

Supreme Administrative Court of Greece
Decision No. 917/2010

Deduction of tax at source and deduction of expenses of a PE

Tax Treaty Case Law Around the Globe
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1. Facts

- German company - public works contract in Greece (construction site - PE)
- Gross income of the PE: **3.472.105,00 EUR**
- Tax paid by the PE (4% on gross income, deducted at source): **138.884,20 EUR**
- Net profits (LOSS) based on the books and records of the PE in Greece: **-205.430,00 EUR**
- Complaint: the tax of 138.884,20 EUR was unduly paid; the method used for calculating the tax is contrary to the DTC; the expenses must always be taken into account, according to Article III para.3 of the DTC

2. Reasoning

- Article III para. 2 of the DTC refers ONLY to the deduction by the PE of the general administrative expenses incurred by the HO; it does not dictate the method to be used by states in the determination of the tax liability of the PE (domestic law issue; Article II TDC)
- Article III para. 2 of the DTC applies in cases where the PE is taxed on a net profit basis
- In any case the notional income attributed to the PE is taking into account the expenses incurred by the PE.
- No-discrimination: domestic companies are also taxed on a notional income tax basis (no further elaboration though)

3. Observations

- The decision is correct in its interpretation of the DTC provisions
- EU tax law considerations (not examined in the decision)
 - Facts of the case similar to those that gave rise to the ECJ **Gerritse** Case (C-234/01)
 - Comparison with the purely domestic case: two corporate income tax rates: (i) 40% and (ii) 35%
 - Domestic situation
 - (i) 40% on the 10% of the gross income = 4% on the gross income; no discrimination
 - (ii) 35% on the 10% of the gross income < 4% on the gross income; discrimination against the PE.