be drafted in Greek and any documents in languages other than Greek must be translated into Greek. The critical documents must demonstrate the application of one of the transfer pricing methods specified in the OECD Transfer Pricing Guidelines, and

include the analysis of comparable third-party information.

Companies transacting with related parties face potential income adjustments and transfer pricing penalties if they cannot demonstrate that such transactions have been conducted at arm's length. The following fines are provided by Law 3728/2008:

- a one-off fine equal to 10 percent of the value of the transactions for which the documentation file was not submitted to the authorities, or for which the list of inter-company transactions was not submitted in due time;
- an administrative fine of EUR 5,000, as provided in paragraphs 7 and 14 of article 30 of the Market Code, in addition to the penal sanctions stipulated in article 30 of the Market Code; and
- notification to the competent tax authorities for the imposition of tax penalties, if the company did not comply with the OECD arm's length principle.

It is important to note that if a transfer pricing issue is raised on the basis of Law 3728/2008 during an audit by the Ministry of Development, the above provisions and penalties are separate and independent of the penalties set out in article 39 of the Greek Income Tax Code (ITC) (Law 2238/2994) as recently amended by Law 3775/2009 on a tax audit by the tax authorities.

As indicated above, the Greek ITC was amended by Law 3775/2009 introduced by the Ministry of Finance, to be harmonized with the law introduced by the Ministry of Development regarding transfer pricing documentation.

According to the new provisions of the Greek ITC any domestic enterprise operating under any legal form in Greece (including permanent establishments) and qualifying as an enterprise affiliated to a foreign enterprise (that is, enterprises related to each other in a relationship of direct or indirect substantial administrative or financial dependence or control) is obliged to provide data and information required for the documentation of transactions between them.

Domestic enterprises that are members of multinational groups can fulfill their transfer pricing documentation obligation through the maintenance of a documentation file consisting of the basic documentation file common for all the enterprises of the group, which contains common uniform information for all the affiliated companies and branches of the group, and the Greek documentation file which supplements the basic file and

contains additional information related to the Greek enterprises of the group.

Enterprises whose annual gross income does not exceed EUR 1.5 million are exempt from the above obligation. They are, however, obliged to maintain simpler and limited documentation determined by the Minister of Finance. Transactions between the same enterprises with the same subject matter that do not exceed EUR 200,000 annually are also exempt.

The documentation maintained by domestic enterprise must be delivered to the competent tax authority in the course of an audit, on the auditor's request within a reasonable time period, which cannot be less than 60 days.

If a failure to maintain the documentation information adequately is revealed during a tax audit, monetary penalties are imposed depending on the category of accounting books maintained by the enterprise ranging from EUR 858 to EUR 8,800.

The new regime introduced by the Ministry of Finance applies to companies whose income or expenses arise during financial years for which the obligation to file an income tax return arises as of 1 January 2011 and onwards.

Dual Residency

There are no special provisions for entities considered dual residents in Greece. On this basis, unless an applicable double tax treaty provides for a procedure to resolve the issue, the Greek tax authorities will seek to tax the dual-resident entity for its worldwide income in Greece and, subject to certain limitations, provide a tax credit for any foreign tax paid abroad.

Foreign Investments of a Local Target Company

Any profits realized from foreign investments of a Greek entity are taxable under the general income tax provisions. Any loss arising from a foreign investment is in principle non-deductible, but may be offset against other taxable profits from foreign investments.

KPMG in Greece notes that, given that a loss arising from the same type of domestic investment is income tax deductible in Greece, the above treatment may constitute a breach of EU legislation guaranteeing the free movement of capital.

Comparison of Asset and Share Purchases

Advantages of Asset Purchases

- The purchase price (or a portion of it) may be amortized for tax purposes.
- No previous liabilities of the company are inherited.
- It is possible to acquire only part of a business.

Disadvantages of Asset Purchases

- If the purchased assets form a separate branch of activity or if the transaction is considered a transfer of an enterprise, there may be a need to renegotiate supply, employment and technology agreements and to change stationery, and there may be no protection from previous liabilities.
- A deemed minimum capital gain will apply if the transaction qualifies as a business transfer.
- No tax losses are transferred.
- The purchase may be subject to state and local transfer taxes and VAT.
- The asset(s) may not be free of encumbrance surety.
- If assets are acquired under the provisions of either Law 2166/1993 or Law 2578/1998 the acquisition process may be time-consuming.

Advantages of Share Purchases

- The company/business remains the same, since only the shareholding changes.
- No need to enter into new supply, employment, and technology agreements, among others.
- No transfer tax is payable on the net assets acquired.

Disadvantages of Share Purchases

- No deduction of the purchase price is provided.
- Five percent taxation for purchases of unlisted shares, as mentioned above.
- Ten-percent WHT on the profits earned from the sale of shares listed on a Greek or foreign Stock Exchange acquired after 1 January 2010.

Withholding Tax Rate Chart

The rate information and footnotes contained in this table are from the 2009 IBFD/KPMG Global Corporate Tax Handbook.

Country	Dividends		Interest ¹	Royalties ²
	Individuals, Companies (%)	Qualifying Companies ³ (%)		
Albania	5	5	5	5
Armenia	10	10	10	5
Austria	- ⁴	- ⁴	0/10/ ⁵	0/10 ⁵
Austria (New treaty) ¹³	15	5	8	7
Belgium	15	5	5/10 ⁶	5
Bulgaria	10	10	10	10
China (People's Rep.)	10	5	10	10
Croatia	10	5	10	10
Cyprus	25	25	10	0/5 ⁷
Czech Republic	- ⁴	- ⁴	10	0/10 ⁸
Denmark	38	38	8	5
Egypt	10	10	15	15
Estonia	15	5	10	5/10 ⁹
Finland	47	47	10	0/10 ⁸
France	- ⁴	- ⁴	10	5
Georgia	8	8	8	5
Germany	25	25	10	0
Hungary ¹⁴	45	45	10	0/10 ⁸
Iceland	15	5	0/8 ¹⁰	10
India	- ⁴	- ⁴	- ⁴	- ⁴
Ireland	15	5	5	5
Israel	- ⁴	- ⁴	10	10
Italy	15	15	0/10 ¹⁰	0/5 ⁸
Korea (Rep.)	15	5	8	10
Kuwait	5	5	5	15
Latvia	10	5	10	5/10 ⁹
Lithuania	15	5	10	5/10 ⁹
Luxembourg	38	38	8	5/7 ⁸
Malta	10	5	8	8
Mexico	10	10	10	10
Moldova	15	5	10	8
Netherlands ¹⁴	35	35	8/10 ⁶	5/7 ⁸
Norway	40	40	10	10
Poland	- ⁴	- ⁴	10	10
Portugal	15	15	15	10
Romania ¹⁴	45	45	10	5/7 ⁸
Russia	10	5	7	7
Slovak Republic	- ⁴	- ⁴	10	0/10 ⁸
Slovenia	10	10	10	10
South Africa	15	5	0/8 ¹⁰	5/7 ⁸
Spain	10	5	0/8 ¹⁰	6
Sweden	0 ¹¹	0 ¹¹	10	5
Switzerland ¹⁴	35	35	10	5
Turkey	15	15	12	10
Ukraine	10	5	0/10 ¹⁰	10
United Kingdom	- ⁴	- ⁴	0	0
United States	- ⁴	- ⁴	0/ ¹²	0 ¹⁵
Uzbekistan	8	8	10	8

Notes

1. Many treaties provide for an exemption for certain types of interest, such as interest paid to public bodies and institutions or in relation to sales on credit. Such exemptions are not considered in this column.
2. The withholding tax on rental payments may also be reduced under the provisions on royalties in various tax treaties. The text of the relevant treaty should be consulted.
3. Unless otherwise indicated, the rates in this column apply if the holding is at least 25 percent of the Greek company's capital or voting power, as the case may be.
4. The domestic rate applies; there is no reduction under the treaty.
5. No withholding tax is due if the Austrian company owns no more than 50 percent of the Greek company; 10 percent is due if it owns more than 50 percent. The domestic rate applies to interest from loans secured by immovable property in Greece.
6. The lower rate applies to interest paid to a bank or other financial institution.
7. The rate is 5 percent on royalties for films, other than films shown on TV.
8. The lower rate applies to royalties paid for copyrights of literary, artistic, or scientific work, including films, etc.
9. The lower rate applies to equipment rentals.
10. The lower rate applies, besides interest mentioned in note 1, to interest paid by public bodies.
11. The domestic rate would apply if Greece applied the dividend deduction system.
12. If the U.S. company controls more than 50 percent of the voting power in the Greek company paying the interest, the domestic rates apply. If 50 percent or less is held, the domestic rates apply to any interest in excess of 9 percent; otherwise the interest is exempt.
13. Effective from 1 January 2010.
14. Hungary, Netherlands, Romania, and Switzerland are under revision.
15. Local rate applies where royalties are for motion picture films.
16. Double tax treaties with Tunisia, Bosnia, and Serbia have been signed but have not yet entered into force.

KPMG in Greece

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