

1. Introduction

Under Greek legislation the notion of “attribution of profits to permanent establishments (PEs)” is to a great extent identical to the notion of “determining the gross and net income of a PE”.¹ As the rules for the determination of the gross and net income of the PE are the same that apply to domestic enterprises, there has been no need for a particular elaboration in the context of a PE. Consequently those rules will be dealt with in this report, as they are the rules used for the attribution of profits to PEs. The attribution of profits to PEs of banks and insurance companies will not be dealt with separately as the applicable rules do not in principle differentiate from the general rules.²

2. The position under domestic tax law

2.1. Background issue: definition of PE

Article 100 of the Greek Income Tax Code (Law 2238/1994, as amended; *Kodikas Forologias Eisodimatos*, hereafter: ITC) bears the title “Concept of permanent establishment in Greece of foreign legal persons”. Strictly speaking, this article contains no definition of the term PE; instead it enumerates a number of cases that create a PE of the foreign entity in Greece, when the relevant conditions are fulfilled.³

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¹ See also G. Matsos and S. Kotanidis, “Tax treatment of general enterprise/permanent establishment dealings”, ITPJ 5/2005, pp. 245 *et seq.* (p. 247), according to whom “to some extent, under Greek law, income allocation and income generation become identical”.

² Special rules apply regarding the determination of the taxable profits of banks and insurance companies, but they will not be analysed in this report, as they are not relevant for the attribution of profits to PEs. For some aspects of the attribution of profits to PEs of banks and insurance companies see the Greek branch report of C. Chrissostomidis, in IFA *Cahiers*, vol. 81a, *Permanent Establishments of Banks, Insurance Companies and Other Institutions* (1996).

³ Similarly N. Barbas, *Forologia Eisodimatos [Income Taxation]*, Athens-Thessaloniki 2003 (in Greek), pp. 349 *et seq.*

According to article 100(1) ITC and, for the purposes of the Greek Income Tax Code, it is considered that a PE of a foreign enterprise or organization exists in Greece if the foreign entity:

- (a) maintains in Greece one or more branches, agencies, annexes, offices, warehouses, plants or workshops, as well as facilities aiming at the exploitation of natural resources; or
- (b) is engaged in the processing of raw materials or agricultural products in Greece, by using, for this purpose, either owned facilities or the facilities of a third party, that is acting on its behalf; or
- (c) (i) performs activities or provide services in Greece through a representative, who has the authority to negotiate and conclude contracts on behalf of the foreign entity;
 - (ii) the same applies (i.e. there is a PE) even where the activities are performed or the services are provided without a representative, but they are of a technical or scientific nature in general or they involve research, the setting up of studies and the elaboration of designs;⁴ or
- (d) maintains a stock of merchandise out of which it executes orders on its own behalf; or
- (e) participates in a personal company (partnership) or limited liability company that has its seat in Greece.⁵

The enumeration is restrictive. This approach guarantees a certain level of legal certainty but it does not lack disadvantages. Compared to the PE definition of the OECD MTC, the concept of PE in Greek tax legislation has substantial differences.⁶ Article 100 (1) ITC is at the same time broader and narrower than the concept and definition of a PE in the OECD MTC.⁷ It is narrower in the sense that any kind of activity that is not specifically referred to in article 100(1) ITC cannot be deemed to create a PE in Greece.⁸ On the other hand it is broader in the sense that it considers that a PE is created even in cases where no business activ-

⁴ The requirements set in case (c)(ii) are fulfilled even in cases where the foreign entity creates a technical project or plan in its entirety in the foreign country where it has its seat, without any physical presence in Greece, but operates on behalf of a domestic entity; Barbas, *op. cit.*, pp. 352–353.

⁵ It has been judged by the Greek Supreme Administrative Court that in case where a PE of the foreign entity is established as a result of its participation in a Greek limited liability company (*Etaireia Periorismenis Euthynis* – EPE), the income attributed to the PE by such participation will be taxed according to the tax rate that is in force at the time of submission of the financial statements of the foreign entity and not at the time of the submission of the financial statements of the Greek EPE (decision StE 1797/1993). It has to be noted in regard to the creation of a PE as a result of the participation of a foreign entity to a Greek limited liability company (EPE), that in practice the tax authorities do not claim this anymore, since the EPEs are subject to corporate income tax, just like the *société anonyme* (the participation in a Greek *société anonyme* does not create a Greek PE).

⁶ Similarly Matsos and Kotanidis, *op. cit.*

⁷ See the comparison of Ch. Anagnostopoulos, “H ennoia tis monimis egkatastasis kata to arthro 100 par. 1 tou N. 2238/1994 [The concept of permanent establishment according to art. 100 (1) of Law 2238/1994]”, DFN 1997, pp. 1299 *et seq.* (in Greek), who compares the domestic law provision to the provisions of art. 5 OECD MTC; see also a comparison in Barbas, *op. cit.*, pp. 356 (*in fine*) *et seq.*

⁸ The Greek tax authorities will seek to interpret the relevant provision in such a way as to cover as many cases as possible.

ity is carried out, such as in the case of an office that carries out preparatory or auxiliary works.⁹

One of the major differences is that the domestic provision does not make the creation of a PE dependent upon any time conditions; even a temporary presence of the foreign entity in Greece, through one of the ways enumerated in article 100(1), will raise a PE issue.¹⁰ Furthermore the nature or the reason for the presence in Greece of the foreign entity is not relevant;¹¹ it is sufficient that there exists an office, for example, irrespective of whether part of the main activities of the enterprise are carried out through that office or a simple collection of information is conducted.¹²

The different approach between the OECD MTC definition of the PE and the domestic law concept of the PE is problematic and it has been suggested that the domestic legislation should be amended in order to meet the OECD MTC standard clause.¹³

The tax authorities were called to interpret the provisions of article 100(1) ITC in respect of a Spanish entity (a reinsurance company) that wished to carry on business in Greece.¹⁴ The foreign company intended to open a representative office in Greece that would carry out the following activities: advertising and providing information to possible clients of the foreign company, the collection of information on the Greek market and the execution of any other technical and advisory activity of an auxiliary or preparatory nature in comparison to the main activity of the foreign company. A Greek individual was to be appointed as head of the representative office, and would have the power to enter into certain types of agreements related to the operation of the representative office only (such as the hiring and dismissal of employees, the opening and handling of bank accounts, the leasing and renting of movable and immovable property etc.). In interpreting article 100(1) ITC, under the light of the given facts, the tax authorities stated that since the foreign entity maintains an office in Greece, it is deemed

⁹ Anagnostopoulos, *op. cit.*

¹⁰ There seems to be a differentiation for the case of the dependent agent: a single profit making act is not enough for the creation of a PE but an element of permanence is required; see Barbas, *op. cit.*, p. 351, who makes reference to a very old decision of the Supreme Administrative Court (StE decision 2421/1965).

¹¹ Differently on this subject Barbas, *op. cit.*, p. 350, with references to Theocharopoulos. Barbas holds that the simple presence in Greece of a foreign entity that does not generate directly any income for the foreign entity, cannot constitute a PE in Greece; likewise, if the foreign entity operates in Greece purely auxiliary functions, regarding to its main function in the foreign country, it should not be deemed as having a PE in Greece.

¹² A good example of how these provisions are applied offers the case of *cabotage*. The tax authorities, in interpreting art. 100(1), lit. (c) of the Greek Income Tax Code, stated that a foreign entity that is engaged in *cabotage* activities in Greece (after special licensing) and has its seat in a non-DTC country is deemed to have a PE in Greece. If the foreign entity has its seat in a DTC country, then the creation or not of a PE is governed by the provisions of the relevant DTC. See *ad hoc* the decision of the Minister of Finance 1069830/442/0015/pol. 1173/12 June 1998 on the "Tax treatment of merchandise transportation carried out by a person holding a *cabotage* license. Books and records keeping obligations".

¹³ Anagnostopoulos, *op. cit.*, p. 1305. Barbas, *op. cit.*, p. 357 agrees with this proposition, under the condition that the requirement of reciprocity is fulfilled.

¹⁴ The case arose at a time when the DTC with Spain was not yet in force.

to have a PE in Greece, irrespective of the kind and nature of the activity that is carried out through this office.¹⁵

2.2. Basic rule for attribution of profits to PEs

The attribution of profits to a PE is determined by a combination of special statutory provisions.¹⁶ The basic rule is that, according to article 101(1) lit. (d) ITC,¹⁷ foreign entities operating in Greece under any form (and irrespective of the existence of a PE) are subject to the Greek corporate income tax.¹⁸ The tax is levied on the aggregate net income that is accrued by the foreign entity that operates in Greece (article 98 ITC).

According to article 99(1) lit. (d), the tax is levied “on the net profit that is accrued by the foreign entity from any source in Greece as well as the net profit accrued by the Greek PE of the foreign entity, according to the PE concept of article 100 ITC”. The Greek Supreme Administrative Court (*Symvoulío tis Epikrateias* – StE) has interpreted this clause as an “either/or” case; according to its decision StE 2912/1990, a foreign entity is subject to Greek corporate income tax either on the income that is derived by a source in Greece or on the income that is accrued by the Greek PE of the foreign entity. Those two cases are, according to StE case law, separate and independent from each other.¹⁹ This means that there is no force of attraction principle applicable in the case of a PE of a foreign entity that is established in Greece; the foreign entity will be taxed only on the income that is attributed to its Greek PE. If the same foreign entity derives income from another Greek source, then this will also be taxed in Greece, but as Greek source income²⁰ and not as part of the Greek PE profits.

¹⁵ The ruling is published in D. Stamatopoulos and A. Karavokyris, *Forologia eisodimatos fysikon kai nomikon prosopon [Individual and Corporate Income Taxation]*, Athens, 2003 (in Greek), pp. 1448–1449.

¹⁶ In Greece taxation is governed by the constitutional principle of legality in its strictest form; see art. 78(1) and (4) of the Greek Constitution.

¹⁷ This article is contained in part B of the Greek Income Tax Code, providing for corporate income taxation. A PE is conceivable only in the framework of foreign entities operating in Greece and the article does not apply to individuals. However as Matsos and Kotanidis, *op. cit.*, p. 246, footnote 8, point out “this ... does not cause many practical problems, due to the fact that an individual who maintains a fixed place of business in Greece that qualifies as a PE under art. 100 ITC will always receive Greek-source income and will be taxed on that basis”.

¹⁸ The foreign entity is subject to Greek corporate income tax irrespective of whether, because of its form, if it were a Greek entity it might fall under the provisions of individuals’ income tax. This is the case for example with partnerships; Greek partnerships (personal companies like OE and EE) are subject to the individuals’ income tax; a foreign partnership operating in Greece would, however, fall under the corporate income tax provisions; similarly Barbas, *op. cit.*, p. 344.

¹⁹ This is a standard interpretation followed by the Supreme Administrative Court; similarly: StE 842-3/1984, StE 5049/1984, StE 1834/2000 and StE 3429/2000. Initially the Supreme Administrative Court held the position that the two cases described in the law should apply concurrently in order for the income accrued by a foreign entity to be taxed in Greece; see on this subject Barbas, *op. cit.*, pp. 347–348.

²⁰ According to art. 105(9) ITC, if there is no PE in Greece, the net income of the foreign entity arising from sources within Greece is determined following the application of the relevant provisions of the individuals’ income tax (part one of the Greek Income tax Code); it is, however, subject to corporate income tax.

2.2.1. The “separate entity” approach

The profits of the Greek PE are determined by following the separate legal entity approach, even though there is no explicit provision establishing the fiction of a separate entity.²¹ It could be argued that the separate legal entity approach finds its statutory ground in article 105(10) establishing the arm’s length principle in dealings between the foreign head office and its PE in Greece. It appears that the underlying rationale is that the PE and its head office are two separate entities, dealing with each other as if they were separate and independent enterprises.²²

The rules applicable to domestic corporate taxpayers are also applicable to the determination of the taxable profits of the PE.²³ Article 105 provides for the determination of the gross and the net income of the PE. Gross income is regarded as the income from the sale of goods and the provision of services as well as income from movable and immovable property; income from participations in other companies; agricultural income; income resulting from alienation of items of capital (capital gains) and any other income that does not fall into any of the above mentioned categories.²⁴ The net income is calculated after deducting certain expenses, as they are defined mainly in article 31 ITC.

The foreign entity that operates in Greece under any form, irrespective of whether this operation creates a PE in Greece, is deemed to be an “entrepreneur”, within the meaning of article 2(1) of the Greek Code on Tax Accounting and Bookkeeping (*Kodikas Vivlion & Stoicheion* – KBS) and, therefore, has the obligation to keep the books and records that are required by the Code. In this way all the transactions of the PE, including its dealings with its head office, must appear in its books and be supported by relevant documentation, as provided for by the KBS.²⁵ The results of the books are used by the tax authorities in

²¹ Barbas, *op. cit.*, p. 376; L. Theocharopoulos, *Forologiko Dikaio (eidiko) [Tax law-special part]*, Thessaloniki, 1999, p. 233; Matsos and Kotanidis, *op. cit.*, p. 247 correctly point out that in the absence of an explicit provision in the Greek legislation providing for the fiction that both the general enterprise and the PE are separate enterprises, this fiction is not always easy to apply. It seems that a significant minority of the members of the Supreme Administrative Court indirectly do not accept this practice of recognizing a fiction of separate entity for tax law purposes; the minority in the decision StE 598-600/2003 claimed that no tax should be levied on transfer of funds from the Greek PE to its foreign head office as there was no income realized within the same legal entity by the sole transfer of funds.

²² The Supreme Administrative Court, however, did not accept the allegation invoked by the tax authorities that a PE of a foreign enterprise is a totally independent enterprise and therefore article 100(2) on the deductibility of expenses is not applicable; StE decisions 1724-1725/1984.

²³ Similarly Barbas, *op. cit.*, pp. 368 *et seq.*

²⁴ It is possible that the income of a PE includes tax-free items (i.e. dividends of a Greek company) or items that have been subject to a final withholding taxation (i.e. state bonds interest). Those types of income remain tax free as long as they appear in a special reserve and they are not distributed. If they are distributed, then they are taxed at the normal rate. Transfers from the tax-free reserve of a Greek PE to the foreign head office are deemed to be distributions and therefore tax is levied upon the credit or actual transfer of the above amount to the head office (art. 106(4) and (5)). It is interesting to note that in a recent decision of the Plenary Session of the Supreme Administrative Court a strong minority opinion was expressed according to which in a case where a transfer of profits takes place from the PE in Greece to the head office in another country, no tax should be levied, as this is not income for the head office (StE 598-600/2003).

²⁵ Foreign entities are subject to the same bookkeeping obligations as domestic companies; see on this matter Barbas, *op. cit.*, p. 345.

order to ascertain the profits that are attributable to the PE.²⁶ This provision of the KBS facilitates the application of the direct method for the attribution of profits to PEs.

2.2.2. *The deductibility of expenses incurred by the head office*

Article 100(2) ITC contains provisions for the deductibility of the expenses incurred by the foreign head office of a Greek PE.²⁷ According to this provision, in order to determine the net profit that is accrued by the PE in Greece, the latter can deduct a portion of the general and administrative expenses incurred by the foreign head office outside Greece that cannot exceed 5 per cent²⁸ of the total administrative and operating expenses incurred in Greece by the PE, as they appear in the annual financial statements.²⁹ The ministerial decision establishing the procedure for the recognition of such expenses³⁰ stipulates that the deductibility of those expenses depends on the condition that the foreign entity produces to the Greek tax authorities at any time before a tax audit takes place, a certificate issued by the competent auditing authority or other equivalent fiscal authority of the country where the head office is situated containing the following information:

²⁶ If the books have deficiencies that make the determination of the profits impossible or no books have been kept at all, then the tax authorities may use other methods in order to determine the gross and net profits of the enterprise; see for example StE decision 2555/2004, regarding the determination of the profits of a PE of a US company when no books were kept by the PE.

²⁷ It is worth noting that under the previous regime (art. 5(2) of the legislative decree 3843/1958 “on corporate income tax”) it was provided that “the method of the attribution of profits to the Greek permanent establishment, the method of the allocation of general etc. expenses incurred by the head office between the head office and the Greek permanent establishment, the required documentation as well as any other necessary detail for the application of this provision are to be determined through the enactment of royal decrees that are to be issued after a proposal of the Ministry of Finance”. No such decree was ever issued and in 1984 (by law 1473/1984) the relevant provision was amended and the requirement of a decree for the determination of the method for the attribution of profits to the Greek PE was abolished.

²⁸ Until the end of 1984 the relevant provision set no upper limit for the deduction of such expenses. It provided that a decree would be issued setting the way of apportionment of those expenses; since no such decree was ever issued, and in case of lack of specific data, the courts interpreted the relevant provision as requiring a *pro rata* apportionment, according to the relation between the gross income of the Greek PE and the total gross income of the foreign entity (StE 8/1997, StE 1151/1991, StE 1148/1991, StE 737/1990, StE 411/1988, StE 2877-8/1985). The limit was enacted for the first time in 1984 (Law 1473/1984) and as from 1 January 1985 the percentage was 2 per cent of the gross income of the Greek PE. The provision changed again (by Law 2459/1997) and currently the percentage is 5 per cent of the total expenses incurred by the PE in Greece.

²⁹ The concept of “administrative and operation expenses” contained in art. 100(2) ITC is defined in an opinion delivered by the National Accounting Council (*Ethniko Symvoulío Logistikis – ESYL*) after a request by the Ministry of Finance; see the ESYL Opinion 290/18 April 1997.

³⁰ Decision of the Minister of Finance 1043228/10334/B0012/pol. 1131/22 April 1997 (published in the Official Journal B 332/22 April 1997). This decision has been subject to criticism; it has been suggested that it creates substantial requirements that have to be observed by the taxpayers, requirements that exceed the scope of the legislative provision; see on this subject A. Malliou, “The deduction of administrative expenses incurred by the Head Office of foreign banks regarding the operation of Greek branch”, DFN 2000, pp. 1138 *et seq.*

- (a) the total amount of the expenses incurred outside Greece during a given fiscal year by the head office of the foreign entity, which has been duly included in the accounting books of this entity that are kept at its seat, and are charged to the Greek PE; and
- (b) the portion of the above-mentioned expenses regarding administrative and operating expenses of the Greek PE of the foreign entity, which the latter incurred exclusively for the operation of the Greek PE.

Article 100(2) also applies, in principle, to cases where a DTC exists and there is no explicit provision in the latter providing differently for the deductibility of such expenses.³¹ The case law of lower administrative courts has fluctuated on this subject. According to the 11805/1998 decision of the Administrative Court of First Instance of Athens, a Greek PE of a US bank, in the absence of a clause similar to article 7(3) OECD MTC in the Greece–USA DTC, is not entitled to deduct the general and administrative expenses incurred by the head office for the benefit of the Greek PE, unless the requirements of article 100(2) ITC are fulfilled.³²

Another decision delivered by the same court in 2000 ruled differently: according to the 9360/2000 decision of the Administrative Court of First Instance of Athens, the Greek PE of a USA bank, even in the absence of a provision similar to that contained in article 7(3) OECD MTC in the relevant DTC, can deduct the expenses incurred by the head office, without any restriction, since article 100(2) ITC is inapplicable where a DTC exists, even when no specific provision is included in the DTC.³³ The court in this case applied article 7(3) of the OECD MTC directly in order to interpret and complement the provisions of article III of the Greece–USA DTC on the attribution of profits to PEs. The Greek Court declared the domestic legislation inapplicable in this case on the grounds that it constituted discrimination against the PE. The Court made use of the non-discrimination clause in both the Greece–USA DTC and in the OECD MTC, which applies, according to the Court, by virtue of article 31 of the Vienna Convention on the Law of Treaties (VCLT).

2.2.3. *Arm's length principle*

In cases where there are dealings between the Greek PE and its head office, article 105(10) ITC provides that those dealings are recognized, under the condition, and to the extent that, the arm's length principle is observed;³⁴ if not, the tax authorities have the right to adjust the profits of the PE.³⁵

³¹ Barbas, *op. cit.*, pp. 369 *et seq.*

³² This decision was criticized as being wrong by Ch. Anagnostopoulos, "H ekptosi exodon dioikisis kentrikou allodapis etaireias [The deduction of administrative expenses incurred by the head office of a foreign company]", DFN 2000, pp. 120 *et seq.* See also the similar decision of the Administrative Court of First Instance 1119/1999.

³³ This case law is towards the right direction; likewise, Matsos and Kotanidis, *op. cit.*, p. 251; see also the comment by G. Kypraios in *Dikaio Epixeiriseon kai Etaiireion*, 2001, p. 1168.

³⁴ On the other hand, these provisions do not apply in case of dealings between a domestic head office and its foreign PE. See the analysis of this provision in Barbas, *op. cit.*, pp. 371 *et seq.*; see also Matsos and Kotanidis, *op. cit.*, p. 247.

³⁵ Since 1994 a special agency, the Department of Prices' Research and Control, has been set up (art. 26 of Law 2214/1994, as amended by art. 1(7) of Law 2343/1995) and it has the duty to

“The provisions of article 39 are also applicable to the legal entities of article 101(1). The same provisions apply by analogy and on the foreign entities or organizations that have a PE in Greece, according to article 100 ITC, when the foreign entity imposes on the branch, agency, plant etc. that is situated in Greece terms of commercial or financial cooperation that are obviously more burdensome than those that would be agreed upon if the transaction took place with a third party, with the result that there is a transfer of the profit outside Greece. If this is the case then this profit is considered as having arisen in Greece and it increases the profits of the branch, agency, plant etc. deriving from its activity in Greece...”

Article 39(1) ITC provides that:

“When between domestic enterprises or between a domestic enterprise and a foreign one contracts are concluded for the sale of goods or the provision of services and the price or other remuneration agreed upon is unjustifiably set to an amount higher or lower, depending on the case, than the one that would be agreed upon if the contract was concluded with a third party under the circumstance that prevail in the market at the time of the conclusion of the contract, the difference is deemed to be a profit of the enterprise that earned the lower or paid the higher, depending on the case, price or remuneration. This difference increases the profits of the enterprise, as they are determined by the books and it does not affect the accuracy of the books and records ...”

Paragraph 6 of article 39 provides that:

“The provisions of this article apply by analogy to the royalties or other remuneration that are paid to foreign enterprises and organizations for the use in Greece of technical assistance, patents, signs, designs, secret industrial methods and models, intellectual property and similar rights”.

The Supreme Administrative Court, in interpreting the transfer pricing provisions, has repeatedly stated that the burden is on the tax authorities to prove that the prices or remuneration agreed between the (associated) enterprises are unjustifiably lower or higher than they would be if the same transaction (or dealing, in the case of a PE) were carried out with a third party.³⁶

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provide the tax authorities with information, guidance and technical advice for the carrying out of specific audits, in cases where under the application of tax legislation it is proved that there exists a transfer pricing case (under- or overpricing goods or services). The Department operates on the basis of the Presidential Decree 343/1998.

The Supreme Administrative Court, however, has not accepted that the tax authority proved that a price agreed between two associated enterprises is unjustifiably lower or higher than the market price based only on the evidence provided by this Department; the Court requires that not only the prices are compared but also other elements of the transaction, such as the kinds of enterprise, the comparability of the countries from where a certain product is bought, the quality, etc. See *ad hoc* StE decision 826/1995.

³⁶ See for example the decisions StE 4464/1997, StE 995/1995 and StE 3803/1988.

The provisions of article 39 do not apply if the contracting enterprises prove that the transfer price did not have as a purpose the avoidance of the payment of any direct or indirect tax.³⁷

2.2.4. Special rules for certain categories of companies

Special rules apply for the determination of the profits of companies that exploit ships flying a foreign flag and airplanes:³⁸ article 105(8) ITC provides that the net profit will be deemed to be 10 per cent of the gross income earned by the transportation of persons, merchandise and goods in general from Greek ports and airports until they reach the destination port or the foreign port/airport of transit to another ship or airplane belonging to a foreign company.³⁹

Special rules apply also for the determination of income of foreign enterprises that have an activity in Greece consisting of the production, or the special processing and packaging of raw materials, which takes place after their purchase. According to article 37 ITC on the “determination of income of foreign enterprises”, the foreign enterprise is deemed to acquire a profit in Greece, although no sale to third parties from Greece has taken place. This profit is determined, if it is not directly and separately shown on the financial statements of the foreign enterprise by an apportionment method: the total profit of the enterprise is split between the foreign head office and the Greek PE according to the ratio between the gross income derived from the sales of the product that has been transferred from Greece to the head office with the purpose of being sold to third parties and the gross income of the head office derived from other sales.⁴⁰

Further provisions stipulate that the sales price of the raw materials can be set either by using the FOB price or by using a cost plus method. For the application of either of these two methods a Decision of the Ministry of Finance and a Presidential Decree are needed; none has been issued to date.

³⁷ See art. 39(5). The Supreme Administrative Court in its decision StE 4464/1997 held that “the law does not provide for a special rule as to how to prove that there is no tax avoidance purpose. It follows however from the whole set of the provisions that a substantial element for the judgment regarding the lack of tax avoidance purpose is, according to the law, the fact that as a result from the application of transfer prices the total tax burden of both contracting companies is not different or is not substantially different, depending on the circumstances, from the amount that would be due in total for the same taxes if no transfer pricing had taken place”; similar decisions StE 4413/1996 and StE 784/1988.

According to the Circular of the Minister of Finance 1065868/10569/B0012/pol. 1183/17 July 2001, the auditing authorities are urged to base their judgment regarding the unjustified prices in cases of transfer pricing on information requested from the tax authorities of the country where the foreign entity that has contracted with the Greek one is situated. It is stated that the provisions of art. 39 do not apply unless it is proven, based on evidence, in the course of audit that a case of tax avoidance has taken place through the method of transfer pricing.

³⁸ Similar rules apply when the ships or airplanes belong to individuals; see art. 37(4) ITC.

³⁹ See also the analysis in Barbas, *op. cit.*, pp. 358 *et seq.*

⁴⁰ Art. 37(1) ITC. The apportionment method is to be applied only on a subsidiary basis, i.e. when the direct method is not applicable due to various reasons; see also Barbas, *op. cit.*, pp. 376 *et seq.*

2.3. Specific situations under domestic law

One can distinguish two cases for which a transfer from the head office to the PE or the opposite could occur: one is that this happens in the course of the normal activity of the PE (or head office) and the second is that this happens merely as an intra-company arrangement. Different treatment should be accorded to each of the two separate cases: the former should normally be regarded as a situation that generates income for the PE while the latter is the opposite and does not seem, in principle, to generate any income for the PE.

In general and in any case it must be borne in mind that in the absence of any other specific provision the tax authorities are only entitled to adjust the profits attributed to a PE in the following two separate cases:

- (a) where the dealing between the PE and its head office is proved to be a sham (i.e. it is a wholly or partly artificial arrangement, irrespective of whether tax is avoided or not); and
- (b) where the dealing between the PE and its head office is real but the arm's length principle has not been observed.

In the following paragraphs it is assumed that the dealing between the PE and its head office is real and it is conducted at arm's length.

2.3.1. The transfer of inventory from a head office to a PE (or from a PE to a head office)

In general, two cases may be distinguished with respect to the purpose of such a transfer: the transfer of inventory from a Greek PE to a foreign head office may take place either for the purpose of an immediate sale, resale or further processing or for keeping the goods in stock for intra-business purposes. The former case will fall within the scope of the transfer pricing rules and therefore the transfer has to be made at arm's length prices, according to article 105(10) ITC. The latter creates no taxable event.⁴¹

When raw materials are transferred from a Greek PE to its foreign head office, article 37 ITC applies.⁴² Therefore, even if no sales have taken place from Greece to third parties, the Greek PE is deemed to have acquired a profit, according to the provisions of article 37 ITC.

2.3.2. The transfer of capital equipment from a head office to a PE (or from a PE to a head office)

The transfer of machinery and other capital equipment is considered to be a sale (business profit) for corporate income tax purposes.⁴³ Therefore it is included in the gross profits of the alienator and the acquirer has the right to deduct annually

⁴¹ Unless there is a realized appreciation in the value of the inventory; see on this subject the distinction made by Matsos and Kotanidis, *op. cit.*, p. 248.

⁴² According to a direct provision included in art. 105(1)(b) ITC on the determination of the gross and net income.

⁴³ Matsos and Kotanidis, *op. cit.*, p. 249 suggest that when a transfer of a capital asset takes place by the Greek PE to its foreign head office there is no tax on the transfer, as this would be equal to an exit tax and no exit tax exists in Greece.

an amount equal to the depreciation rate that applies for that machinery or other capital equipment.⁴⁴

2.3.3. *The transfer of an intangible asset (e.g. a trademark) from a head office to a PE (or from a PE to a head office)*

A head office can make available an intangible asset to its PE either by transferring it or by giving to the PE the right to use the intangible asset. Any remuneration for the transfer or the right of use of intangible assets is considered to be business profit for corporate tax law purposes.⁴⁵ When such transfers take place between a PE and its head office, then the amount that can be deducted from the gross income of the Greek PE⁴⁶ is determined according to the rules contained in article 31(1) lit. (i) ITC.⁴⁷ According to the latter, the PE can deduct “the royalties or other remuneration that are paid to companies and organizations for the use of technical assistance, patents, signs, designs, secret industrial methods and models, intellectual property and similar rights”. It has to be pointed out that the provisions cover the actual payment of any remuneration and not the deduction of any deemed royalties.⁴⁸

Article 31(1) lit. (i) was recently amended by article 9(10) of law 3296/2004 relating to the deduction of such expenses incurred from 1 January 2005 and onwards. It establishes the following procedure: when the above-mentioned amounts are paid to foreign entities, *inter alia*, it is provided that the deductible amounts must be approved by a special Commission that is set up for this purpose by the Ministry of Finance. When payments are made by companies other than trading companies, which are members of a group to the parent company or to foreign (sister) companies that belong to the same group, then amounts up to 4 per cent of the gross income derived by the use of the specific intangible asset and up to a total of 500,000 euro, must be approved by the Commission first, in order to be deductible.⁴⁹

To ensure that the dealings are at arm’s length, the provision stipulates that the amount of deductible expenses cannot be higher than the average percentage that is paid by other associated enterprises that belong to the same group to any company of the same group.⁵⁰

⁴⁴ No deduction is permitted in cases where the alienator is an offshore company; art. 31(14) ITC.

⁴⁵ Art. 13(1) ITC in combination with art. 105(1)(b) ITC.

⁴⁶ No deduction is permitted in cases where the payments are made to an offshore company; art. 31(14) ITC.

⁴⁷ This article applies according to a direct reference to it contained in art. 105(1)(b) ITC, on the determination of the gross and net income.

⁴⁸ Matsos and Kotanidis, *op. cit.*, p. 250, suggest that in this case the separate entity approach simply does not apply since notional royalty payments are non-deductible.

⁴⁹ Decision 1076283/11073/B0012/pol. 1113/5 August 2005 of the Minister of Finance provides for the documentation needed for the application of these provisions. Circular 1090003/11167/B0012/pol. 1126/23 September 2005 of the Ministry of Finance provides clarifications and instructions for the application of these provisions.

⁵⁰ Various interpretation problems arise by the simultaneous use of the three limits: the 4 per cent of the gross income derived from the use of a specific intangible asset, the flat amount of 500,000 euro and the average percentage that other companies of the same group pay for the same intangible asset. The provision seems also problematic from an EC law point of view: this

If the prices are not at arm's length, then article 39(6) ITC becomes applicable and the tax authorities have the power to adjust the profits of the Greek PE. Since article 39(6) ITC also stipulates that the whole of article 39 applies where royalties or other remuneration are paid for the transfer or use of intangible assets, there is a conflict between the two provisions as to how the arm's length price will be determined. Given that the new provisions of article 31(1) lit. (i) have specifically addressed the issue of cross-border transactions, it seems that they will prevail according to the *lex specialis derogat lege generali* rule.

2.3.4. *The supply of services by a head office to a PE (or by a PE to a head office)*

The provision of services from one party to the other is considered to be gross income for the supplier and the remuneration paid is a deductible expense⁵¹ for the receiver, according to article 105(1)(a) ITC. When the provision of services is made by a Greek PE to a foreign head office the arm's length principle applies and an adjustment is possible under article 105(10) ITC. In the reverse situation article 105(10) is not applicable.⁵²

Provision of administration and general management services falls under the specific provisions of article 100(2) ITC providing for the deductibility of expenses incurred by the head office for the benefit of the PE; these provisions have been analysed above.⁵³

3. The impact of DTCs

3.1. Background to the Greek DTC network

Greece has signed a relatively small number of DTCs. Currently there are 44 DTCs signed, of which 39 are in force, as shown in Table 1.

Greek DTCs usually follow the OECD MTC. DTCs are part of international law and after their conclusion they need ratification in order to become part of Greek domestic law. The ratification takes place according to the provisions of article 28 of the Greek constitution. After their ratification by the Greek

cont.

procedure is only applicable when the royalties or other remuneration is paid to a foreign entity, while there is no limit when the same amounts are payable to a domestic entity. See on this subject G. Mavraganis, "The pre-approval of royalty expenses and administrative expenses" (in Greek), *Epixeirisi* 1, pp. 402 *et seq.* For the problems that arise under the previous legislation (that is substantially similar to the new one) see also G. Mavraganis, "Greek tax law provisions relating to companies in breach of European Union law", BIFD 2005, pp. 36 *et seq.* (pp. 41 *et seq.*).

⁵¹ No deduction is permitted in cases where the supplier of services is an offshore company; art. 31(14) ITC.

⁵² Matsos and Kotanidis, *op. cit.*, p. 251, suggest that notional payments made by the foreign general enterprise to the Greek PE cannot be taxed.

⁵³ Matsos and Kotanidis, *op. cit.*, suggest that in this case no mark-up for the foreign general enterprise beyond actual costs should be deductible in Greece, as this does not constitute an actual expense for the PE and notional expenses are normally not deductible under art. 31 ITC.

Table 1

	Country	Signed on	Effective since
1	Albania	14 July 1995	1 January 2001
2	Armenia	12 May 1999	1 January 2003
3	Austria	22 September 1970	1 January 1972
4	Belgium	24 May 1968	1 January 1966
5	Bulgaria	15 February 1991	1 January 2001
6	China	3 June 2002	Not in force
7	Croatia	18 October 1996	1 January 1999
8	Cyprus	30 March 1968	1 January 1967
9	Czech Republic	23 October 1986	1 January 1990
10	Denmark	18 May 1989	1 January 1993
11	Egypt	27 November 2004	Not in force
12	Finland	20 January 1980	1 January 1982
13	France	21 August 1963	1 January 1965
14	Georgia	10 May 1999	1 January 2003
15	Germany	18 April 1966	1 January 1964
16	Hungary	25 May 1983	1 January 1985
17	India	11 February 1965	1 January 1964
18	Ireland	24 November 2003	1 January 2005
19	Israel	24 October 1995	1 January 1999
20	Italy	3 September 1987	1 January 1984
21	Korea	20 March 1995	1 January 1999
22	Kuwait	2 March 2003	1 January 2006
23	Latvia	27 March 2002	1 January 2006
24	Lithuania	15 May 2002	Not in force
25	Luxembourg	22 November 1991	1 January 1996
26	Moldova	29 March 2004	1 January 2006
27	Netherlands	16 July 1981	1 January 1981
28	Norway	27 April 1988	1 January 1992
29	Poland	20 November 1987	1 January 1991
30	Portugal	2 December 1999	1 January 2003
31	Romania	17 September 1991	1 January 1996
32	Russian Federation	26 June 2000	Not in force
33	Serbia and Montenegro	25 June 1997	Not in force
34	Slovak Republic	23 October 1986	1 January 1990
35	Slovenia	5 June 2001	1 January 2004
36	South Africa	19 November 1998	1 January 2004
37	Spain	4 December 2000	1 January 2003
38	Sweden	6 October 1961	1 January 1963
39	Switzerland	16 June 1983	1 January 1983
40	Turkey	3 December 2003	1 January 2005
41	UK	25 June 1953	1 March 1951
42	Ukraine	6 November 2000	1 January 2004
43	USA	20 February 1950	1 January 1953
44	Uzbekistan	1 April 1997	1 January 2000

Parliament, DTCs become part of domestic law and rank higher in the hierarchy of norms than statutes. As a result they can only be modified or suspended by following special procedures. Therefore, statutes, even those adopted after the conclusion of a DTC, do not affect the provisions of a DTC. As for their interpretation, it is accepted that an autonomous interpretation is preferred and reference to domestic law should be limited only to cases expressly provided for in the DTCs. Since DTCs are international treaties, the relevant provisions of the VCLT on the interpretation of international treaties are applicable.⁵⁴

3.1.1. The inclusion of article 7(2) and (3) OECD MTC in Greek DTCs

All Greek DTCs contain provisions similar to those contained in article 7 OECD MTC. There is no deviation regarding the basic rules set in article 7(2): the separate entity approach is adopted even in older DTCs and the determination of profits takes place according to the arm's length principle. The rule contained in article 7(3) OECD MTC is also included in Greek DTCs. Most treaties do not contain any quantitative limit as to the amount of deductible general administrative expenses incurred by a head office; however, there are a few cases where some deviations may be observed.

In some older treaties there is no provision equivalent to article 7(3) OECD MTC. For instance, this is the situation with the DTCs Greece has signed with the USA, the UK and India. In the absence of a specific provision in the DTC, the tax authorities will normally seek to apply the relevant domestic legislation; thus article 100(2) ITC and the specified limitations apply. It has been suggested that even when a DTC does not contain a clause similar to that of article 7(3) OECD MTC, the OECD rule should in any case apply. On this point, the case law of lower administrative courts has fluctuated.⁵⁵ The correct approach should be that even in the cases where the DTC contains no clause similar to article 7(3) OECD MTC, the deductibility of general and administrative expenses incurred by a head office for the benefit of a Greek PE should not be denied or limited, on the basis of the non-discrimination provision.⁵⁶

3.1.2. Deviations from the standard clause of article 7(3) OECD MTC

In some recent DTCs there is a frequent and normal deviation regarding the recognition of royalty payments, etc. The DTCs with Armenia, Ukraine, Lithuania, Moldova and Uzbekistan contain the UN MTC clause:

“In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the

⁵⁴ Regarding the interpretation of DTCs in Greece see K. Perrou, “Tax treaty interpretation in Greece” in M. Lang (ed.), *Tax Treaty Interpretation*, Linde Verlag, Vienna and Kluwer Law International, London, 2001, pp. 153 *et seq.* The Administrative Court of First Instance of Athens in its decision 9360/2000 has explicitly referred to both the OECD MTC and its commentary as acceptable tools for the interpretation of DTCs, based on art. 31 VCLT.

⁵⁵ This subject has been dealt with above in section 2.2, in the analysis of art. 100(2) ITC.

⁵⁶ See Administrative Court of First Instance of Athens decision 9360/2000, regarding the Greece–USA DTC.

permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.

However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment.

Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise by way of interest on moneys lent to the head office of the enterprise.”.

By inserting this clause the unity of the enterprise is recognized; therefore it is considered that no profit is generated when patents or other rights are used by a different part of the same enterprise. The kind of intra-company dealings that are described in the UN version of article 7(3) are not recognized for tax law purposes.

3.2. The general approach to the attribution of profits to a PE under the Greek DTCs

The Greek tax authorities and Greek case law have dealt with only a few specific matters regarding the attribution of profits to PEs when a DTC exists.

According to the decision of the Supreme Administrative Court 2692/1994, regarding the attribution of profits to a US company with a PE in Greece, the Court held that the setting up and operation of a PE in Greece was not enough to create a right to tax the foreign entity in Greece the foreign entity had to acquire income in Greece through that PE. If this is the case then the foreign entity is subject to Greek income tax only for the part of profits that are attributable to the PE. The profits attributable to the PE are those generated from the trading operations of the company through a PE; in any case, the tax is levied on the profits that arise after the setting up of the PE in Greece and to the part of the profits that result from its operation.

In another Supreme Administrative Court ruling the rule for the attribution of profits contained in article III of the DTC between Greece and Germany was interpreted.⁵⁷ A German company carried out a project of installing and assembling parts of machinery in Greece; the same foreign company had previously

⁵⁷ StE decision 3449/1994, regarding the interpretation of the Greece–Germany DTC; similarly, StE decision 1035/1994.

sold that machinery to a Greek plant. The Court held that the profits that were taxable in Greece were only those profits that derived from a contract for the provision of services (installation and assembly) and not the profits deriving from the sale of materials and machinery, as the latter was made directly by the head office to Greece and not by the Greek PE. Where a flat amount has been agreed as remuneration for the provision of services in two different situations, one of which creates a PE and the other does not, then the Court is not allowed to apportion the remuneration and attribute a part of it to the PE and consider the remaining part as (Greek) source income. Instead it should consider the contract as a whole and judge what is the dominant element of the contract and then subject the whole remuneration to the provisions pertaining to its characterization.⁵⁸

Regarding the deductibility of general administrative expenses incurred by the head office, the Supreme Administrative Court has steady case law maintaining that the specific provisions of the DTCs apply rather than article 100(2) ITC. As a result, and since in the DTCs signed by Greece the equivalent of article 7(3) OECD MTC contains no quantitative limit, the Court rejects the application of the limit set by domestic law and permits the unlimited deductibility of such expenses, as long as they are made for the benefit of the PE.⁵⁹

3.3. Specific situations

For the treatment of various specific situations the OECD MTC commentary offers detailed guidance on how they should be treated. The OECD MTC commentary, even though it is not legally binding as such, in practice has great importance in the interpretation and application of the tax treaties. This has also been accepted by the Greek courts.⁶⁰ However, no guidelines addressing these issues have been issued by the tax authorities. Therefore one could be relatively certain that the treatment of each one of the following specific situations would normally follow the commentary.

Again a distinction should be made as to the purpose of the transfer: if it is a transfer that takes place in the course of the normal business activity of the PE, then income is generated and a profit should be allocated to the dealing, because according to the arm's length principle it has to take place at an arm's length price. If on the other hand it is simply an intra-company arrangement not generating income, then no profit should be deemed to arise.

The various specific situations of intra-company dealings will normally be dealt with according to the same rules that have been described earlier regarding the treatment by domestic legislation. However, a few differentiations exist regarding the transfer of intangibles, the provision of services and the provision of capital. In any event it has to be noted that the domestic legislation is applicable in so far as it does not violate the non-discrimination article contained in all Greek DTCs.

⁵⁸ *Ad hoc* StE decision 2555/2004, regarding the Greece–USA DTC.

⁵⁹ See, for example, StE decision 4078/1999, regarding the Greece–Italy DTC.

⁶⁰ See, for example, the decision of the Administrative Court of First Instance of Athens 9600/2000, where a later OECD MTC commentary is used for the interpretation of the Greece–USA DTC.

3.3.1. The transfer of inventory from a head office to a PE (or from a PE to a head office)

If this happens for business purposes then it generates income for the transferor and a deductible expense for the acquirer. Since there are no specific rules in the DTCs providing otherwise, domestic legislation applies.

3.3.2. The transfer of capital equipment from a head office to a PE (or from a PE to a head office)

Again, since this subject is not dealt with specifically in the DTCs, domestic legislation applies.

3.3.3. The transfer of an intangible asset from a head office to a PE (or from a PE to a head office)

Where there is no specific provision in a DTC then domestic legislation applies; the remuneration for the alienation of an intangible asset is deemed to be a business profit and will be taxed accordingly; the payments for the right of use of intangibles are also deemed to generate profit.

There are cases, however, where the specific DTC provides differently: in the DTCs with Armenia, Ukraine, Lithuania, Moldova and Uzbekistan, intra-company royalty payments for the right of use of intangibles are not recognized as profit for the receiving PE or head office and as deductible expenses for the payer PE or head office, respectively. In this case only the deduction of the actual expenses is recognized.

3.3.4. The supply of services by a head office to a PE (or by a PE to a head office)

In the DTCs with Armenia, Ukraine, Lithuania, Moldova and Uzbekistan, intra-company payments in the form of commission for specific services performed or for management and payments in the form of interest on moneys lent by the head office to the PE and vice versa are not recognized as deductible expenses nor as generating profit for the receiver.

3.3.5 The provision of capital from a head office to a PE

In the DTCs with Armenia, Ukraine, Lithuania, Moldova and Uzbekistan, intra-company payments in the form of interest on moneys lent by the head office to the PE (and vice versa) are not recognized as deductible expenses nor as generating profit for the receiver.

3.4. Specific issues relating to banks and insurance companies

In the DTCs with Armenia, Ukraine, Lithuania, Moldova and Uzbekistan intra-company payments in the form of interest on moneys lent by the head office to the permanent establishment (and vice versa) are not recognized as deductible

expenses nor as generating profit for the receiver; this rule does not apply in dealings between the PE and the head office of banks.

4. The future

Although the separate entity approach is not explicitly adopted in the domestic legislation it appears that Greece follows this approach both in its domestic law and in the DTCs it has entered into. This lack of statutory support of the separate entity approach creates certain problems, especially regarding the recognition of certain dealings between a PE and its head office, where there is much uncertainty. In some recent DTCs Greece has entered into a deviation from the standard wording of the provisions contained in article 7(3) OECD MTC; these changes, however, are only included in DTCs with developing countries and therefore it does not seem to be a standard policy initiated by the Greek tax authorities but rather a compromise to the demands of the other contracting state. In the absence of such a specific provision, either in DTCs or in domestic legislation, however, in the reporter's opinion there is little chance that such dealings will not be recognized, subject to the condition that they are not artificial and that the arm's length principle for the determination of the remuneration is observed.

If the OECD accepted the separate entity approach in its entirety, as has been described in the OECD discussion drafts on the attribution of profits to PEs, it seems that a simple change in the commentary would not be enough to make it applicable to all the DTCs concluded by Greece. In principle, it is the reporter's opinion that this would create problems with the principle of legality as it is established in the Greek Constitution.⁶¹ The principle of legality requires that all taxes or tax exemptions are provided for in a statute; given that the commentary is not an integral part of a DTC, it is doubtful that a change in the commentary could ever have the same validity as the text of a DTC itself. Moreover, it would constitute a breach of the constitutional principle of the separation of powers,⁶² since the changes to the commentary are made by governments and are not approved by Parliament. If, on the other hand, the new interpretation is in line with the wording of the DTCs, and in most cases it usually is, then it would be acceptable as tool of interpretation for all DTCs.

However, there are certain other limitations to the application of the separate entity approach in its entirety. The most important one is that the attribution of income to a PE as a result of the application of the separate entity approach when no such income has been generated in reality, is a direct breach of the constitutional ability-to-pay principle.⁶³ Such a provision, creating a presumption that income has been generated, results in the taxation of a taxpayer on hypothetical income. The use of presumptions for the determination of the income of tax-

⁶¹ Art. 78 of the Greek Constitution.

⁶² Art. 26 of the Greek Constitution.

⁶³ The ability to pay principle is one aspect of the principle of equality and it is contained in the constitutional provision of art. 4(5). See also on the ability to pay principle Anastopoulos-Fort-sakis, *Forologiko Dikaio [Tax Law]*, Athens 2003 (in Greek), pp. 116 *et seq.*

payers has been judged already by the Supreme Administrative Court. According to this case law, the presumptions are unconstitutional, *inter alia*, when they are not intended to reveal the real economic capacity of the taxpayer but simply lead to the calculation of a hypothetical income of the taxpayer.⁶⁴

Even though no public dialogue has taken place yet relating to this subject, in view of the above, it is the reporter's opinion that Greece will move closer towards adopting in full the separate entity approach, as it has been elaborated by the OECD literature. As the full application of this approach possibly conflicts with the Greek Constitution in certain respects, a clear statutory provision, respecting the constitutional principles, should be adopted to ensure its full application.

Résumé

En Grèce, le concept de l'attribution de bénéfices à un établissement stable (ES) est, dans une large mesure, identique à celui de la détermination du revenu brut et du revenu net de l'ES. Deux grandes règles sont applicables: premièrement, les entités étrangères opérant en Grèce, sous quelque forme que ce soit et indépendamment de l'existence d'un ES, sont assujetties à l'impôt sur le revenu des sociétés; deuxièmement, les entités étrangères sont imposées sur le bénéfice net de source grecque ou d'un ES grec.

L'existence d'un ES est déterminée conformément aux règles énoncées à l'article 100(1) du Code grec de l'impôt sur le revenu. Cet article ne contient aucune définition; en revanche, il énumère, de manière restrictive, les cas où un ES est réputé exister. Cette approche crée des problèmes car elle est plus large que le concept de l'ES que celle qui figurant dans le modèle de convention de l'OCDE.

Les bénéfices nets de l'ES sont calculés en suivant les mêmes règles que celles qui sont applicables aux entreprises résidentes. Premièrement, on détermine le revenu brut d'un ES en appliquant trois principes: l'approche de l'entité distincte, bien qu'elle ne soit pas légale; la méthode directe facilitée par le fait que les ES sont soumis aux mêmes règles comptables que les entreprises grecques; et le principe de pleine concurrence qui s'applique aux transactions entre l'ES et le siège de l'entreprise.

En ce qui concerne le calcul des bénéfices nets, il existe deux grandes exceptions par rapport aux entreprises résidentes: il s'agit, premièrement, de la déductibilité des frais généraux et des frais divers de gestion supportés par le siège de l'entreprise et, deuxièmement, la déductibilité des redevances et autres rémunérations de même type pour l'utilisation d'actifs incorporels. Dans ces deux cas, des règles particulières prévoyant des restrictions quantitatives sont applicables. Les conventions de double imposition ne prévoient pas de telles restrictions.

Il existe des règles spécifiques pour déterminer les bénéfices nets des banques et des compagnies d'assurances; il s'agit notamment de la déductibilité de certains frais. Il en va de même pour la détermination du bénéfice net d'un ES appartenant à des compagnies maritimes ou des compagnies aériennes. Pour celles-ci, le bénéfice net est calculé en appliquant au revenu brut un taux forfaitaire (à savoir 10 pour cent sur le revenu brut de source grecque). Ces règles étant aussi applicables aux entreprises nationales, elles ne sont pas traitées en détail. Enfin, des règles particulières sont applicables aux ES ayant des

⁶⁴ See on this subject *ibid.*, pp. 116 *et seq.* and pp. 123 *et seq.* Regarding the StE case law on the use of presumptions see for example the StE decision 4897/1987.

activités dans la production, la transformation et l'emballage de matières premières en Grèce.

Les conventions de double imposition signées par la Grèce suivent généralement le modèle de convention de l'OCDE en ce qui concerne les dispositions relatives à l'attribution de bénéfices à des ES (articles 7(2) et 7(3) du modèle de convention fiscale de l'OCDE). On observe quelques divergences dans certaines conventions de double imposition signées récemment, qui reprennent les dispositions de l'article 7(3) du modèle de convention fiscale de l'ONU. Toutefois, la proposition visant à appliquer l'approche de l'entité distincte dans son intégralité semble poser quelques problèmes au regard du droit constitutionnel grec.

Une modification du modèle de convention fiscale de l'OCDE et du commentaire ne suffirait pas pour assurer l'application de la nouvelle approche dans tous les cas concernant les conventions de double imposition signées par la Grèce, si les modifications ne sont pas incorporées dans chacune de ces conventions. Étant donné qu'il peut y avoir une incompatibilité entre cette approche et la Constitution grecque à certains égards, il conviendrait d'adopter une disposition légale claire respectant les principes constitutionnels afin d'assurer son application pleine et entière.

Zusammenfassung

Die Vorstellung davon, wie die Zuschreibung von Gewinnen an ständige Niederlassungen (SNs) in Griechenland zu erfolgen hat, ist weitgehend identisch mit der Vorstellung, wie die Brutto- und Nettoerträge einer SN zu ermitteln sind. Es gelten zwei Grundregeln. Erstens: Ausländische Unternehmen, die in Griechenland in irgendeiner Form tätig sind, unterliegen unabhängig davon, ob sie dort eine SN betreiben, der Körperschaftssteuer. Zweitens: Ausländische Unternehmen werden nach dem Reingewinn besteuert, den sie entweder aus griechischer Quelle oder aus einer griechischen SN erzielen.

Die Existenz einer SN bestimmt sich nach den Vorschriften von Artikel 100 Abs. (1) des griechischen Einkommensteuerrechts. Diese enthalten zwar keine Definition des Begriffs SN, aber dafür eine beschränkte Aufzählung von Fallbeispielen, an denen eine regelrechte SN beteiligt ist. Ein solcher Ansatz wirft Probleme auf, da er weitläufiger angelegt ist als der SN-Begriff im OECD-Musterabkommen (MA).

Der Reingewinn der SN wird nach den gleichen Vorschriften errechnet, die auch für im Lande ansässige Gesellschaften gelten. Zuerst wird der Bruttogewinn der SN ermittelt. Für das Vorgehen in dieser Phase gelten drei Prinzipien: der (allerdings nicht gesetzlich verankerte) Ansatz, dass die SN als eigenständiges Unternehmen zu behandeln ist, die Direktmethode, die dadurch erleichtert wird, dass SNs der gleichen Aufzeichnungs- und Buchführungspflicht wie inländische Gesellschaften unterliegen, und der Grundsatz der Unabhängigkeit (*arm's length principle*), der für Geschäfte zwischen der SN und deren Hauptverwaltung gilt.

Bei der Berechnung des Reingewinns gelten im Vergleich zu den im Lande ansässigen Gesellschaften zwei wesentliche Ausnahmen: eine hinsichtlich der Abzugsfähigkeit von Gemein- und Verwaltungskosten, die der Hauptverwaltung entstanden sind, und die andere hinsichtlich der Abzugsfähigkeit von Lizenzgebühren und sonstigen Vergütungen für die Nutzung immaterieller Güter. Für diese beiden Fälle gelten Sonderregelungen, die quantitative Beschränkungen vorschreiben; solche sind wiederum in den DBAs nicht vorgesehen.

Für die Ermittlung des Reingewinns von Banken und Versicherungen gibt es eigene Regelungen, die insbesondere die Abzugsfähigkeit bestimmter Aufwendungen betreffen. Sonderregelungen gelten ebenfalls für die Ermittlung des Reingewinns der SNs von Schifffahrts- und Fluggesellschaften. Bei diesen wird der Reingewinn anhand eines für den Brut-

togewinn geltenden Pauschalsatzes berechnet (d.h. 10 Prozent vom in Griechenland erzielten Bruttogewinn). Nachdem diese Regelungen gleichermaßen für inländische Unternehmen gelten, wird hier nicht näher auf sie eingegangen. Und schliesslich gelten noch besondere Vorschriften für SNs, die mit der Herstellung, Verarbeitung und Verpackung von Rohstoffen in Griechenland befasst sind.

DBAs, die Griechenland mit unterzeichnet hat, richten sich in ihren Bestimmungen zur Gewinnzuschreibung an SNs normalerweise nach dem OECD-MA (Artikel 7 Abs. (2) und (3) OECD-MA). Einzelne Abweichungen davon sind in einigen neueren DBAs zu finden, wo die Bestimmungen von Artikel 7 Abs. (3) des UN-Musterabkommens übernommen wurden. Die vorgesehene uneingeschränkte Anwendung des Ansatzes, nach dem eine SN als eigenständiges Unternehmen zu behandeln ist, erscheint jedoch aus der Perspektive des griechischen Verfassungsrechts etwas problematisch.

Eine Änderung des OECD-MA und des Kommentars würde nicht genügen, um die Durchführung des neuen Ansatzes in sämtlichen Fällen, die DBAs mit griechischer Beteiligung unterliegen, sicherzustellen, wenn das jeweilige DBA im Einzelfall nicht so formuliert ist, dass es die Änderungen deckt. Da in einiger Hinsicht die Möglichkeit besteht, dass der obige Ansatz zur Behandlung von SNs mit der griechischen Verfassung kollidiert, sollte unter Beachtung der Verfassungsgrundsätze eine eindeutige gesetzliche Bestimmung verabschiedet werden, um die vollständige Anwendung dieses Ansatzes sicherzustellen.

Resumen

El concepto de atribución de beneficios a un establecimiento permanente (EP) es idéntico, en gran medida, al de determinación de las rentas bruta y neta del EP. Se aplican dos importantes normas: la primera, las entidades extranjeras que operen en Grecia, sea cual fuere la forma y con independencia de que exista un EP, tributan por el impuesto de sociedades; la segunda, las entidades extranjeras tributan sobre el beneficio neto de fuente griega o de un EP griego.

La existencia de un EP se determina conforme a las reglas del artículo 100(1) del Código griego del Impuesto sobre la Renta. Este artículo no contiene definición alguna; en su lugar hace una enumeración restrictiva de los casos en que existe un EP. Este planteamiento da lugar a problemas, pues es más amplio que el concepto de EP del modelo de convenio de la OCDE.

Los beneficios del EP se calculan con las mismas reglas aplicables a las empresas residentes. En primer lugar se determina la renta bruta del EP aplicando tres principios: el de la empresa independiente y separada, aunque no sea reglamentario; el método directo, facilitado por el hecho de que los EP están sujetos a las mismas reglas contables que las empresas griegas; y el principio de plena competencia (*arm's length*) que se aplica a las transacciones entre el EP y la matriz.

En el cálculo de los beneficios netos existen dos grandes excepciones respecto de las empresas residentes: primera, la deducibilidad de los gastos generales y de gestión soportados por la matriz y, segunda, la deducibilidad de los cánones y otras remuneraciones similares por el uso de intangibles. En ambos casos son de aplicación las normas específicas que prevén limitaciones cuantitativas. Los CDI no incluyen estas limitaciones.

Existen normas específicas para determinar los beneficios netos de los bancos y compañías de seguros; sobre todo respecto de la deducibilidad de algunos gastos. Lo mismo puede decirse para la determinación del beneficio neto de los EP de compañías marítimas o aéreas, en que se aplica un tipo global a los ingresos brutos (10 por ciento sobre la renta bruta de fuente griega). Estas reglas no se estudian con detalle ya que son aplicables también a las empresas nacionales. Por último existen normas específicas aplicables a

los EP con actividades de producción, transformación y embalaje de materias primas en Grecia.

Los CDI concluidos por Grecia siguen en general el modelo de convenio de la OCDE sobre atribución de beneficios a los EP (artículo 7(2) y (3) del modelo de convenio de la OCDE). Se observan algunas diferencias en los CDI concluidos recientemente, que retoman las disposiciones del artículo 7(3) del modelo de convenio de la ONU. No obstante, la propuesta de aplicación del principio de empresa distinta y separada parece plantear algunos problemas respecto del derecho constitucional griego.

La modificación del modelo de convenio de la OCDE y del comentario no bastaría para asegurar la aplicación de la nueva propuesta a todos los CDI concluidos por Grecia, si tales cambios no se introducen en cada uno de los CDI. Como puede darse alguna incompatibilidad entre esta propuesta y la Constitución griega, convendría adoptar una normativa clara, respetuosa de los principios constitucionales, para asegurar su completa aplicación.