

TAX BRIEFING: Monthly Insight

Legislative Changes Including Amendments to Provisions on Annual Tax Certificates, Fictitious Tax Documents and Businesses and Stamp Duty

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The Ministry of Finance issued an amendment of the Ministerial Circular on annual tax certificates and the Council of State issued Opinions on the deductibility of expenses recorded on the basis of fictitious tax documents, persons held liable for the payment of the assessed overdue debts of fictitious businesses to the State and stamp duty on the grant of use of assets free of charge.

A. Ministerial Circular POL. 1034/2016 on the Annual Tax Certificate Issued by Certified Auditors and Audit Firms

Ministerial Circular POL. 1034/2016 amended the provisions of POL. 1159/2011 with regard to the annual tax certificate issued by certified auditors and audit firms for Sociétés Anonymes and Limited Liability Companies (EPE), and extended its scope of application to branches of non-Greek legal entities. The implementation of the provisions of POL. 1034/ 2016 has not yet been tested in practice.

In accordance with the new provisions, certified auditors and audit firms are obliged to preserve audit files until the lapse of the statutory limitation period for the issue of tax assessment reports by the Greek tax authorities. Enterprises for which

certified auditors or audit firms have issued a tax certificate with a negative conclusion or with the inability to express a conclusion, are subject to a mandatory audit by the authorities. In any other case, enterprises may be selected for audit by the tax authorities on the basis of various criteria, including risk analysis.

In addition to the above, tax audits may be conducted based on the following criteria:

1. receipt or issuance of false or fictitious tax documents;
2. transactions with legal entities which are non-existent for tax purposes;
3. transfer pricing violations;
4. indications of violation of the Greek tax legislation arising from internal or external resources or data processing;
5. non-issuance of a tax certificate by certified auditors or audit firms within the deadline set for electronic submission to the Ministry of Finance;
6. cases of audits where certified auditors and audit firms are in breach of Law 3693/2008 (this law transposed the provisions of Council Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts into Greek legislation);
7. prosecution of members of a company's Board of Directors for money laundering;
8. control of over 70% of a specific market sector by the same audit firm;
9. qualitative findings of an audit conducted by certified auditors.

The tax authorities must conduct all tax audits within the statutory limitation period during which they are entitled to issue tax assessment reports. A limited scope tax audit may be conducted in the event of accounting differences amounting to less than 0.5% of the gross revenues of the audited company as assessed by the certified auditors.

Depending on the contents of the tax certificate issued by certified auditors or audit firms, the Ministry of Finance provides the following guidelines:

I. Tax Certificate Issued by Certified Auditors or Audit Firms Without Reservation

The tax authorities will not conduct a comprehensive tax audit unless:

- a. risk analysis provides indications for a tax audit to be conducted;
- b. the criteria under 1-5 above are met; or
- c. additional evidence is notified to the tax authorities which was not available to the certified auditors, the audit firms or the tax authority auditors during their official audit.

2. Tax Certificate Issued by Certified Auditors or Audit Firms With Emphasis or Under Reservation

The tax authorities will conduct a partial or limited scope tax audit to evaluate the pending issues and assess any taxes due. A further tax audit may be conducted if the partial tax audit results in information relating to, or evidence of, breaches of tax legislation.

3. Tax Certificate Issued by Certified Auditors or Audit Firms with a Negative Conclusion or With the Inability to Express a Conclusion

In this case, the tax authorities will conduct a comprehensive tax audit of all taxes (income tax, capital tax, indirect taxes etc.), since a breach of the tax legislation is probable.

Enterprises in relation to which a tax certificate has been issued are subject to the same obligations as those set out above to preserve tax books and records.

B. Council of State Opinion No. 28/2015 on the Tax Deductibility of Expenses Recorded on the Basis of Fictitious Tax Documents

Interpreting the provisions of the previous Income Tax Code (Law 2238/1994), applicable until 31 December 2013, and the provisions of the new Income Tax Code (Law 4172/2013), applicable from 1 January 2014 onwards, the Council of State held that expenses may not be deducted from the gross income of a business, if the fictitiousness of the tax document issued derives from the fact that the transaction referred to in the tax document is not the one that actually took place between parties. In this case, the party receiving the tax document may not be treated as acting in good faith.

C. Council of State Opinion No. 61/2015 Determining the Persons Liable for the Payment of Assessed Overdue Debts of Fictitious Businesses to the State

On the basis of the previous Council of State Opinion No. 525/2012 and following interpretation of the provisions of the Code for the Collection of Public Revenues and Article 40 of Law 3220/2004, the Council of State opined that the natural persons behind a company, joint venture, civil law association or any other type of business, who are actually liable for a fictitious business activity, are jointly liable with such enterprise for any assessed overdue debt owed to the State. They will not however be held jointly liable if they can provide proof that they

did not take part in the relevant transactions. All actions for tracking sources of repayment as well as enforcement measures open to the State are extended to the natural persons behind the fictitious business.

D. Council of State Opinion No. 79/2014 on Stamp Duty on the Grant of Use of Assets Free of Charge

The recently published Council of State Opinion No. 79/2014 rules contrary to the provisions of Ministerial Circulars POL. 1055/2015 and POL. 1184/1995, according to which the grant of use of assets free of charge by an enterprise to third parties or

customers to facilitate the enterprise's activities (for example the grant of use of refrigerators to facilitate the storage or sale of ice-creams) is not subject to stamp duty, as it is an ancillary agreement to a transaction subject to the VAT rules. Council of State Opinion No 79/2014, on the contrary, rules that the grant of use of such assets free of charge by an enterprise to third parties or customers to facilitate the enterprise's activities is subject to stamp duty. The reasoning used by the Council of State for the issue of Decision No 79/2014 is based on Decision No 3529/2010 issued by the Supreme Administrative Court, ruling on an old dispute (dating back to 1990-1991). The impact from the publication of Decision No 79/2014 has not as of yet been tested.

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.

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