**Tax evasion and collection of information on bank accounts under Greek tax legislation and case law**

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## I. INTRODUCTION

1. There have been significant developments, over the last few years, in Greek law, regarding access to data on bank accounts, for tax law enforcement purposes.

2. The evolution of relevant Greek legislation was prompted not only by changes in EU law but also by the debt/financial crisis, which led to a large number of tranfers of capital from bank accounts in Greece to bank accounts abroad (in particular, to Cyprus).

3. The evolution of the relevant case law of the Council of State (Supreme Administrative Court) of Greece has been characterized, to a large extent, by considerations based on general principles of tax law (enforcement) and fundamental rights, under the Greek Constitution, the ECHR and general principles of EU law.

## II. PRINCIPAL LEGISLATIVE FRAMEWORK

1. Code of Tax Books and Documents (presidential Decree 186/1992 – applicable until 31.12.2012) – article 36(1): the Tax Administration is entitled to take note of the economic operators' documents and property found at the premises of another economic operator.

2. Code of Income Tax (Law 2238/1994 – in force until 31.12.2013)

(a) article 66(1): the Tax Administration may request (i) from the taxpayers to provide it with information, clarifications and documentation useful for the determination of their income, (ii) that certain third parties, such as banking institutions provide it with all the data it considers necessary for the facilitation of its audit

[secrecy rules concerning these third parties cease to apply following a decision of the Public Prosecutor, issued upon request of the Tax Administration (Legislative Decree 1059/1971 provides for secrecy rules, in relation to bank accounts)].

(b) article 48(3) (as amended by article 15 of Law 3888/2010): "Every income that does not fall under one of the categories of income (A – F) specified above, is levied as self-employed income. In case the taxpayer fails to demonstrate the origin of an increase in his net property, the source of which remains unknown to the Tax Administration, this increase is levied as self-employed income. [the second subparagraph was added by Law 3888/2010]".

3. Code of Tax Procedure (Law 4174/2013 – in force since 1.1.2014)

(a) article 14: the taxpayer is liable to an administrative fine if he fails to provide, within the specified time limits (in principle, within five working days), to the Tax Administration the information the latter has requested from him.

(b) article 15: the Tax Administration is entitled to request from third persons, such as banking institutions, information or documents, with a view to determining the taxpayer's obligations. Third parties bound by professional secrecy are obliged to give the requested information, that refers to their financial transcactions with the taxpayer concerned.

(c) article 27: the Tax Administration may use audit methods of indirect determination of the taxable income, based, inter alia, on the amount of the taxpayer's bank deposits.

4. Law 4170/2013, as amended by Laws 4378/2016, 4474/2017 and 4484/2017 (transposition of Directive 2011/16/EU, as amended by Directives 2014/107/EU, 2015/2376/EU and 2016/881/EU)

*Main provisions of Law 4170/2013, the interpretation and application of which is likely to be affected (indirectly) by recent judgments of the Council of State (discussed below, under III):*

(a) article 24(1), implementing article 25(1) of Directive 2011/16: "All exchange of information pursuant to this Law shall be subject to the provisions of Law 2472/1997 [implementing Directive 95/46/EC]. The exchange of information, including information resulting from administrative enquiries, takes place following a decision, taken by the requesting authority and the requested authority, that gives specific reasons as to the necessity and the proportionality of the data, in accordance with article 4 of Law 2472/1997 [implementing article 6 of Directive 95/46, which provides that personal data must be, inter alia, relevant and not excessive in relation to the purposes for which they are collected and/or further processed] […]". The reasons provided by the requesting authority are examined by the receiving Greek authority."

(b) article 24(2) and (4), implementing article 25(2) and (4) of Directive 2011/16: "Reporting Financial Institutions and the competent authorities of the Ministry of Finance are considered to be data controllers for the purposes of Law 2472/1997 [Directive 95/46], in relation to the processing they conduct. […] Information processed in accordance with this Law shall be retained for no longer than necessary to achieve the purposes of the present Law and in any case in accordance with each data controller's rules on statute of limitations."

(c) article 7(3), implementing article 6(3) of Directive 2011/16: "In order to obtain the requested information or to conduct the administrative enquiry requested, the requested authority follows the same procedures as it would when acting on its own initiative or at the request of another Greek authority."

5. Law 4428/2016, ratifying the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (developed by the OECD)

## III. RELEVANT ISSUES CONCERNED BY RECENT DECISIONS OF THE COUNCIL OF STATE

**1. Request and exchange of information on the balance (before 2016) or movements of bank accounts** [as from 2016, information on the balance of the bank accounts at the end of the calendar year is communicated to the competent authorities of other Member States by automatic exchange, pursuant to article 8(3a) of Directive 2011/16, as amended by Directive 2014/107]

**Such information refers to personal data of the account holder – Relatedly, it is reminded that, according to article 24(1) of Law 4170/2013, the request for info must be duly reasoned as to the necessity and proportionality of the data sought and the appropriateness and adequacy of this reasoning is examined by the competent/receiving Greek authority.**

**<u>Council of State 884/2016</u>** (seven-judge panel of the Second Chamber of the Court, which deals with tax disputes – reply on a request for a preliminary ruling, made by the Administrative Court of Appeals of Athens)

The dispute originated in an administrative decision, which imposed on a famous singer (X) additional income tax, for the taxable year 2010 (amounting το two million euros) and tax surcharges, for tax evasion. The Tax Administration considered that the singer had failed to declare in his tax return for 2010 taxable income of unknown source. This finding was based on the fact that, during the first months of 2010, X had transferred large amounts of money (around five million euros), from his bank accounts in Greece to his bank account in Cyprus and that these amounts were not covered by the income he had declared during the last ten years. The main issue raised was whether the Tax Administration had lawfully relied on article 15 of Law 3888/2010 [enacted in September 2010, without retroactive effect – this article amended article 48(3) of the Code of Income Tax], under which, if the taxpayer failed to demonstrate the origin of an increase in his property, the source of which remained unknown to the Tax Administration, this increase was to be levied as self-employed income. In dealing with this question, the Council of State held, inter alia, the following:

> "7. […] In a case like the one at hand, the taxpayer's situation as regards his banking assets calls for reasonable explanations on his part, taking into account that it may be impossible or very difficult for the Tax Administration to find the true nature and exact cause of the increase in the taxpayer's net property, inferred from the large amounts of money in his bank accounts in Greece. Moreover, in such a case, the taxpayer presumably knows or should know where the large amounts of money in his bank accounts come from and, hence, can easily and is, in principle, obliged to communicate to the Tax Administration the origin of this money, pursuant to article 66(1) of Law 2238/1994 and article 14(1) of Law 4174/2013, given that *<u>this information is not about sensitive personal data or, more generally, does not concern personal data subject to enhanced protection vis-à-vis the State, which enjoys a wide margin of appreciation as regards its access to such data, for the purposes of tax controls and its combat against tax evasion</u>* (cf. ECtHR 22.12.2015, G.S.B. v. Switzerland 28601/11, paras. 92-93). Consequently, the taxpayer is, in principle, obliged to provide the Tax Administration with all the

necessary and reasonable, in light of the circumstances, information that adequately explains and justifies his patrimonial situation, which is at odds with the one resulting from his tax returns. Finally, although the taxpayer can exceptionally refuse to comply with his above-mentioned obligation, by invoking an overriding right, such as his privilege against self-incrimination (cf. ECtHR 3.5.2001, 31827/96, J.B. v. Switzerland, paras. 65-71, ECtHR 5.4.2012, 11663/04, Chambaz v. Switzerland, paras. 53-58 – cf. also CJEC 18.10.1989, 374/87, Orkem, paras. 35-41, in the field of competition law), his refusal or failure to provide with the information requested by the Tax Administration or his inability to adequately substantiate his assertions regarding the provenance of the large amounts of money found in his bank accounts should be taken into account by the Tax Administration and (in case of a judicial appeal) by the Administrative Courts, when assessing the evidence of the case, and may support the conclusion that the taxpayer has committed tax evasion (cf. ECtHR 8.2.1996, 18731/91, John Murray v. United Kingdom, para. 47 and ECtHR 20.3.2001, 33501/96, Telfner v. Austria, paras. 15-17).

8. The suppresion of tax evasion (in particular, where the tax evaded is high), by means of tracking down the relevant violations and of imposing the evaded taxes and the administrative sanctions provided for by tax law, amounts to a compelling public interest, according to the Constitution [articles 4(5) and 106(1)(2)]. Under the fundamental principles of respect of human dignity [article 2(1) of the Constitution), of the rule of law [article 25(1)(a) of the Constitution], of proportionality [article 25(1)(d) of the Constitution] and of the presumption of innocence (safeguarded in article 6 para. 2 of the ECHR), applicable also to administrative punitive proceedings (cf. CJEU 21.1.2016, C-74/14 Eturas, para. 38 and CJEU 23.12.2009, C-45/08, Spector Photo Group, paras. 42-44), the burden of proof of tax violations lies, in principle, with the State, namely with the Tax Administration. However, this does not imply that the Tax Administration has to prove the violation by irrefutable evidence, which prove directly and with absolute certainty the perpetration of the violation. Such a requirement would impose on the Tax Administration a disproportionate and often impossible burden, incompatible with the need to strike a fair balance between the aforementioned fundamental principles (and corresponding rights of the taxpayers) and the compelling public interest in the suppression of tax evasion, which is, by its very nature, usually difficult to detect. The effective suppression of tax evasion requires that the principles or

> rules governing the type and standard of proof of its existence do not render impossible or extremely difficult the enforcement of tax law by the Administration. Hence, the perpetration of a tax violation, like the one at issue in the present case, may be substantiated not only on the basis of direct evidence but also on the basis of indirect proof (inferences), namely material indications, which, viewed as a whole and in the absence of an alternative, reasonable and adequately substantiated, under the circumstances, explanation expected from the taxpayer, are capable of forming a solid factual basis for finding that a tax violation has occurred […]. This does not amount to a reversal of the burden of proof but to a rule governing the nature and assessement of evidence […]. More specifically, such evidence of indirect proof may be found in cases, like the one at hand, where a bank account of the taxpayer contains a large amount of money, which is not covered by the income he has declared to the Tax Administration or by another specific and adequately substantiated source that he invokes or that the Administration detects, by showing due diligence in taking the necessary, appropriate and reasonable, under the circumstances, investigative measures, permitted by law, since such evidence, assessed as a whole and in light of the dictates of reason and common sense, may, in principle, support the conclusion that the amount of money at issue, the source of which cannot be identified (but consists presumably in an economic activity not forbidden by law) corresponds to taxable undeclared income of the holder of the bank account […]. This income is considered and taxed as self-employed income, pursuant to the first subparagraph of article 48(3) of the Code of Income Tax […]".

The above considerations of the Court and, in particular, the one concerning the State's power to access and process personal data of the taxpayer regarding the balance and movements of his bank accounts in Greece, are likely to have a significant bearing on the interpretation and application of the legislative provision requiring specific and adequate reasons for the necessity and proportionality of the requested information about such data.

With regard to information on the *balance of the bank* accounts at the end of the calendar year, it must be borne in mind that such information is communicated to the competent authorities of the other Member States in the context of the automatic exchange of information provided for in Directive 2014/107. Relatedly, the Preamble to the Directive (para. 10) notes that the processing of information under this Directive is necessary and proportionate for the purpose of enabling Member States' tax administrations to correctly identify the taxpayers concerned, to administer and enforce their tax laws in cross-border situations, to assess the likelihood of tax evasion being perpetrated and to avoid unnecessary further investigations. This assessment of the EU legislature is reasonable and in harmony with the above holdings of the Greek Council of State. These elements imply, in my view, that requests for information on account balances not covered by Directive 2014/107 (most notably, before 2016) should be considered, at least in principle, as justified by the Member States' important interest in conducting tax controls and enforcing their tax legislation. This creates a strong presumption in favour of the necessity and the proportionality of the data sought by this kind of requests, which dispenses, in general, the requesting authority from its obligation to provide specific relevant reasons. Hence, it seems that, in such cases it is enough for the requesting Member State to indicate (a) the cross-border element, that is capable of bringing the case within its tax jurisdiction, and (b) that the account holder is under tax investigation or appears to have legal and/or economic ties with a specific person under tax audit, in view of which the requested information is likely to be relevant to the tax affairs of the latter person.

I believe that a similar approach is appropriate with regard to information on the *movements of the bank accounts*, in particular the deposits made. Given that the annual balance of the taxpayer's bank accounts constitutes an easily discernible and readily retrievable piece of important information on his economic situation, the taxpayer may attempt to hide capital, representing undeclared income, deposited in his bank accounts by spending it, investing it or transferring it to his bank accounts abroad or to bank accounts held exclusively or jointly by other persons, shortly after the relevant deposits and before the end of the year. Hence, the effectiveness of tax controls is likely to be intertwined with the examination of the movements of the taxpayer's bank accounts. In light of the above, I would argue that, as a general matter, a request for such information does not have to be based on specific reasoning referring to the necessity and proportionality of the data requested. This position is supported (i) by article 13(1)(e) of Directive 95/46/EC, which allows restrictions on the scope of data protection rules of article 6(1), when necessary for safeguarding the financial interests of the Member States in taxation matters [see also similar provision of article 23(1)(e) of Regulation 2016/679], (ii) by the opinion/measure n. 145/17.4.2012 of the Italian Data Protection Authority, concerning the legislative rules adopted in December 2011, under which banking institutions send periodically to the Tax Administration data on the moves of bank accounts, that the Administration may process, with a view to tracking down tax evasion (the Authority noted, inter alia, that "there is no question of the need to have all the necessary information suitable for verification actions and combatting tax evasion"), (iii) the above holdings of the Greek Council of State concerning the State's wide margin of appreciation regarding its access on bank accounts data for law tax enforcement purposes and the Administration's duty to take appropriate inquiry measures in the context of its constitutionally mandated fight against tax evasion, which is, in general, difficult to detect, (iv) the decision of the U.S. Supreme Court in United States v. Miller, 425 U.S. 435 (1976), where the Court held that a depositor does not have vis-à-vis the State a legitimate expectation of privacy in the content of his bank records (e.g. concerning checks and deposit slips), which the banking institutions are required by law to maintain, inter alia, because of their high degree of usefulness in tax investigations and proceedings, and that these records are accessible to the Government for law enforcement purposes, without the Fourth Amendment guarantees (including the search warrant and probable cause/reasonable suspicion requirements) to come into play.

**2. National rules on statute of limitations on income taxation (and sanctions for related tax violations)**

Article 6(3) of Directive 2011/16 [transposed by article 7(3) of Law 4170/2013] provides that, **in order to obtain the requested information or to conduct the administrative enquiry requested, the requested authority follows <u>the same procedures</u> as it would when acting on its own initiative.** Rules concerning limitations periods on the imposition of income taxes and relevant sanctions may be regarded as procedural, for the purposes of applying the above provision of EU law (despite the fact that such rules may be deemed as substantive, under national law), given that (a) the expiry of the limitations period means that the Tax Administration is no longer competent ratione temporis to levy income tax, which implies that it is also not empowered to initiate relevant investigation proceedings, (b) in its decision in case C-105/14, *Taricco* (para. 57), the CJEU referred to the case law of the ECtHR that classifies as procedural the rules on statute of limitations regarding criminal tax offences (see also the opinion of Advocate General Bot, delivered on 18.7.2017, in case C-42/17, paras. 131-140). Moreover, article 25(4) of Directive 2011/16 [transposed by article 24(4) of Law 4170/2013], stipulates that information processed in accordance with this Directive is retained, in any case, in accordance with each data controller's (including the Administration's) rules on statute of limitations. Although this provision refers to the retention of data, one could arguably infer from it the applicability of national rules on limitations periods regarding the collection and processing of the information by the Administration.

**<u>Council of State (Grand Chamber) 1738/2017</u>** (following a referral by the Second Chamber of the Court)

The question resolved by the Grand Chamber concerned the compatibility with the Constitution of successive legislative rules that prolonged repeatedly the limitations periods on income taxation, before their expiry (initial and after their prolongation). The Court held, inter alia, the following:

> "The principle of legal certainty, which originates in the rule of law and in the provisions of articles 2(1) and 25(1)(a) of the Constitution […], requires, in particular, that legislative rules be sufficiently clear and foreseeable in their application. This requirement must be respected rigorously when it comes to rules that are likely to have significant economic repercussions to the persons concerned, such as the rules providing for taxes and sanctions for tax violations (cf. CoS 144, 1976/2015, 1623/2016 and CJEU, 2.6.2016, C-81/15, Kapnoviomichania Karelia AE para. 45, 3.9.2015, C-384/14, Établissement national des produits de l' agriculture et de la mer, para. 30). More specifically, the above fundamental principle, which serves the public interest, implies that the legal situation of taxpayers, as regards their compliance with tax laws, cannot indefinitely be called into question. Consequently, the imposition of taxes and relevant sanctions must be subject to a limitations period, which, in

> order to be compatible with the aforementioned requirement, has to be determined in advance, to be sufficiently foreseeable by the taxpayer and to make impossible the imposition of the relevant taxes and sanctions after its expiry. [...] Moreover, its total duration must be reasonable, that is consonant with the principle of proportionality (cf. CJEU 17.9.2014, C-341/13, Cruz & Companhia Lda, paras. 62 and 65) [...], so as (a) to make possible for the Administration to carry out effective tax controls, without, however, encouraging inertia on the part of the tax authorities, which may result from long limitations periods or the possibility of their extension retrospectively, especially close to their expiration, [...], (b) not to expose taxpayers to long periods of legal uncertaintly, which is prejudicial to economic plalning and development and detrimental to national economy [...], (c) not to expose taxpayers to the risk of not being able not only to defend themselves properly, but also to deal with the financial obligations imposed on them by the tax control [...], and (d) not to expose the State to the risk of being unable to collect the relevant taxes and fines [...]. [...] Taxpayers need to know with certainty about their tax obligations over regular and relatively small periods of time, also in view of the fact that tax audits are facilitated by modern electronic tools [...]. The legislative rules in question extended repeatedly the five-year limitations period, which is provided for in article 84(1) of the Code of Income tax and must be considered as reasonable [...]."

Relying also on the constitutional provisions which place temporal limits to retroactive income taxation [article 78(2) of the Constitution], the Council of State went on to hold that the legislative rules at issue were contrary to the Constitution. Although this holding was based on the principle of legal certainty, the Court's rationale refers in addition to the relevant principle of reasonableness and proportionality of the length of the statute of limitations. This is a requirement that recently emerged from the case law of the CJEU (see its decisions in cases C-201/10 και C-202/10, *Ze Fu Fleischhandel and Vion Trading* and C-341/13, *Cruz & Companhia*; cf. also C-105/14, *Taricco*, which considers the length of limitations periods of criminal tax offences as a possible barrier to the effective application of EU law in the field of VAT). In light of this case law and the above considerations of the Greek Council of State, one may argue that the respect by the national legislature of the principle of proportionality in this context is reviewed by the Courts on the basis of the following criteria: (i) what is at stake, namely the conflicting (private and public) interests concerned and the need to ensure their effective and balanced furtherance, (ii) the type and gravity of the violation(s) governed by the statute of limitations, and (iii) the principle of rational organisation and effective functioning of the Administration, which has to show, in relation to its controls and investigations, due diligence, in accordance with its duties under the Constitution and the principle of good Administration.

Under the new Code of Tax Procedure (Law 4174/2013), applicable as from 1.1.2014, the limitations period is, in principle, five years, beginning right after the end of the year during which the relevant tax return had to submitted [article 36(1)]. However, in case of tax evasion, the prescription is fixed at twenty years [article 36(1)]. This period seems to be too long to be compatible with the principle of proportionality, taking into account the above criteria and the relevant considerations of the Council of State (cf. CJEU C-341/13, *Cruz & Companhia*, paras. 60-65). Such a position would lead to the application of the general five-year statute of limitations to cases of income tax evasion.

Under the Code of Income Tax (Law 2238/1994), applicable until 2013, the limitations period is, in principle, five years, beginning right after the end of the year during which the relevant tax return had to submitted [article 84(1)]. Nevertheless, the limitations period is extended to ten years, if new crucial evidence comes up after the expiry of the initial five-year limitations period or if the relevant tax return is proved to be inaccurate or if the Tax Administration receives relevant information in the context of its administrative cooperation on tax matters with other countries [article 84(4) in conjunction with article 68(2)]. In its decision 3820/2016, the Administrative Court of Appeals of Athens held that information on (the balance and movements of) the taxpayer's bank accounts in Greece cannot be considered as new evidence, for the purposes of the above provision, given that such data were at the disposal of the Tax Administration, in the context of its controls, pursuant to article 66(1) of the same Code. The case is currently pending before the Council of State. If the judgment of the Court of Appeals ia affirmed, that may effectively mean that the general rule on the five-year limitations period is applicable, when income tax evasion before 2014 is inferred from data on bank accounts in Greece.

Hence, depending on the correct interpretation of Directive 2011/16 and on the applicable provisions of Greek tax legislation on limitations periods, it may well be the case that the Greek Tax Administration cannot collect and give to the tax authorities of other EU Member States the requested information on the balance and movements of bank accounts in Greek, despite the fact that the issuance by these Member States of administrative decisions imposing income tax is not time-barred, under their tax rules.

## IV. CONCLUSION

The recent developments in the case law of the Greek Council of State discussed above may facilitate access to data on bank accounts in Greece, in the context of the administrative cooperation at international level in the field of taxation, to the extent they could minimise the burden of providing specific reasons regarding the necessity and proportionality of such information requested. By contrast, they may lead to restrictions on the scope ratione temporis of information on bank accounts that may be acquired, processed and exchanged, by reason of application of national rules on limitations periods.