

The Judicial Application of Anti-Avoidance Doctrines in Greece and its Impact on International Tax Law

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1. General remarks

‘The avoidance of taxes is the only intellectual pursuit that still carries any reward’ British economist John Maynard Keynes once wrote. The search for the means to combat unintended tax avoidance seems to be equally challenging. In this respect several doctrines have been developed in various countries, aiming mainly at punishing the abuse of tax laws that leads to tax avoidance.

In the following article I will present briefly the anti-avoidance doctrine in Greece, based mainly in the case law of the *Συμβούλιο της Επικρατείας* (*Symvoulitis Epikrateias* (Conseil d’Etat, Supreme Administrative Court)(StE)) and then I will explore its interaction with the DTCs, emphasizing the importance of the OECD 2003 revision of the Commentary to the Model Convention.

As there is no statutory general anti-tax avoidance rule in Greece, a number of questions arise. First of all, there is a dogmatic question: is tax avoidance legitimate and, in some cases, even deliberate? Does that mean that there is a degree of tolerance from the state towards taxpayers trying to minimize their tax burden? Although some authors have supported this view and a court decision ruled similarly in a specific context, we have to bear in mind that tax avoidance is in many cases a breach of the constitutional principle of equality. The lack of a statutory GAAR does not mean that there exists an implied tolerance by the state or the tax authorities towards tax avoidance schemes employed by taxpayers. It means that the Greek legislator has opted for targeted measures rather than for a general provision that would create many more problems, as it would leave room to the tax authorities to exercise their discretionary power, which could easily lead to abuse on their part.

Once it is established that tax avoidance schemes constitute a breach of the principle of equality, it becomes obvious that the broken equilibrium must be re-instated. Two main doctrines have been developed in this context: the first one is the ‘realism of tax law’ doctrine, which is another form of the ‘substance over form’ doctrine. Several key provisions in the Greek *Κώδικας Φορολογίας Εισοδήματος* (*Kodikas Forologias*

Eisodimatos; Income Tax Code) reflect this doctrine while courts have produced an extensive case law on the sham doctrine.

The second doctrine is the *fraus legis*. Since there is no *fraus legis* or abuse of law clause in public law or in tax law, both the tax authorities and the taxpayers have invoked either the civil law provision or the constitutional provision prohibiting the abuse of rights. The Supreme Administrative Court, however, has denied the applicability of both provisions in tax matters.

It must be noted that in many cases the courts do not distinguish between the two notions: ‘realism of tax law’ or ‘sham’ on the one hand and ‘abuse of law’ or *fraus legis* on the other.¹ However the difference exists: in the sham transaction the transaction as it appears to the tax authorities is fake, either because it did not take place at all or because it took place but between two different contracting persons than the ones appearing to have contracted with each other. In a *fraus legis* case, however, the transaction is real to all its elements but the rationale behind it is not (purely) economic or business orientated; it is (mainly) to avoid the payment of taxes otherwise due.

In the final part of this article the specific situation of international tax cases will be dealt with. It is interesting to see how the Supreme Administrative Court dealt with the problem of tax avoidance in a cross-border situation based on a totally different legal reasoning. The court did not use the sham or the *fraus legis* doctrine; instead it used the constitutional requirement of reciprocity as a subject-to-tax clause or an anti-avoidance rule. In this part I will also examine the application of the anti-avoidance doctrines in relation to the application of DTCs and the possibility of conflict that may or may not arise, giving special consideration to the issues arising from the 2003 revision to the OECD Model Convention Commentaries.

2. Is tax-avoidance illegitimate?

Avoiding taxes through the loopholes of the tax system is considered by some authors to be a legal reaction of

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¹ It seems that the ‘abuse of law’ and the ‘sham approach’ although totally different in nature are treated as the same in the case law; see e.g. StE 1590/2000 and ns. 48 to 49 below.

taxpayers who wish to reduce their overall tax burden.² This point of view explains why no abuse of law doctrine has been developed in Greece: using the law to optimize one's taxes cannot be considered an abuse. Before examining whether tax avoidance can constitute a proper justification for the imposition of taxes, we should examine whether tax avoidance constitutes a legitimate option for taxpayers.

A. Tax avoidance as a legitimate option

There can be two categories of tax avoidance: legitimate and illegitimate.³ The first one is the intentional tax avoidance opportunity, when the legislator has deliberately regulated certain cases in such a way as to lessen the tax burden for certain categories of taxpayers or for certain categories of income or for certain transactions. In these cases the result is known and even intended by the legislator and therefore the purpose of the law is prohibiting the tax authorities from challenging those cases as cases of illegitimate tax avoidance.⁴ These cases can be described as 'tax saving' and they are perfectly legal.

On the other hand there are cases of illegitimate tax avoidance, i.e. cases where the tax relief was not intended by the law but the taxpayers, by using various techniques or by forming their legal relationships in a certain way, manage to escape taxation. In those cases although the taxpayers' behaviour is apparently in conformity with the rules, in reality it is contrary to the spirit of law and for this reason loaded with heavy demerit. These cases belong in the gray zone of tax avoidance, against which specific measures need to be taken, as the purpose of tax avoidance is not in itself a legitimate ground for levying taxes.

B. Tax avoidance as a justification for the imposition of taxes

In one decision⁵ the *Conseil d'Etat* expressly dealt with tax avoidance and considered the issue whether it can constitute a legitimate justification upon which a tax can be levied. The case regarded a legislative provision that considers as rental income the amounts earned by the alienation of the usufruct of immovable property, when the acquirer is a company (domestic or not); in case the acquirer is an individual the amounts paid for

the transfer of the usufruct are not considered to be rental income.⁶ The provision was challenged as unconstitutional and the Supreme Administrative Court indeed declared it unconstitutional, on the grounds that it is breaching the principle of equality by creating a different tax treatment based not on the ability to pay of the alienator of the usufruct but based on the quality of the acquirer (a legal entity or an individual). The Court supported that there is no valid justification for this different treatment and that the purpose of combating tax-avoidance that was described as justification for the enactment of the said provision is not reason enough to justify the unequal treatment. In other words the Court held that tax avoidance does not constitute a legitimate justification for the enactment of a provision imposing taxes, when this provision is breaching the constitutional principle of equality.⁷

2. The realism of tax law and the effect of sham in tax matters

The basis of the realism of tax law doctrine can be found in the Constitution: in Art. 4(5) the principle of equality among all taxpayers is established. The notion of equality is that of an analogous equality, meaning that each one has to contribute to the state finances according to his ability to pay. The equality is both horizontal and vertical: same income must be subject to same taxation and higher income must be subject to higher taxation. In cases of tax evasion, the taxpayer is breaching the principle of equality, thus giving the right to the state to re-establish the equilibrium by disregarding the action of the taxpayer that lead to the tax avoidance and by re-instating his real tax paying power.⁸ The realism of tax law as a general principle can also be detected behind certain provisions of the Income Tax Code.

According to Arts. 62(5) and 66(1) of the Greek Income Tax Code the taxpayer has an obligation-duty to be honest and truthful and declare his real income and relationships to the tax authorities and the tax authority has the obligation to control the accuracy of the declarations-tax returns. From the combination of the two provisions it follows that the tax authorities must levy taxes according to the taxpayer's ability to pay and if the taxpayer has not been honest, they have the duty to uncover the simulation. This is considered

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² This view is supported by G. Matsos, 'Avoidance of double non-taxation in Greece', in M. Lang (ed.), *Avoidance of double non-taxation* (Linde Verlag Wien, 2003), p. 137 with further references.

³ See the distinction in K. Finokaliotis-N.Barbas, *Dimosia Oikonomia-Foro-Dimosia daneia* (Public Finance) (Thessaloniki, 2001) (in Greek), p. 35, G. Matsos, see n. 2 above, follows the same distinction.

⁴ What the tax authorities can do is challenge the application of the certain provision as sham.

⁵ StE 648-650/1995.

⁶ This provision was inserted in the ITC by Art. 6(1) of Law 1473/1984. Nowadays it forms Art. 21(1)(e) of the ITC.

⁷ In any case, it is supported that tax avoidance can be effectively dealt with by using the sham doctrine. See also n. 16 below.

⁸ See analysis in K. Finokaliotis, *Forologiko Dikaio* (Tax Law), 2nd ed. (Thessaloniki, 1999) (in Greek), p. 154.

to be a right that the tax authorities have within their auditing and controlling powers (Arts. 66 to 67 of the Income Tax Code), under the condition that they justify their judgment on sham and prove it without doubt.⁹

A. The doctrine of realism of tax law

The doctrine of *economic reality*,¹⁰ based on the French *réalisme du droit fiscal*,¹¹ represents at present the Greek equivalent of the ‘substance over form’ doctrine, developed in common law countries, and widely accepted in the interpretation and application of tax treaties. The realism of tax law has a double meaning: on the one hand it means that the tax is levied on any income, irrespective of the source it comes from; the tax provisions apply even in cases where the income acquired is derived by illegal operations.¹² On the other hand, it means that the tax authorities, as long as this is permitted by the relevant tax law provisions, are not bound by the legal characterization that the parties give to a certain transaction or situation; on the contrary they have the right and at the same time the obligation to proceed to a re-qualification of a certain situation in order to reveal its true nature.

However, no general statutory provision giving the right to the tax authorities to proceed to the re-qualification of a legal situation is to be found in the Greek income tax legislation;¹³ instead, the doctrine of realism of tax law has been the theoretical basis on which some special provisions of the Greek Income Tax Code (ITC) find their justification.

According to Art. 5(1) of the ITC, the income that one spouse acquires from employment in a business that depends economically on the other spouse will not

be dealt with and taxed separately, although it is declared separately, but will be added to the income of the other spouse.¹⁴ The rationale behind this provision is that the income the dependent spouse acquires is in reality income that should be attributed to the other spouse and is split between two persons in order to profit by paying less tax in a lower income tax bracket.¹⁵

Article 39 of the ITC,¹⁶ which provides for the Greek transfer pricing rules, offers another example of how the realism of tax law is applied. According to these provisions, where two related enterprises use prices for the transaction between them that differ substantially from the prices two unrelated enterprises would have used if they had been engaged in the same transaction, the tax authorities have the right to disregard the said prices and they are obliged to correct the prices according to the arm’s length principle.¹⁷

According to a very old Supreme Administrative Court’s decision, any effort by the taxpayer to circumvent the tax law provisions with a view to avoid paying taxes by using legal forms of other parts of law, has to be dealt with according to the spirit and the purpose of the tax law provisions. The tax authorities in applying the tax law provisions must in any case look for the real legal situation.¹⁸ However this power must always be exercised within the limits that the principle of legality sets, and in particular the principle of strict interpretation of the tax law provisions.

Last but not least, the realism of tax law is also obvious in the provisions regarding the tax penalties in cases of sham: Art. 19(4) of Law 2523/1997 provides that in cases of sham invoices the interposed person that is proven totally irrelevant with the sham transaction is not subject to any tax sanctions; on the

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⁹ This has also been repeated in the opinion of the *Nomiko Symvoulío tou Kratous* (State Legal Council -NSK) 64/2001.

¹⁰ J. Anastopoulos and Th. Fortsakis, *Forologiko Dikaio* (Tax Law), 2nd ed. (Athens, 2003) (in Greek), p. 25; Th. Fortsakis, ‘H simasia tis theorias sti diamorfoisi tou forologikou dikaiou’ (The importance of theory in the formation of tax law), *Dikaio Epixeiriseon kai Etaireion* (Business and Company Law Review) 2003, (in Greek), p. 1206.

¹¹ Nowadays, this theory is no longer supported in France. See Léherissel, ‘French National Report in IFA’, *Cahiers de droit fiscal international* 2002, vol. LXXXVIIa; *Form and substance in tax law* (Kluwer, 2002), p. 263.

¹² In a very old decision the *Dioikitiko Protodikeio Athinon* (Administrative Court of First Instance of Athens; decision DPrAthion 23/1962) ruled that the Income Tax Code provisions do not examine the way the income was derived. As long as the certain amount of money earned by a person in the course of a fiscal year has all the characteristics of ‘income’ it must be taxed as any other income, as it is subject to tax. For the application of the relevant ITC provisions it is not examine the nature and the source of the income; even income derived through illegal operations is subject to tax. This case concerned the taxation of income that the owner of a hotel earned by using the hotel as a brothel (provision of services); he had not included this income in his tax return.

¹³ Such a provision exists however in the Inheritance and Gift Tax Code. See n. 34 below.

¹⁴ Article 5(1) of the Income Tax Code.

¹⁵ This provision has been often challenged before the Courts but the Supreme Administrative Court in its established case law has ruled that it is not unconstitutional. The fiction that it creates can be proved by the taxpayer as not valid and therefore if the spouses really carry on independent activities their respective income will be taxed separately; see *ad hoc* the decisions StE 479/2000, StE 3738/1998, StE 4101/1997, StE 2471-2472/1996, StE 6108/1995, StE 3422/1995, StE 981/1995, StE 1743/1992, StE 3643/1990. See also K. Finokaliotis, *Forologiko Dikaio*, n. 8 above, p. 158.

¹⁶ This provision was first enacted by Art. 55 (1-3) (7) of law 1041/1980 and was amended by Art. 8 (13) of law 1828/1989.

¹⁷ The courts have dealt with various issues regarding this provision: StE 4464/1997: regarding the taking into account of the overall tax burden in order to determine if there is tax avoidance; StE 4313/1996, StE 2469/1996: regarding the right to overrule the fiction established by the provision; StE 824-826/1995 and StE 1976/1993 regarding the data/factors that have to be taken into account in order to determine the applicable arm’s length price; StE 662/1995 regarding the non-liability of the company in case it proves that the special prices were real and not applied in an effort to avoid the payment of taxes; StE 3498/1991 regarding the constitutionality of the provision.

¹⁸ StE 1606/1973 (in a case of land transfer taxation) annulled the decision of the *Forologiko Efeteio* (Tax Court of Appeals) on the grounds that it did not look at the real nature of a certain civil law right, as it should have.

contrary, the person that is really hidden behind the intermediary is held liable for both administrative and criminal sanctions.

B. Case law concerning cases of sham

Most of the court cases dealing with tax avoidance are using the sham approach. The legal ground for declaring transactions as sham¹⁹ used to lie in Art. 144(2) of the Tax Courts Procedure Code (*Κώδικας Φορολογικής Δικονομίας*: KFD), regarding proof.²⁰ Article 144(2) of the KFD provided that the content of any public or private documents is freely estimated by the court and that the court, unless there is a specific provision prohibiting it, is not bound by the content of a legally drafted document but can judge or qualify differently a situation or a relationship if it is convinced, using other evidence, that in reality the examined relationship or situation is partly or wholly non-existent or different in nature to the one described or declared in the document presented. In 1999 the Code of Tax Courts' Procedure was replaced by the Code of Administrative Courts' Procedure²¹ and in the new law there is no similar provision. However, it seems that Arts. 171(1) and 148 of the new Code, providing for the free assessment of the evidence and of the content of documents by the court, is practically leading to the same result.

The tax authorities challenging a fact as sham bear the burden of proving the sham. The court has the right to examine the arguments brought forward by the tax authorities and the counter-arguments provided by the taxpayer and the decision must contain a detailed reasoning accepting or overruling the sham allegation.²² The sham may be referring to: the person having the tax liability; the amount of earned income; the amount of deductible expenses (taxable income);

the use of companies; or the qualification of a transaction etc.

1. Sham entrepreneur

A major issue that the Supreme Administrative Court has dealt with is what happens in cases where it is proved that the business is not really carried out by the person who appears to do so to the tax authorities but by another person. In those cases the income is typically accrued by the interposed person, in the name of whom all tax returns are filed and taxes are paid although the real beneficiary is the other person, on behalf of whom the interposed person is acting.²³ According to established case law, once the sham is proven, the hidden person becomes liable to tax and the tax authorities may issue tax assessments for this person.²⁴

What is still under dispute is what happens with the interposed person: is this person still liable to tax for the income he has declared, even though it is proven that he was acting on behalf of another person? In its early decisions the Supreme Administrative Court held that in these cases only the real (hidden) entrepreneur has the tax liability; the sham entrepreneur has not in fact earned any income, therefore according to the ITC provisions he has no liability to pay any taxes.²⁵ In its recent decisions the Supreme Administrative Court has changed its position: according to the prevailing opinion the interposed person has full tax liability, together with the real entrepreneur, even in cases of proven sham.²⁶

In the later decisions, however, there is an interesting minority opinion²⁷ holding that the Income Tax Code provisions providing for the individual income tax aim at the real income that the individuals earn. Consequently, persons who act on behalf of other persons who do not wish to appear to be carrying out a

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¹⁹ M. Kypraios, 'To provlima tis isotitas enopion tou nomou kai tis forodotikis ikanotitas' (The problem of equality before law and the ability to pay). Comment on the decision StE 648/1995, *Dikaio Epixeiriseon kai Etareion* (Business and Company Law Review) 1996 (in Greek), p. 424. Kypraios in its note proposed the use of the German theory of *wirtschaftliche Betrachtungsweise* as an effective means against tax avoidance.

²⁰ Law 4125/1960, as it had been codified by the Presidential Decree 331/1985.

²¹ Law 2717/1999.

²² See *ad hoc* StE 3705-3707/1983.

²³ In cases of custom duties, this scheme is considered smuggling and it results in serious penalties. The Supreme Administrative Court has in numerous cases dealt with the following structure: the taxpayer (usually a car dealer) who wants to import goods by another country does not do it in his own capacity but instead he uses, as an interposed person, another person who is entitled to certain tax exemptions regarding the import of goods (such as Greek immigrants from the former Soviet Union who are entitled to bring a car in Greece without paying taxes). See the cases StE 3610-3611/2003, StE 3310/2003, StE 3611/2000, StE 1201/1998, StE 1101/1998, StE 3090/1992.

²⁴ See *ad hoc* the decisions StE 401/2002, StE 718-720/2002, StE 4346/2001. The *Nomiko Symvoulion tou Kratous* (Legal Council of State (NSK)) has also dealt with the same subject. In its opinion NSK 64/200 it stated that the rental income earned by the person to whom the usufruct of the immovable property has been transferred will be considered as income earned by the owner, if the transfer of the usufruct is proven sham; in that case the rental income will be considered as income of the owner only and will be taxed accordingly.

In opinion NSK 727/2002 (that has been accepted by the Minister of Finance; see the Circular of the Ministry of Finance 1071/21-4-2003) the Legal Council of State dealt with the issue of many individual enterprises that are not carrying out any (or only very little) real business activity but they only (or mainly) supply other entrepreneurs with sham invoices (false expenses). The NSK held that when the business is carried on by another person and not by the person who has declared so by the tax authorities, then the income is considered to be the income of the hidden person and not of the 'interposed person' and the hidden person is also liable to tax, together with the interposed person. The NSK has pointed out that this issue must be regulated by a legislative provision, as the StE case law is fluctuating.

²⁵ This was supported in decisions StE 3705-3707/1983, 3738/1983, 5008/1995.

²⁶ This is supported in decisions StE 718-720/2002, StE 401/2002, StE 4346/2001, 4548/2001, StE 3445-3446/2000.

²⁷ See e.g. the decisions StE 401/2002, StE 720/2002 and StE 4346/2001.

business and earning income, are not liable to tax for the income that they have (supposedly) earned. This (interposed) person may be held responsible by criminal law provisions or may be subject to other tax penalties (i.e. for incorrect book-keeping) but he cannot be considered as subject to individual income tax for this income. As a result, both the tax authorities and the courts have the right to assess the sham regarding the person (the identity) of the entrepreneur and consider as subject to tax only the person that has really earned the income.

I believe the former case law of the Supreme Administrative Court and the minority opinion expressed in the recent cases is the correct approach.²⁸ Since the sham entrepreneur has not earned any income his ability to pay is false. However, the Constitution requires that each one pay taxes according to his real ability to pay.²⁹ As long as the sham is proven, then the ability to pay of both persons, the sham and the real entrepreneur, is determined. If the sham entrepreneur has to bear some kind of consequences because of his behaviour, especially when he is has not been acting in good faith but has voluntarily entered into this scheme, then he should be liable to some kind of tax (administrative or criminal) sanctions.

2. Sham income

According to the case law of the Supreme Administrative Court the tax authorities can adjust the taxable profits of a taxpayer if they can prove that he has earned higher income than the income that he has declared in his books. The Court has judged that only if the tax authorities prove the sham can they add the respective amounts to the taxable income of the taxpayer. They cannot add any fictitious amounts to the taxable income on the basis that the taxpayer could have earned a higher income but he failed to do so because of various reasons.³⁰

3. Sham companies

Up until the early 1990s personal companies were considered as fiscally transparent entities and their profits were attributed to the members of the company, according to each one's participation percentage, they were added to the other items of income they might have and taxed accordingly.³¹ A common practice that had developed was to set up personal companies in the place of individual enterprises or to set up personal companies with as many members as possible, in order to minimize the individual tax burden. Although the abuse of legal form is another case of abuse of law, the case law has dealt with the setting up of a company not for commercial or business reasons but purely in order to distribute the income to more persons and achieve lower tax rates as sham. In this context it had been ruled that the tax authorities and the courts have the right to judge if a company has been set up for real business reasons or not. If it proved that this was not the case, but the only purpose of setting up the company was to split the income to more persons and achieve lower taxation, then the tax authorities could attribute the income to the persons that were found to be really carrying out the business disregarding the other persons-members of the personal company.³²

4. Sham expenses and deductions

In many cases the taxpayers are trying to reduce the taxable base by including expenses that have not really been effected. In this case the tax authorities can prove that the expenses are sham and can adjust the profits by adding to the net profits the relevant amounts that were previously deducted.³³

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²⁸ This is also the position of J. Photopoulos in a comment on StE 401/2002, published in *Dikaio Epixeiriseon kai Etaireion* (Business and Company Law Review) 2003 (in Greek), p. 690.

²⁹ It suffices to point out here that in the context of a long debate regarding the constitutionality of imputed income, the *Conseil d'Etat* ruled that imputed income is only a constitutional way of imposing taxes when it reflects and reconstitutes the real ability to pay of the individual and not in cases where the parameters used to determine the income are far from reality, resulting in taxation of fictitious income.

³⁰ *Ad hoc* StE 2723/1996, StE 725-726/1992 and StE 3530/1989, that ruled that in cases where the tax legislator wishes to add any fictitious amount to the income of a taxpayer, he does that expressly, as in transfer pricing cases.

In many cases the price of selling immovable property, that is considered business income, has been proved sham, giving the right to the tax authorities to recalculate the price and add the relevant amount to the taxable income of the taxpayer; see *ad hoc* StE 3564-3565/1997.

For the cases regarding the income derived by the alienation of an enterprise as a whole or of a participation in an enterprise see StE 459/2002 and also StE 4433/1996, regarding a cross-border case (Greece-Germany).

³¹ Nowadays all forms of companies are separate taxable entities.

³² This would be the case, e.g. when the members of the personal company are A, A's father, B and B's mother, where the participation of the close relatives of A and B in the company consisted in the investment of relatively little capital regarding to the amount of required capitals for carrying out the business activity of the company (construction); see *ad hoc* StE 3215/1995. In StE 549/1994 the Court also held that the company was sham as (among other reasons) the entrepreneur had no real business reason in transforming his existing and financially strong individual business to a personal company with his employee as a partner. In this case the whole income that the personal company earned was attributed to one of the partners, as the participation of the other partner was proved sham. In StE 1987/1996 the Court was not convinced that the participation of a partner in a company was sham on the grounds only that she was a close relative of the managing partner, that she was living with him, that she was of old age and that she never really dealt with the affairs of the company.

³³ Out of the vast case law on this subject see, e.g. StE 461/2002, StE 1273-1274/1998, StE 4116/1997, StE 2202/1995, StE 1823/1994, StE 141/1993. The same applies if a personal deduction is proven sham: in case StE 3030/1997 a donation to a sports club that is deducted from the taxable income was proven to be sham and therefore it was not deducted in order to determine the taxable income of the taxpayer.

5. Sham transactions

In many cases taxpayers have tried to combine their affairs in such a way that they fall into the scope of application of another taxation that is lower, instead of the one that they should be subject to. One of the most common examples is gift taxation: in many cases transfers of land or of amounts of money are supposed to be effected under a contract where a price is paid, when in reality it is a gift.³⁴ The courts have repeatedly ruled that the tax authority may re-qualify the transaction and prove that it is not a sale but a gift and in that case they may apply the provisions of gift taxation.³⁵

C. The *fraus legis* doctrine

There is no explicit provision in Greek law providing for the abuse of law. There exist, however, two fundamental provisions providing for the abuse of rights: Art. 25(3) of the Constitution and Art. 281 of the Civil Code; the doctrine accepts that the cases of abuse of law are covered by those provisions in such a way that there is no need for an explicit provision.³⁶ The abuse of right is defined as an action that goes beyond the limits of good faith or of the social or economic purpose of the right; no *animus nocendi* is required in order to establish the abuse of a right. In the case where the abuse is proved, then the transaction is illegal, as it breaches the prohibitive legal provision.

In the field of public law there is no equivalent provision; especially there is no such provision in the field of income tax law.³⁷ Both the application of the Constitutional and the Civil Code provisions have

been proposed but neither of them has been accepted in income tax law cases by the Supreme Administrative Court.

1. The civil law clause

The civil law fundamental provision of ‘abuse of rights’ is laid down in Art. 281 of the Civil Code, which provides that ‘the exercise of a right is prohibited if it obviously exceeds the limits set by good faith or by virtue or by the social or economic purpose of the right’. The provision has been characterized by case law as a provision of ‘intensively public order character’.³⁸ It is accepted that within the concept of abuse of right is also included the institutional abuse and the abuse of law, and therefore there is no need for separate provision prohibiting expressly the abuse of law. In case where the abuse of right is established, then the individual’s right is no longer protected, as its conduct is disapproved, and since his actions are breaching the law they are illegal and therefore null and void. Furthermore, if the individual has caused damage because of his abuse of right, then he will be liable to grant indemnity.

The tax authorities have not used, to my knowledge, the argument of abuse of law³⁹ in order to levy taxes to persons that appear to have avoided paying taxes by abusing the law without directly breaching it.⁴⁰ However, they have brought forward the argument of abuse of right and claimed the application of Art. 281 of the Civil Code in cases of refund of indirect taxes that have been further transferred on the consumers.⁴¹

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³⁴ The Inheritance and Gift Tax Code contains an express anti-sham provision: Art. 34(3) of Law 2961/2001.

³⁵ StE 3461/1997, StE 3443/1997, StE 3456/1997, StE 1125/1995. Regarding the benefits that employers grant to their employees: StE 5058/1996 ruled that in general any benefit granted by the employer to the employee is considered to be made in the context of the labor law relationship and therefore it is not subject to gift taxation. According to the Opinion of NSK 330/1999, however, the tax authorities are not totally deprived from the right to prove that the granting of the benefits (such as stocks or cash) constitutes fully or partly a gift (Art. 34 (3) of Law 2961/2001) and therefore they are subject to gift taxation.

³⁶ J. Spyridakis, *Genikes arxes A'* (General Principles of Civil Law) (Athens, 1985) (in Greek), p. 130, especially pp. 139–140 and 148.

³⁷ There is one particular provision in the Inheritance and Gift Tax Code (Law 2961/2001) that provides for abuse of law in a very specific context. Article 29(4) of the Inheritance and Gift Tax Code provides that in case of an adoption the inheritance (Art. 29(4)) or gift (Art. 44) tax will be calculated according to the relationship established with the adoption. If however the tax authorities prove that the adoption constitutes a case *fraus legis*, (the aim was to minimize the tax burden) then they can disregard the adoption and impose the inheritance or gift tax according to the rates applicable based on the relationship that existed before the adoption. See *ad hoc* StE 214/2001. Obviously this provision cannot be interpreted as a general anti-abuse provision and it cannot be applied in other cases or even in other taxes, such as the income tax. The existence of this provision could also constitute an argument that the legislator is familiar with the cases of abuse by the taxpayers but he has chosen not to insert a statutory GAAR and that at the same time he tolerates no unwritten GAAR either.

³⁸ Article 281 of the Civil Code has been very elaborated in Greek literature and jurisprudence. There is very rich case law of the civil courts; its interpretation has also been the subject of the *Ανώτατο Ειδικό Δικαστήριο* decision 8/1984 (*Anotato Eidiko Dikastirio*, Supreme Special Court; AED). A. Georgiadis and G. Stathopoulos, *Astikos Kodix – kat' arhron ermineia, I – Genikai Arxai* (Civil Code – interpretation, I – General principles) (Athens, 1978) (in Greek), interpretation of Art. 281.

³⁹ Taxpayers, on the other hand, have often invoked the application of the principle of sound administration and they have supported that the tax authorities were ‘abusing their right’ of imposing taxes (weakening of a right – the German theory of *Verwirkung* is a case of abuse of right), in cases where the tax authorities are conducting the audit and levy taxes shortly before the time limit expires. The Supreme Administrative Court has not accepted this reasoning in order to annul the imposition of taxes; the Court has held that in those cases the tax authorities are acting legally and that this behaviour does not constitute an abuse of right; see *ad hoc* the decisions 3511-3513/1996 of the Supreme Administrative Court; see also J. Anastopoulos and Th. Fortsakis, *Forologiko Dikaio* (Tax Law) (in Greek), pp. 547 and 549. In the decision 1807/2002 of the Supreme Administrative Court, the Court ruled that Art. 281 of the Civil Code is not applicable in relationships governed by public law, such as the relationship between the state and the taxpayer, and therefore the fact that the tax authorities are imposing taxes in cases where they had given the wrong directions to the taxpayer regarding his tax obligations did not constitute an abuse of right and a valid reason under which the taxpayer would not be required to pay the taxes (note: this subject is regulated by law now in favour of the taxpayer).

⁴⁰ Even in those cases where the wording of the law is very clear as in the case of Art. 29(4) of the Inheritance and Gift Tax Code, the tax authorities insist on following the sham approach: they try to prove that the adoption was sham, although the provision is talking about abuse of law. The Court held that the tax authorities did not prove that the adoption was sham and therefore they lost the case.

⁴¹ See *ad hoc* StE 1104/1992; StE 542/1990. The Supreme Administrative Court has also repeated in various non-tax law cases that Art. 281 of the Civil Code is not applicable in relationships governed or rights stemming from public law legislation but it only regulates the exercise of civil law rights; see e.g. StE 491/2003; StE 568/1999; StE 4640/1997.

The *Conseil d'Etat* has repeatedly ruled that the Civil Code provision is only applicable in civil law relationships and it cannot be transposed into public law relationships, such as the relationship between the state and the taxpayer; therefore Art. 281 of the Civil Code is not applicable. The wording used by the Supreme Administrative Court is so broad and absolute that although the argument was regarded in the specific context of a case it leaves no room for a hypothesis that maybe the same argument could be used successfully in another tax law case.

2. The constitutional clause

Article 25(3) of the Greek Constitution provides that the abusive exercise of rights is prohibited.⁴² The definition of the abuse of rights is not given in the constitutional provision itself; it is accepted, however, that the constitutional clause has the same content as the Civil Code clause, *mutatis mutandis*. The abuse of right must not be confused with the breach of a provision, which is also illegal. There is an abuse of rights when no breach of the letter of a provision is present but when the use of a right is against the constitutional order and especially the purpose for which the specific right has been provided for; that is when there is a breach of the spirit of the Constitution. The scope of application of this provision is the constitutional provisions of the individual and social rights that are laid down in Arts. 4 to 24 of the Constitution and it sets the limits of state intervention. It does not apply to any kind of claims that the individuals may raise against the state.⁴³ In numerous cases the Supreme Administrative Court argued that the Constitutional provision of Art. 25(3) refers only to the abuse of the constitutional individual and social rights and that it does not apply in relationships that are governed by public law, such as the relationship between the state and the taxpayer.⁴⁴

It has to be noted that those arguments were brought forward in cases where the taxpayer was asking for a refund of taxes (recovery of undue payments) and the tax authorities claimed that it is an abuse of law to ask for a refund when the taxpayer has rolled over the tax to the consumers. However, the Court has expressed itself very broadly, stating that in general, Art. 25(3) is only applicable in cases of abuse of the constitutional individual and social rights, therefore the tax authorities could never argue that a taxpayer is breaching Art. 25(3) of the Constitution: there is no abuse of a constitutional right by the

taxpayer and furthermore this provision's purpose is to protect citizens against other citizens and against the state and not the state against the citizens!

3. *Fraus legis* as justification to impose taxes

Having found adequate ground to deal with tax avoidance cases in the sham doctrine and having overruled any proposed use of abuse of law clauses in tax law, the *Conseil d'Etat* has not developed a strong *fraus legis* doctrine. On the contrary it seems to have accepted that *fraus legis* is not a valid justification in order to adjust the profits of an enterprise and determine accordingly its tax liability.⁴⁵ However, in a recent circular issued by the Ministry of Finance⁴⁶ the tax authorities are required to identify cases of abuse of law, that is cases where a right has been exercised in excess of the limits of good faith. One particular example is given in this circular: according to the Greek ITC the president and the managing director of a company are personally responsible for the payment of taxes that the legal entity is liable to. Those persons are liable to pay the tax by virtue of their quality as president or managing directors of the said company, irrespective of the fact whether or not they have really been able to control the company. Because of the strict interpretation of the tax law provisions, no other persons may be held liable for the payment of the tax liabilities of the company. In some cases, however, the persons who have had one of the qualities described by the law and according to which they would be liable to pay the tax debts of the company, have changed just a little before the crucial time upon which the liable persons are determined, and therefore, since they no longer hold the quality described by the law during the period of time specified by the law, they cannot be held liable for the payment of the taxes of the legal entity of which they have been president and/or managing directors. The loss of the said qualities can also result from the explicit or silent resignation of the person holding the office. Those particular cases are to be examined closely, according to the ministerial circular, since the resignation may have been exercised abusively, that is in exceeding the limits of good faith.

It is considered that there is an abuse if the resignation has been effected shortly before the liquidation or the transformation of the legal entity with the purpose of avoiding personal responsibility. If that is proved, then the tax authorities that are carrying out the audit must not take into account the

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⁴² See P. Dagoglou, *Syntagmatiko Dikaio – Atomika Dikaiomata A'* (Constitutional Law) (Athens, 1991) (in Greek), p. 131; P. Pararas, *Syntagma 1975-Corpus I* (1975 Constitution-Corpus, I) (Athens, 1982) (in Greek), Commentary under Art. 25.

⁴³ Such as the claims for return of undue taxes, according to settled case law; see i.e. StE 542/1990.

⁴⁴ This is the wording used in the decision StE 911/1984.

⁴⁵ This was implied in StE 3530/1989. See also n. 30 above.

⁴⁶ Circular of the Ministry of Finance no. 1103/12-10-2004 that contains directions to the tax authorities regarding the identification of the persons who are liable to pay the taxes in case they are not the persons in the name of whom the tax assessment has been made.

resignation, but they should act as if it had not taken place and hold liable the resigned person.⁴⁷

In a recent court case⁴⁸ that dealt with the same issue, although the case was clearly one of abuse of law, the Supreme Administrative Court did not use the theory of *fraus legis* but used instead the sham approach: the Supreme Administrative Court ruled that the late president or managing director of the bankrupt company can still be held liable, even if they have in the meantime resigned, as long as there is no new president or managing director appointed. The Court justified this solution by stating that if the opposite were accepted, it would mean that the persons who are in a position to know the financial situation of the company (president, managing director) would be able to arrange things in a convenient way so as to be discharged of any responsibility by resigning at a crucial time.⁴⁹ This behaviour, concluded the Supreme Administrative Court, is directly contrary to the spirit and purpose of the relevant tax law provisions, safeguarding the right of the state to recover taxes⁵⁰ and since it is an artifice used by the taxpayers it must be disregarded.

D. The relationship between DTCs and domestic anti-avoidance doctrines

In examining the application of domestic anti-avoidance doctrines on DTCs the question that arises is to what extent a domestic anti-avoidance doctrine, be it statutory or jurisprudential, may be applicable in international tax cases when a DTC is applicable. The problems of a possible application of the domestic anti-abuse doctrine will be examined before dealing with the application of the sham doctrine. The position of the OECD and its potential impact on Greek anti-abuse doctrine will be dealt with in a separate part of this article, before presenting case law supporting the use of the constitutional reciprocity clause as a subject-to-tax clause, in an effort to counter abuse of tax treaties.

1. The application of the anti-abuse doctrine and the DTCs

Regarding the abuse of law doctrine it seems that it is very difficult to effectively apply it in order to block the application of a DTC and deny entitlement to benefits. First of all the abuse of law doctrine cannot be applied in public law relationships, such as the relationship between the state and the taxpayer, because of the lack of a specific legislative provision. Neither the civil law provision nor the constitutional law provision is applicable. Even if the civil law provision could be transposed into public law relationships, it could never be used in order to block the application of a DTC, as it is *lex inferior* compared to the DTCs. Only the Constitutional anti-abuse provision could be applicable, since it stands higher in the norm hierarchy than a DTC; but also the constitutional anti-abuse provision is not at all applicable in the relationship between the state and the taxpayer.

As DTCs, even after their transposition into domestic law, are still part of international law, it could be argued that perhaps an international law abuse-of-law doctrine (or provision) may apply. It has been supported⁵¹ that there exists such an international law 'abuse of law' doctrine that could apply in cases where states have difficulties in applying their domestic anti-abuse principles to DTCs. It seems a little difficult, however, to accept that, since international law obligations are primarily exclusively addressed to states and not to persons. The meaning of such an international law obligation would be that states should not abuse the law in their relationships between them. This could not constitute an adequate legal ground in order to give a state the right to use the international law anti-abuse clause against its nationals (or residents, in the case of DTCs), or against nationals (or residents, respectively) of another state.

Double tax conventions have a special character compared to other international bilateral treaties in that their provisions creating obligations and granting rights to the Contracting States have direct results on persons that are entitled to the benefits provided for in them. This fact cannot lead to the conclusion that the application of the VCLT (which is already applicable

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⁴⁷ It has to be noted that the relevant legislation does not give the right to the tax authorities to proceed to such a breach of the legal veil. The circular states that the possible case of abuse of law must be evaluated, established and described as a real fact and not as a legal qualification, pointing again to the direction of sham approach.

⁴⁸ StE 1590/2000.

⁴⁹ According to the facts of the case the resignation was effected on 2 April 1985, two days before the company was declared bankrupt by the court, on 4 April 1985. The Court held that the resignation was sham, since the managing director resigned from his post with the purpose to avoid the personal tax liability.

⁵⁰ The same reasoning is also found in StE 2028/1997.

⁵¹ David A. Ward, 'Abuse of tax treaties' in: Alpert and Van Raad (eds), *Essays on International Taxation* (1993), p. 397. Ward also refers to the argument brought forward by K. Vogel, that 'it would be preposterous to assume that taxpayers are entitled to exercise rights given to them under tax treaties in an abusive way and remain immune from the consequences that would otherwise be imposed by international law on the treaty states themselves if they abuse their rights'. This being an undisputable argument for the need of specific anti-abuse legislation, it cannot be however the legal ground for the application of this international law doctrine to persons. A.J. Martin Jimenez, 'Domestic anti-abuse rules and double taxation treaties: a Spanish perspective – part I', BIFD 2002, p. 542 (p. 546) has proposed that there exists a public international law abuse of rights doctrine that is recognized as having a substantive nature and results in protecting the states against abuse of law by other states and/or individuals. He admits however that international law does not contain an anti-abuse standard that is valid for tax treaties (p. 547).

on DTCs) can be extended to persons. In other words the good faith obligation that the VCLT instructs, is an obligation that states have in their international relationships; it can also be an obligation that a state has towards citizens; it cannot be interpreted the other way round, as creating an obligation for the citizens of a certain state to apply the international treaties signed by that state in good faith.

As has been pointed out earlier, the abuse of tax laws, including the abuse of tax treaties, is not directly prohibited in Greece, but we have to make a distinction between cases of desired tax avoidance and cases where tax avoidance is an unintended result. The inclusion of preventing tax avoidance in the title and therefore in the aims of DTCs, makes it difficult to support that tax avoidance resulting from the application of DTCs can be a desired result. However, as the Supreme Administrative Court has ruled, the purpose of anti-avoidance as a justification for the enactment of legislation that may breach the constitutional principle of equality is not sufficient. As a consequence, the underlying anti-avoidance purpose of the DTCs cannot be adequate justification in denying entitlement to the treaty benefits.

If this were the case and the tax authorities had the power to deny the benefits of a treaty in cases of abuse, then they would deny the granting of a tax benefit without relying on a specific law provision. Given the fact that the Greek Constitution⁵² contains a strict principle of legality regarding the imposition of tax burdens, denying the application of a DTC (and, as a result, denying the granting of a benefit) on grounds of abuse that is considered to be contrary to the purpose of the DTC, would result in the imposition of a tax burden without a law providing for it. Therefore this would be an unconstitutional denial of the application of a DTC.

2. *The application of the sham doctrine and the DTCs*

The application of the sham doctrine in international tax cases presents no problems. Double tax conventions contain mainly allocation rules and less substantial rules, restricting the taxing rights (or in some cases broadening the taxing rights) of a Contracting State. They do not contain rules for the determination of the tax liability or procedural rules, such as rules providing for the application of a DTC or provisions for the execution of the controlling/auditing powers of the tax authorities in case a DTC applies. Therefore the application of domestic rules

for the determination of the tax liability or for the verification of the facts presented is not in conflict with the DTC rules, since they regulate different matters; the domestic rules in this case apply without any reservation.

The sham doctrine is applicable on a domestic level, in order to determine whether or not a person or a situation is entitled to treaty benefits (that is, countering treaty shopping cases) and on a DTC level, in order to determine which specific provision of the DTC will apply in a certain case (that is, countering rule shopping cases).

The tax authorities in verifying the facts according to which a resident requests the application of a DTC, may examine whether they have a real or an artificial structure to deal with. If they prove that the structure is artificial, then they are not bound by it and they can apply the tax laws as if the artificial structure were not present.⁵³ The taxpayer who requested the application of a DTC and argues that he is entitled to certain treaty benefits will then have to prove that he has not come up with an artifice. The courts will finally decide upon the existence of sham, being a question of facts and a matter of proof. The same applies also in the second case, where the tax authorities will seek to apply a different provision of the DTC than the one suggested by the taxpayer, after a re-characterization of a certain income.

3. *The position of the OECD in particular regarding the application of the domestic anti-abuse doctrines and its impact on tax treaties practice*

The abuse of tax treaties has been the subject of an extensive analysis in the OECD Commentary on Art. 1 of the Model Convention, under the umbrella of the improper use of treaties. The 2003 revision of the Commentary greatly affected this subject and resulted in substantial changes that, combined with the dynamic interpretation of the DTCs supported by the OECD, led some authors to talk about an indirect modification of the existing DTCs.⁵⁴

The 2003 changes in the Commentary on Art. 1 reflect basically a change in the position of the OECD regarding two subjects: the purpose of tax treaties and the concept of the abuse of tax treaties; they both have been broadened. This change gives rise to questions such as what is the impact of those changes on existing and on new treaties and whether the changes in the Commentary create any constitutional problems. Those questions are in fact reduced to the fundamental

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⁵² Article 78(1) and (4) of the Greek Constitution.

⁵³ In this regard, if for example a Greek resident company has set up another company in a DTC country and the tax authorities manage to prove that the business in Greece is not carried out by the DTC country company but directly by the Greek company (application of the sham entrepreneur or sham company case, as analysed previously), then they would deny the application of the DTC because in reality there is no cross-border activity and all the income would be attributed to the Greek company.

⁵⁴ See Adolfo J. Martin Jimenez, 'The 2003 revision of the OECD Commentaries on the improper use of tax treaties: a case for the declining effect of the OECD Commentaries?', BIFD 2004, p. 17 and further citations there.

underlying problematic of the relationship between domestic and international law.⁵⁵

Double tax treaties that are ratified by the Parliament according to Art. 28(1) of the Greek Constitution, form part of the domestic legal system but, as they are of an international law origin, they lie higher than statutes in the norm hierarchy and they cannot be derogated from, amended or suspended in any other way (i.e. by statute) than in the manner provided for in the treaty itself or by international law norms. In any case, double tax treaties always remain subordinate to the constitutional provisions.

The Commentary discussion on the concept of the abuse of tax treaties is essentially different from the domestic concept of abuse. According to the Commentary the concept of abuse includes both cases of sham and cases of abuse of law, *stricto sensu*.⁵⁶ In a first step and following the interpretation rules of Art. 3 of the Model Convention, it could be argued that for treaty purposes the concept of abuse of law contained therein takes precedence over the domestic concept. This argument is still not absolutely convincing though, as it is connected with the importance one grants to the Commentary and in general it is not unanimous whether the Commentary can be accepted as the context of any particular DTC. However, even if this were accepted from an international law point of view, from a constitutional point of view it is still problematic as it is in contradiction of fundamental principles.

The Commentary to the OECD Model Convention remains part of soft law, as it cannot be given legally binding character under any of the existing interpretation rules. Even if its importance for the interpretation of tax treaties is widely recognized and its standardizing function cannot be denied, the interpretation options that it contains are always subject to the ultimate limit of a two-fold requirement stemming from the Constitutional principle of legality: statutory provision of taxes and strict interpretation of tax laws. Therefore, as long as and to the extent that the revised Commentary in Art. 1 lies beyond the wording of a treaty, its content cannot be accepted as a justified interpretation. The same must be accepted for already existing treaties: the retroactive broadening of the concept of abuse and of the purpose of the treaties through the dynamic interpretation proposed by the OECD is also in breach of the principle of legality.

Furthermore, what illustrates even more vividly the unconstitutionality of interpretation based on the Commentary is the fact the Commentary is formulated

by the positions of the tax authorities' (i.e. the Government) representatives in the OECD. Apart from the principle of legality that requires a statute, that is a formal Parliamentary Act, and not a mere Governmental Act for the introduction, amendment or suspension of tax legislation, if the indirect amendments through the Commentary were accepted, that would constitute a breach of the democratic principle requiring the partition of powers among the parliamentary, the executive and the judiciary body.⁵⁷

The broadening of the purpose of the DTCs so as to include tax avoidance and the relevant reference in the title of the Conventions could not be considered as creating an unwritten abuse of law principle generally applicable in the field of tax treaties. It can only be considered as being indicative of the spirit of the treaty. Yet, the spirit of a law is not considered as sufficient legal basis for the denial of tax treaty benefits to persons otherwise entitled to them. The only derogation that is acceptable is if the person is found to have used artificial structures in order to gain access to treaty benefits; but in that case it is a matter of application of the domestic rules for the determination of tax liability and not a subject that is governed by a DTC, and it applies irrespective of whether or not it is included in the title or the purpose of the DTCs.

The change in the purpose of the DTCs also creates problems regarding its interaction with the fundamental purpose and function of DTCs as tools for the avoidance of international double taxation. It cannot be denied that DTCs may have more than one purpose but it should always be borne in mind that their principal role is the avoidance of double taxation; any secondary or ancillary purpose can be important only as long as the principal one is safeguarded. Therefore, in cases where it is suggested by the Commentary that treaty benefits must be denied as a result of the application of the anti-abuse purpose of a treaty, a test must be carried out: if this interpretation results in double taxation, then in my view, this interpretation is in breach with the context and the spirit of the treaty, as the secondary purpose takes precedence over the first.

The only way to deal with all the above problems in respect with the *stricto sensu* abuse of tax treaties is by inserting a specific provision in the DTCs denying access to the treaty benefits on the grounds of abuse. The argument that from a practical point of view this requires a huge number of amendments of all the existing tax treaties is not sufficient in order to bypass constitutional provisions.

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⁵⁵ This particular subject is analyzed in K. Perrou, 'Tax Treaty Interpretation in Greece', in: M. Lang (ed.), *Tax Treaty Interpretation* (Kluwer Law International and Linde Verlag Wien, 2001), p. 153 and the analysis that follows is constantly referred there for the relevant matters.

⁵⁶ With the phrase '*stricto sensu* abuse of law' I refer to the civil law concept of abuse, as analysed previously: cases of real and apparently legal transactions that are in breach of the spirit of the law.

⁵⁷ The principle of the partition of powers is laid down in Art. 26 of the Greek Constitution.

4. *The use of the constitutional clause of reciprocity as a subject-to-tax clause*

Very few international taxation cases have been judged by the courts and only one of them has addressed specifically the matter of tax avoidance. The case involved the DTC between Greece and Switzerland and it was judged by the Court of Appeals of Athens in 1996.⁵⁸

A Swiss company held a participation in a Greek limited liability company. According to Arts. 5(7) and 7(1) of the relevant applicable DTC this participation did not constitute a Greek PE for the Swiss company. According to the domestic law, however, the participation of a foreign entity to a Greek limited liability company constitutes a PE, and therefore, the tax authorities held that the part of the profits of the Swiss company that were realized in Greece should be taxed in Greece. Furthermore, the tax authorities argued that Swiss companies that participate in Greek limited liability companies, due to a different interpretation of the said provisions of the Greece-Switzerland DTC by the Swiss tax authorities, do not pay taxes for the Greek profits in Switzerland either, and therefore they commit tax avoidance.⁵⁹

The Court ruled that this result was not in line with the constitutional requirement of reciprocity in the application of the international treaties.⁶⁰ According to settled Supreme Administrative Court's case law, the reciprocity has to be substantial, in the sense that the other Contracting Party is in fact effectively applying the treaty.⁶¹ In this case it would mean that the said income should be taxed in Switzerland. The Swiss company did not prove that and therefore the Court held that the said income should be taxed in Greece, not as a PE profit but as a dividend income (Art. 10 of the Greece-Switzerland DTC).⁶²

3. Final remarks

Despite the lack of a statutory general anti-avoidance rule in Greece, there has not been any discussion about the need of it; this is not by chance. I think it reflects

the fact that a GAAR is not really needed in Greece, since, as it appears, both the tax authorities and the Courts have the means to tackle quite effectively tax avoidance schemes employed by the taxpayers using the sham doctrine.

The Greek Supreme Administrative Court's case law concerning tax avoidance has developed around the concept of sham. Sham, being merely a question of facts, does not require the proof of any difficult legal concepts, such as good faith or economic purpose of an action, or the proof of subjective elements, such as the aim to avoid the payment of taxes.

The *fraus legis* doctrine, although useful in combating tax avoidance, has not been elaborated in Greece, mainly because there is no statutory provision in the field of tax law, or general administrative law, providing for the abuse of law. The civil law provision as well as the constitutional law provision regarding the abuse of law have both been declared by the Supreme Administrative Court as inapplicable in tax matters.

In international tax cases where a DTC applies the question as to what extent the domestic anti-avoidance doctrines are applicable cannot be answered in the same way for all the cases: while the sham doctrine does not create any problems in its application, the anti-abuse doctrine appears problematic. The different result regarding the two anti-avoidance doctrines and their application on DTCs lies in their different nature. The sham doctrine refers to the *corpus*, the objective elements of a structure forming the taxable event; the anti-abuse doctrine on the other hand refers to the *animus*, the subjective elements of a structure that are not included in the definition of the taxable event. While the former is of general application, the latter needs specific legitimization in the DTCs in order to become effectively applicable, as it cannot block the application of DTCs. The 2003 revised OECD Commentary on Art. 1 of the Model Convention regarding the improper use of tax treaties is of limited importance as an interpretative tool against tax avoidance, as the practical application of some of its suggestions and underlying considerations on a number of matters regarding the anti-abuse doctrine would lie beyond the Greek constitutional principles.

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⁵⁸ Decision 4300/1995 of the *Dioikitiko Efeteio Athinon* (Court of Appeals of Athens). The case was brought before the Supreme Administrative Court for revision in 1999 and the Court annulled the decision of the Court of Appeals on grounds of a procedural fault, not examining the correctness of the substantial arguments that the later had based its judgment upon (decision StE 1015/1999).

⁵⁹ Strictly speaking the effect of the combined interpretation and application of the relevant provisions of the DTC by the Greek and the Swiss tax authorities resulted to double non-taxation for the Swiss company.

⁶⁰ The reciprocity is provided for in Art. 28(1) of the Constitution. See *ad hoc* G. Matsos, see n. 2 above, pp. 149–150 and especially pp. 155–156. Matsos also refers to an issue that had arisen in the past regarding the taxation of Greek transparent partnerships; the relevant case law never dealt with the issue of tax avoidance.

⁶¹ StE 2280/1990 that has been confirmed by all recent cases.

⁶² I think however that the reciprocity clause cannot be invoked in cases where the other Contracting State simply follows a different interpretation of the provisions of the DTC. Matsos agrees, see n. 2 above, p. 155.